THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 88 of 2010

BETWEEN : **PARAS RAM** of Lot 17, Secala Road, Nasole, Nasinu in Fiji, Businessman.

PLAINTIFF

AND : **YATHI RAJAN NARAYAN** of C/- Sunrise Holdings Limited, Lot 2 & 3 Rokobili Sub-Division, Walu Bay, Suva in Fiji, Director/Secretary.

FIRST DEFENDANT

AND : **SUNRISE HOLDINGS (FIJI) LIMITED** a limited liability company having its registered office at Lot 2 & 3 Rokobili Sub-Division, Walu Bay, Suva in Fiji.

SECOND DEFENDANT

BEFORE: **Master Vishwa Datt Sharma**

COUNSELS: **Ms. Swastika Narayan** for the Plaintiff
Ms. Mohini Pillai for 1st Defendant
No Appearance by 2nd Defendant

Date of Hearing: 26th April, 2016
Date of Ruling: 06th July, 2016

RULING

[Application to strike out the Plaintiff's substantive Writ of Summons and Amended Statement of Claim pursuant to Order 25 Rule 9 of the High Court Rules, 1988]

(A) INTRODUCTION

1. The Court on its own **Motion issued a Notice** to the parties on 09th February, 2015, listing the matter for the parties to show cause why the case should not be struck out for want of prosecution or as an abuse of the process of the Court since no action was taken for a period of more than six (6) months.

2. This Notice was issued pursuant to ***Order 25 Rule 9 of the High Court Rules, 1988***.

3. The Plaintiff filed its Affidavit on 03rd July, 2015 and the 1st Defendant filed his Affidavit in Response to the Plaintiff's Affidavit on 20th July, 2015. There was no appearance by the 2nd Defendant.

4. The application was heard with Written Submissions on 26th April, 2016.

(B) THE LAW

5. This application is issued pursuant to ***Order 25 Rule 9 of the High Court Rules 1988,*** which *inter-alia* states as follows:

> *"(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.'*

6. The basic law on ***Order 25 Rule 9*** has been crystallized in the leading authority of **Birkett vs James (1978 AC 297 (1977) 2 ALL ER** whereby the House of Lords held"

> *"The power should be exercised only where the court is satisfied wither (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 wither as between themselves and the plaintiff or between each other or between and a third party."

7. In the Case of **Abdul Kaddus Hussein vs Pacific Forum Line Civil Appeal No. ABU 0024 of 2000s (30th May 2003)**, the Court of Appeal readopted the principles expounded in Birkett vs James (supra).

8. 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.**"

9. In **Pratap v Christian Mission Fellowship, (2006) FJCA 41**, The Court of Appeal discussed the principles expounded in **Brikett v James 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.

10. While citing **Abdul Kadeer Kuddus Hussein v Pacific Forum (supra)** the court, readopted the principles expounded in **Birkett v James [1978] A.C. 297; [1977] 2 All ER 801.**

*"(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 dishonor or humiliate.*
2. *Disgrace; reproach."*

11. While the "**Summons**" may not seek for strike out on the **abuse of process**, the court can on its own inherent jurisdiction strike the matter out for abuse of process.

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**" (The second ground in Order 25 Rule 9 (1)) as follows:

> *"The Court had power under its inherent jurisdiction to strike out or say 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 established* ***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."*

12. 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 judgment 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."*

11. 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 then may amount to "abuse of process" which justifies for **want of prosecution** without having to show prejudice

(C) ANALYSIS and DETERMINATION

13. I have perused the court file in terms of the documents filed as required by the set down procedures and the ***High Court Rules 1988*** accordingly.

14. This case was commenced by a Writ of Summons and a Statement of Claim together with an Ex-Parte-Motion with an Affidavit in Support on **31st March, 2010** respectively.

15. Both Defendants were served and accordingly filed their **Acknowledgement of Service on 21st April, 2010**. On 11th June, 2010 **1st Defendant** also filed his **Affidavit in opposition** to the Affidavit of the Plaintiff.

16. On **05th November, 2013**, this Court on its own **Motion** issued a **Notice** to the parties to the proceedings to **show cause why the case should not be struck out for want of prosecution or as an abuse of the process of the Court** since no action was taken for a period of more than six (6) months.

17. On this application, the Plaintiff was granted time to file the Statement of Claim as per Hon. Justice Hiettechari's order. Case adjourned to 11th December, 2013. On 11th December, 2013, the court made an order that '**Plaintiff has failed to take any steps in this matter and within 14 days the Plaintiff fails to take any action, then the Statement of Claim would be deemed to have been struck out.**'

18. **An Amended Writ of Summons together with a Statement of Claim** was filed on **24th December, 2013** and thereafter on **28th February, 2014**, both Defendants filed their **Statement of Defence and Counter-Claim** respectively.

19. The Plaintiff was then required to file and serve a **Reply to Defence** and the **Counter-Claim**, but did not take any action or step to complete the pleadings to the substantive matter; rather the matter remained pending in the system.

20. **Again for the second time**, the Court on its own **Motion issued a Notice** to the parties on **09th February, 2015**, listing the matter for the parties to **show cause why the case should not be struck out for want of prosecution or as an abuse of the process of the Court** since no action was taken for a period of more than six (6) months for the second time. In fact on this occasion, there was a **lapse of 12 months** from the time of filing of the Defence and Counter Claim to the time of issuance of the Notice by the Court to show cause to the **Order 25 Rule 9 application.**

21. The **Plaintiff** filed its **Affidavit to show Cause** on **03rd July, 2015** and the 1st Defendant filed his **Affidavit in Response to the Plaintiff's Affidavit** on **20th July, 2015.** There was no appearance by the 2nd Defendant.

33. This Court notes from the Court record that after **28th February, 2014**, no action was taken by the Plaintiff nor any of the Defendants in order to pursue this case any further until **09th February, 2015,** when the Court Registry issued a **Notice** for **the Plaintiff to show cause as to why the within action should not to be struck out for want of prosecution or as an abuse of the process of the court** pursuant to pursuant to ***Order 25, r 9 of the High Court Rules 1988 and the Inherent Jurisdiction of this Honourable court.***

34. This meant that since the last pleading was filed on **28th February, 2014**, and until the ***Order 25 Rule 9*** application was filed, a period of **twelve (12) months had elapsed.** In fact the Law requires that the parties to the proceedings must ensure that the pleadings in terms of the Law must be filed and served on the parties to proceedings to complete the pleadings and allow the case to be heard and determined either before the Master or a Judge of the High Court accordingly.

35. The **onus is on the Plaintiff** to provide a **cogent and credible explanation** for not taking any steps to **advance the litigation** in this case after the **28th February, 2014. Needless to say that this doesn't mean that the Defendants did not have to pursue their Counter Claim and wait for the Plaintiff to pursue this action. The Defendant had a Counter-Claim in place which is rather equivalent to the Plaintiff's Claim and should have pursued their Counter Claim.**

36. This court is therefore required to deliberate on the following **issues** in terms of the impending ***Order 25 Rule 9*** application to arrive at a determination

whether to dismiss the cause or deal with the application as if it were a **summons for directions** accordingly:

(i) *that the default has been **intentional and contumelious**, e.g. disobedience to a peremptory order of the court or conduct amount to an abuse of the process of the court; or*

(ii) *that there has been **inordinate and inexcusable delay** on the part of the Plaintiff or his lawyers; 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 party."*

Default is contumelious

37. "Contumelious" in the context of want of prosecution refers to disobedience of any orders or directions of this court.

38. **The Defendants** filed the **Statement of Defence** and a **Counter-Claim** on **28th February, 2014**. The **Plaintiff** did not file the reply to the **Defence** and **Counter-Claim** as required in terms of the Law. The case was commenced by a Writ of Summons where there is no requirement under the ***High Court Rules, 1988*** for the High Court Registry to assign a returnable date. The Defendant upon being served with the Writ is required thereafter under the law to file and serve a Defence on the Plaintiff. Still no returnable date would be assigned since there is no requirement under the law as such, but certain time period is allocated as a requirement for the **Plaintiff** to file a **Reply to Defence** and **the Counter-Claim,** and hereafter, the parties are required to pursue the claim and act in compliance with the set down procedures and the ***High Court Rules, 1988*** respectively until a time comes when the parties have fully complied with the pleadings and the case is ready for hearing either before a Master of the High Court or a Judge.

In fact, no action was taken by the **Plaintiff** after the **Defendant** filed his **Defence** and **Counter-Claim.**

For the above rational, the first arm of the test does not apply herein since this court at this stage of the proceedings did not make any directions rather the set down procedure in law should have been adhered to.

Delay

39. The test for delay is both '*intentional*' and '*inordinate*'.

Intentional

For these **two elements** to be satisfied, the Defendants must establish that the delay was intentional on the part of the Plaintiff. In other words the Plaintiff has filed an action with having no intention to proceed with the same.

> *The **Plaintiff** in his Affidavit to Show Cause filed on 03rd July, 2015 stated that he has been in financial difficulties for quite some time now. On or about 10th August, 2011, he had a Receiving Order made against him in the case, Paras Ram v. NBF Ltd trading as Colonial National Bank now Bank of South Pacific Ltd- Bankruptcy Action No. MBF 58 of 2011 and the Receiving Order made as a result of the debts owed to the Bank of South Pacific Ltd amounting to approximately $7,000,000. Due to financial status, he was unable to pay legal fees to his Solicitors in a timely manner, resulting in his Solicitors reluctant to continue acting for him. Due to the Receiving Order, he was unable to appoint another Solicitor. That his inability to meet the financial obligation in the running of his case is the main reason why his case has not been continued. The Plaintiff submitted that he prays for the right to be heard and the right to present his case in a trial and that he be not denied his right to be heard.*

Bearing in mind the arguments raised by counsels for the Plaintiff orally and by the written submissions, I do not find that the delay caused in pursuing the case was the Plaintiff's financial difficulties. The delay was for a period of **twelve (12) months** which in the circumstances is **materially longer** than the time usually regarded by the profession and courts as an acceptable period. Further, in this case the Plaintiff went off to sleep and took no further steps to pursue his case until the Court issued a Notice in terms of Order 25 Rule 9. This Court on the First Delay on 11th December, 2013 grant the Plaintiff an opportunity to file his Amended Statement of Claim, which he complied with. Thereafter, the

Defendant filed the Defence and the Counter-Claim but the Plaintiff failed to file any Reply to Defence and the Counter-Claim and the current Order 25 Rule 9 was issued and served by the Court on the Plaintiff.

Therefore the delay in the manner and circumstances was intentional on the part of the Plaintiff.

40. The other requirement is the 'inordinate' delay.

Inordinate

This relates to the length of delay. The word '**inordinate**' is defined in the Supreme Court Practice meaning '***materially longer than the time usually regarded by the profession and courts as an acceptable period.***'

The final pleading filed by the Plaintiff in the present proceeding was the **Statement of Claim** filed on 24th December, 2013. The Plaintiff failed to file and serve any Reply to the Defendant's Defence and Counter-Claim. The Plaintiff did not pursue the cause of action hereafter. The time calculated from the date of the filing of the pleadings in terms of the Statement of Claim, and until the issuance of the ***Order 25 Rule 9*** Notice on 09th February,2015, adds up to twelve (12) months.

If the Defendants encountered any delay on the part of the Plaintiff in pursuing with the cause of action, then the Defendants as parties to the proceedings should have filed and proceeded with an appropriate application to have their Counter-Claim heard and determined by the Court or move an appropriate application for Court to decide rather than wait and only act once the court issued and served the ***Order 25 Rule 9 application.***

In the above circumstances, I am of the finding that both, the Plaintiff as well as the Defendants are to be blamed for contributing to the delay of a period of twelve (12) months. The reason being that if the Plaintiff did not pursue or prosecuted his case any further, the Defendants could have moved the court further, forcing the Plaintiff to file and serve the respective consequent pleadings to complete the pleadings and the cause. If the Plaintiff still failed, then the Defendants should have taken the alternative steps provided for in the Rules, rather than wait for the Plaintiff to pursue his case further. The Defendant could have moved on with his Counter-Claim. This was not done. It is

the duty of the Plaintiff to prosecute his case diligently and this includes the procuring of legal representation and the securing of finances to commence and continue litigation.

If I may add, *that the delay by the Plaintiff has been intentional and contumelious and the delay is both inordinate and inexcusable which gives rise to a substantial risk that it is not possible to have a fair trial of the issues in this action. In addition, the conduct of the Plaintiff constitutes an abuse of the process of this court.*

Reference is made to the case ***of Nakula Enterprises Ltd v ITaukei Land Trust Board (2014) FJHC 745 , the court referred to Grovit v Doctor and Others (1997) 1 WLR 640)(1997) 2 ALL E.R 417 states-***

> ***'The courts exist 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 an 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 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.'***

Taking into consideration the Plaintiffs written submissions and the affidavit showing cause, I find that the Plaintiff have failed to satisfactorily explain his delay which is rather inordinate and inexcusable in the given circumstances and therefore is unacceptable to this court.

Factors relating to inordinate and inexcusable delay on their own, is therefore sufficient to warrant the striking out of this action in terms of Order 25 Rule 9 application.

Prejudice

41. It is trite law that the Defendants must establish that they are prejudiced by the delay.

The Counsel for the Defendant submitted that the Defendant has been **Prejudice** since he has been all along waiting for the Plaintiff to pursue his case. This case **remained pending** in the system unattended by the Plaintiff **since 2010, for some six (6) years now.**

I have taken into consideration the submissions and the case authorities in terms of **Prejudice**. The Plaintiff commenced proceedings in 2010 and it was the Plaintiff who had rather failed to file and serve any **Reply to Defendant's Defence and Counter-Claim which in fact cause unacceptable delay**.

I find that the delay was for a period of twelve (12) months which in the circumstances is materially longer than the time usually regarded by the profession and courts as an unacceptable period.

Interest of Justice

41. The Plaintiff instituted the proceedings in 2010 and has been delayed by their acts to complete the pleadings and allow this Court to hear and determine the case once and for all. The substantive matter remains pending in the system with an interlocutory ***Order 25 Rule 9 application to be determined currently.***

43. Therefore, it has become appropriate that the courts in exercise of its jurisdiction must decide as to whether a fair trial is still possible, even if the Defendant satisfies the requirements in ***Birkett v James***. The Court of Appeal in Chandar Deo v Ramendra Sharma and anor: Civil Appeal No. ABU 0041 of (23 March 2007) (Unrep) stated as follows:-

> *[15] A more fundamental difficulty for the Respondent is that the judge failed to make any finding at all on the final question to be asked when applying the Birkett v. James principles namely: '**In view of the delays which have occurred, is a fair trial now possible?**' (Also case of Department of Transport v, Chris Smaller (Transport Limited [1989] AC 1197 refers.*

44. In ***Lovie v Medical Assurance Society Limited [1992] 2 NZLR 244 at 248.*** Eichelbaum CJ reviewed the authorities and concluded:

> 'The applicant must show that the plaintiff has been guilty of inordinate delay, that such delay is inexcusable, and that it has seriously prejudiced the defendant. Although these considerations are not necessarily exclusive, and ***at the end one must always stand back and have regard to the interests of justice,*** *in this country, ever since NZ Industrial Gases Ltd v Andersons Ltd [1970] NZLR 58 it has been accepted that if the application is to be successful, the applicant must commence by proving the three factors listed.'*

45. Even the courts are reluctant to strike- out any matter summarily which has certain merits in it on the grounds of abuse of process. In ***Dey v. Victorian Railway Commissioners*** (1949) 78 CLR 62, at 91 Dixon J said:-

> '26. This principle was restated by the Court of Appeal of Fiji in ***Pratap v Kristian Mission Fellowship [2006] FJCA 41***. Also refer to; ***New India Assurance Co Ltd v Singh [1999] FJCA 69.***
>
> *The principle as enunciated in these cases reflects the principles on this topic in other common law jurisdictions. These decisions include;* ***Metropolitan Bank Ltd v Pooley (1885) 10 App Cas 210; Dey v. Victorian Railway Commissioners (1949) HCA 1; (1949) 78 CLR 62; Birkett v James [1978] AC 297; Lovie v Medical Assurance Society Limited [1992] 2 NZLR 244; Agar v Hyde (2000) 201 CLR 552.*** *Indeed the passage from* ***Abdul Kadeer Kuddus Hussein v Pacific Forum Line*** *reflects closely* ***Birkett v James*** ***(above).*** *These authorities also make the point that in exercising a peremptory power of the kind under contemplation in these proceedings, the court must be cautious* ***and to put the matter in another way, the court must stand back and ensure that sufficient regard is ahead of the interests of justice.'***

46. I have carefully perused the substantive application, the pleadings filed so far, the written and oral submissions coupled with the applicable laws and the case authorities and therefore find as follows:-

(i) The delay is inordinate and intentional;

(ii) Satisfactory explanation has not been provided by the Plaintiff for the delay as such the Plaintiff has not overcome the factor of inexcusable;

(iii) The default is contumelious and the Plaintiff has rather disobeyed by not completing the cause that was required in Law and Procedure to adhere to and allow the Court to eventually hear and determine the substantive application. of any orders of this court;

(iv) The Defendants have suffered real prejudice to some extend; and

(v) In the interest of justice, a fair trial is not possible in the circumstances.

47. For the aforesaid rational, I make the following orders:-

(a) The Plaintiff's Substantive action is hereby Dismissed in terms of Order 25 Rule 9 application.

(b) The Defendant's application for Counter-Claim is also Dismissed for want of prosecution;

(c) Each party to bear their own costs at the Discretion of this Court.

Dated at **Suva** this 06th Day of **July, 2016**

HIGH COURT OF FIJI SUVA

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MR VISHWA DATT SHARMA
Master of High Court, Suva

cc: Diven Prasad Lawyers, *Suva.*
Reddy & Nandan Lawyers, Suva.