IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action HBC NO. 55 of 2008

BETWEEN : **WESTSIDE MOTORBIKE RENTALS (FIJI) LIMITED**, a duly incorporated limited liability company having its registered office at Martintar, Nadi.

Plaintiff

AND : **MOSESE TOGANIVALU, SURESH, PENI DOLOVALE** as Trustees of Namaka Public School of Namaka, Nadi.

Defendants

RULING

1. The background to this case is set out in an earlier ruling I had given which is reported in *paclii* in **Westside Motorbike Rentals (Fiji) Ltd v Toganivalu** [2011] FJHC 96; HBC55.2008 (31 January 2011). In the earlier interlocutory proceedings, I was dealing with an application by the defendant for specific discoveries and for an order for inspection of the following documents:

   (i) financial statements including profit/loss, balance sheet, fixed assets, depreciation schedule and income returns for the period ending 31st December 2004 to 31st December 2007 inclusive together with the assessments by the Tax Office for the said years pertaining to the plaintiff is or has at any time been in its possession, custody or power and if it parted with them, when it parted with any of them and what has become of them.

   (ii) copies of VAT returns for the period ending 31st December 2004 to 31st December 2007 inclusive together with the relevant assessments by the tax office for the said years pertaining to the Plaintiff is or has at any time been in its possession, custody or power and if it parted with any of them, when it parted with any of them and what has become of them.

   (iii) copies of all stock cards, stock records, stock take records for the period ending 31st December, 2005 pertaining to the plaintiff if or has at any time been in its possession, custody of power and if it parted with any of them.

   (iv) copies of all receipts for purchase of all items allegedly destroyed in the fire pertaining to the plaintiff is or has at any time been in its possession, custody of power and if it parted with any of them, when it parted with any of them and what has become of them.

2. The plaintiffs had opposed the application. Vide an affidavit of Beatrice Nast, the plaintiffs had argued that all the above documents were confidential and not relevant to the proceedings. Nast had deposed that the plaintiff had vacated the Namaka Industrial subdivision where the fire took place. She further deposed that, as director of the plaintiff company, she had kept documents and records at her home in Nadi but these had all been

destroyed in the January 2009 floods. She said that the defendant's application was a fishing expedition and an abuse of process.

3. After reviewing the applicable principles, I had allowed the application and granted Order in Terms and further ordered that the plaintiff was to, within 14 days, file a supplementary affidavit disclosing all the documents in prayers (i), (ii), (iii) and (iv) (see paragraph 2 above) and, if for one reason or another, the plaintiff was not in a position to discover all or any of these documents, then the plaintiff should explain why in the supplementary affidavit.

4. The Orders were duly sealed on 23 March 2011.

5. The plaintiff however did not comply with the above orders. More than a year later, on 16 May 2012, the defendants then filed a Summons to Dismiss the Action for Want of Prosecution. The application is made under **Order 24 Rule 16(1)(b)** and under **Order 25 Rule 9**. It is supported by an affidavit of Romanu Vananalagi, a solicitor in the employ of AK Lawyers. **Vananalagi** deposes inter alia to the prejudice that will be caused to the plaintiff at paragraphs 15 to 19. I reproduce these paragraphs below:

> 15. The lack of interest and/or inaction by the Plaintiff and its solicitors has caused delay which is inordinate and inexcusable and as such is an abuse of the process of this Court and/or has created a substantial risk that there will not be a fair trial on the issues thereby causing prejudice to the Defendants.
> 16. The Defendants are being put to the inconvenience and cost of having to retain Solicitors to defend the action, not knowing whether the Plaintiff intends to prosecute the action with any certainty.
> 17. The Plaintiff is under a duty to the Court and the Defendants to progress the action without undue delay and given the premises, its failure to fully comply with the Order and to prosecute the matter with due diligence and any real interest, is an abuse of the process of the Court and poses a substantial risk to a fair trial and/or prejudice to the Defendants.
> 18. Witnesses for the Defendants will be required to recall events which are alleged to have occurred on 31 August 2006. Their recollection of events due to the passage of time will affect their reliability. An investigation was carried out on behalf of the Defendants in 2009 following the filing of the Notice of Change of Solicitors by A.K Lawyers and it was revealed that the following witnesses would be required:
>   a) No witnesses are available or having any recollection of the fire on 31st August, 2006 and none are likely to be found now with the passage of time. Students and teachers have also moved on. No written statements from any students or teachers were taken.
>   b) The Station Officer of Namaka Police Station Mr Rusiate Saini passed away in December 2010. He had confirmed that there was no file open for this investigation and the matter was classified as IR or investigation refused. As Mr Saini has passed away it will not be possible to ascertain whether he

visited the scene at all and what he may have seen. There is no written statement available of the late Mr Saini.

19. In the premises, pursuant to the inherent Jurisdiction of this Honourable Court, the Defendants pray for an order that the action be struck out and dismissed on the grounds for failure on the Plaintiff's party to comply with the Order on Summons for Directions and the Master's Order on 31st January 2011 and further that the Plaintiff has failed to prosecute the proceedings expeditiously without any real interest in bringing this matter to trial and has abused the process of this Honourable Court thereby causing the substantial risk of an unfair trial and/or prejudice to the Defendants and that the Plaintiff pay the cost of this application.

6. **Ronnie Ravinesh Ram**, a Senior Litigation Clerk of Janend Sharma Lawyers, swore an affidavit in reply on 14 June 2012. Ram deposes as follows at paragraphs 3 to 8:

3. That I have read and understood the affidavit of Romanu Namawi Vananalagi sworn on 09th May, 2012 (herein called the "said Affidavit").
4. That in so far as the contents of this affidavit are within my personal knowledge it is true and in so far as it is not within my personal knowledge, it is true to the best of my knowledge, information and belief.
5. I am duly authorised by the Plaintiff to swear this affidavit on its behalf.
6. I also seek leave of the Court to rely on the affidavit of Beatrice Nast filed herein on 12th July, 2010.

3. That as to paragraph 8-14 of the said affidavit I say as follows:

(a) We have written to FIRCA on numerous occasions requesting them for copies of the relevant documents. Copies of the letters are annexed hereto and marked "R – 1 to R-7". I wrote the letters on instructions of my principle, Mr Sharma. The letters bear my initials "RR" under the signature line.

(b) To date FIRCA has not provided us with the documents.

(c) I had spoken with one Mr Ledua at FIRCA on 30th March, 2011. Mr Ledua had advised that they cannot provide the documents unless there is a Court order directed at FIRCA to provide the documents and if need be they can produce the documents in Court if subpoenaed. He also advised FIRCA Legal Department will reply to our request. A copy of my file note of this conversation is annexed as "R-8".

(d) Mr Ledua then copied an email to us. A copy of this e-mail is annexed as "R-9".

(e) Our client is also attempting to obtain the documents from FIRCA itself.

(f) To date our client has managed to collect the following documents.

(a) Notice of Assessment – Income Tax for the year ended 31st December, 2004, 31st December, 2005 31st December, 2006 and 31st December, 2007. Copies are annexed hereto as "R-10 to R-13"

(b) Notice of Assessment – VAT for taxable period:

(i) August 2005, September 2005, October 2005, November 2005 – Copies are annexed hereto and marked "R-14 to R-17".

(ii) February 2006, April 2006, July 2006 to December 2006 – Copies are annexed hereto and marked "R-18 to R-25".

(iii) January 2007 to August 2007, October 2007 and November, 2007 – Copies are annexed hereto and marked "R-26 to R-35".

4. Paragraphs 15 to 17 of the said Affidavit are denied. I repeat paragraph 4 hereinabove.
5. That as to paragraph 18 of the said Affidavit I say that the Defendant has not disclosed a copy of the Investigation Report to the Court. The Defendant is not stating why written statements were not taken and who are the witnesses whose statements have not been taken. No details have been provided of any other witnesses except for the Station Officer – Namaka. Furthermore the Namaka Police Station should be able to provide relevant details of the fire. Details would also be available from the Nadi Fire Department and the head of the Defendant School.
6. I say that no prejudice would be suffered by the Defendant. The matter could not proceed further due to the Order dated 30th March, 2011 and the inability of the Plaintiff to collect the documents. The Plaintiff has not delayed the matter unreasonably.
7. I further state that the Plaintiff will disclose the relevant documents as and when it becomes available to it.
8. Save for any admissions herein, the remainder of the allegations in the said affidavit are denied.

7. **Beatrice Nast**, a director of the plaintiff company, has also sworn a supplementary affidavit on 23 July 2012. She deposes as follows:

1. That I am the Director of the Plaintiff and am duly authorised by the Plaintiff to swear this affidavit on its behalf and refer to my Affidavit of 12th July, 2010 filed in the action herein.
2. I also refer to the affidavit of Ronnie Ravinesh Ram filed herein on the 18th of June, 2012 ("Ronnie Affidavit") and the annexures thereto.
3. That to date I have managed to collect the following documents:
   (a) Notice of Assessment – Income Tax for the year ended 31st December 2004, 31st December 2005, 31st December 2006 and 31st December 2007. Copies are annexed to "Ronnie Affidavit" as "R – 10 to R – 13".
   (b) Notice of Assessment – VAT for Taxable period:
      (i) August 2005, September 2005, October 2005, November 2005. Copies are annexed to Ronnie Affidavit as "R-14 to R-17".
      (ii) February 2006, April 2006, July 2006 to December 2006 – Copies are annexed to "Ronnie Affidavit" as "R-18 to R-25".
      iii) January 2007 to August 2007, October 2007 and November, 2007 – Copies are annexed to "Ronnie Affidavit" as "R-25 to R-35".
2. That the Plaintiff does not have the following documents as they were all destroyed in the fire:
   (a) Financial Statement including profit/loss, balance sheet, fixed assets, depreciation schedule and income returns for the period ending 31st December, 2004 to 31st December, 2007.
   (b) Copies of VAT returns for the period ending 31st December, 2004 to 31st December, 2007.
   (c) Notice of VAT Assessment by Tax Department for the year ended 31st December, 2004;
   (d) Notice of VAT Assessment by Tax Department for the months of January to July and for December of 2005 for year ended 31st December, 2005;
   (e) Notice of VAT Assessment by Tax Department for the months of January, March, May, June of 2006 for year ended 31st December, 2006;

(f) Notice of VAT Assessment by Tax Department for the months of September, and December of 2007 for the year ended 31st December, 2007;
(g) Copies of stock cards, stock records, stock take records for the period ending 31st December, 2005 pertaining to the Plaintiff.
(h) Copies of all receipts for purchase of all items destroyed in the fire pertaining to the Plaintiff.

3. That I am advised by the Plaintiff's solicitors and verily believe that they have requested Fiji Islands Revenue and Customs Authority for copies of the documents as per Order sealed on 23rd March, 2011. The documents have not been provided in spite of various requests.

8. **Vananalagi** swore a further affidavit on 12 September 2012. He deposes as follows at paragraph 4 (a - d):

(a) The investigation was carried out on my request for the purposes of providing legal advice to the Defendants. This was well after the action was filed. The investigation report is a privileged document.
(b) No witnesses were available to be interviewed having recollection of the fire and none are likely to be found now with the passage of time.
(c) If no file was opened by the Namaka Police Station, no other information can be obtained.
(d) I deny the contents thereof and repeat paragraph 18 of my earlier affidavit.

9. **Order 24 Rule 16(1)(b)** gives the Court power to dismiss an action if any party who is required to make discovery of documents or to produce any document for the purpose of inspection fails to comply

Failure to comply with requirement for discovery, etc. (O. 24 , r.16)

16.-(1) If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose, fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1),-

(a) .....

(b) the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.

10. **Order 25 Rule 9** provides as follows:

9 (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.'

11. I reproduce in full below an extract of my ruling in **Jones v Sau** [2016] FJHC 749; HBC68.2010 (25 August 2016) which I follow in this case now before me:

> 11. In modern civil litigation, discovery is central to the system of fact finding and decision making and parties are encouraged to make available for inspection, all relevant documents, regardless of whether the document(s) support(s) their case or the other party's case.
>
> 12. In **Davies v Eli Lilly & Co** [1987] 1 WLR 428, Sir John Donaldson MR explains the "justice" behind this approach:
>
> > In plain language, litigation in this country is conducted "cards face up on the table". Some people from other lands regard this as incomprehensible. "Why", they ask, "should I be expected to provide my opponent with the means of defeating me?'. The answer of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have all the relevant information, it cannot achieve this object.
>
> 13. **C Cameron & J Liberman, 'Destruction of Documents Before Proceedings Commence - What is a Court to Do?'** (2003) 27 Melbourne University Law Review 273, 274 explain the same policy thus:
>
> > The primary aim of discovery is to ensure that litigants disclose to each other all relevant, non-privileged documents, whether that disclosure helps or hurts their respective cases, so that they will know the case they have to meet and judges will have the evidence they need to do their job effectively
>
> 14. **E Bray, The Principles and Practice of Discovery** (1885), 1 explained the purpose of discovery thus:
>
> > to ascertain facts material to the merits of his case, either because he could not prove them, or in aid of proof and to avoid expense; to deliver him from the necessity of procuring evidence; to supply evidence or to prevent expense and delay in procuring it; to save expense and trouble; to prevent a long enquiry and to determine the action as expeditiously as possible; whether he could prove them aliunde or not; to facilitate proof or save expense.
>
> 15. However, to strike out a statement of defence on account of a defendant's failure to make discoveries is such a drastic step and the power under Order 24 Rule 16(1)(b) is exercised with great caution. In any given case, a defendant's right to defend his case is one not to be quickly or lightly written-off, and even more so, in terms of the right conferred under section 15(2) of the 2013 Constitution of Fiji[2].
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> 16. In **Bhawis Pratap v. Christian Mission Fellowship** (ABU0093.2005), the Fiji Court of Appeal cautions that the power to strike out a defence for want of compliance with discovery orders should only be exercised in the clearest of cases and that "to deprive a defendant of the right to defend is a serious step, only to be taken in the clearest cases".
>
> 17. As to what constitutes the "clearest of cases", the FCA in **Native Land Trust Board v Rapchand Holdings Ltd** [2006] FJCA 61; ABU0041J.2005 (10 November 2006) is insightful. In that case, the defendant failed repeatedly to comply with certain production and inspection orders . The High Court struck out the defence. The orders in question were non-peremptory orders . The defendant then applied to set aside the order which had struck out its defence. However, that application was dismissed by the High Court because the defendant was laxing even in pursuing that application. The High Court then proceeded to assess damages. The defendant however appealed to the FCA.

18. Before the FCA, the defendant explained its failure to comply and argued that:
    (i) it's conduct was not contumacious as it had not withheld the documents deliberately[3] and,
    (ii) the power to strike out a defence is exercisable only if there was evidence that it deliberately disobeyed discovery orders , or, if a fair trial would not be possible[4].
19. The FCA sympathized with the plaintiff's interest in having his claim resolved quickly as well as the (High) Court's case- management obligations. It was also critical of the defendant's delaying tactics. However, the Court took into account that there was a very substantial monetary claim against the defendant and that the High Court had given no written reasons to explain why it struck out the defence. The FCA then warned, as it had done in **Bhawis Pratap v. Christian Mission Fellowship** (ABU0093.2005), that," to deprive a defendant of the right to defend is a serious step to be taken only in the clearest of cases"[5].
20. The FCA accepted the argument that the High Court judge first ask whether the defendant's conduct "was sufficiently unsatisfactory to warrant it being denied its right to defend itself"[6] before striking out the defence.
21. After reviewing the case, the FCA went on to hold that the defendant's failure in the circumstances of that case were not "sufficiently serious to warrant the order striking out the defence". In coming to that conclusion, the FCA took into account the following:
    (i) NLTB's default amounted to just twelve days and three days respectively in relation to the filing of list of documents and pre-trial conference. These were not "sufficiently serious to warrant the order striking out the defence"[7].
    (ii) what is required is actual evidence of contumacious conduct or deliberate disobedience of the discovery orders on the part of NLTB. The court should actually have examined the evidence and make a finding of fact of contumacious conduct and/or deliberate disobedience of court orders [8]. Such evidence would have been sufficient to warrant the striking out of its defence.
    (iii) delay per se does not necessarily amount to contumacious conduct (see footnote 7).
    (iv) but disobedience of an unless order or a peremptory order is sufficient to constitute contumacious conduct[9].

ANALYSIS

22. In my view, **Rapchand** is authority that a Court may strike out a defence on account of a defendant's failure to comply with a non-peremptory order , if there is evidence of contumacious conduct and/or deliberate disobedience of the non-peremptory orders . The onus to establish contumacious conduct and/or deliberate disobedience of the non-peremptory orders lies with the plaintiff who seeks to strike out the defence. However, where the defendant disobeys a peremptory order or an unless order, that in itself is sufficient evidence of contumacious conduct, enough to justify striking the defence out.
23. The English Court of Appeal in **Star News Shops v Stafford Refrigeration Ltd** [1998] 4 All E.R. 408 at 415; [1998] 1 W.L.R. 536 at 545, CA:

    I am reinforced in this conclusion by considering the approach of the court in cases of failure by a party to comply with the terms of an 'unless' order . In **Caribbean General Insurance Ltd v Frizzell Insurance Brokers Ltd** [1974] 2 Lloyd's Rep 32 the Master made an unless order against the plaintiffs in respect of specific discovery and allowed 28 days for compliance. Thereafter two judges granted final extensions. The defendants entered judgment in default of compliance with the unless order . At trial the plaintiffs applied to set aside the default judgment. The trial judge set aside the judgment and

extended the time for compliance with the original unless order . The Court of Appeal held that the judge was wrong to do so in the exercise of his discretion, failed to ask himself the right question and erred in law. Peremptory orders were made to be obeyed. Final, peremptory or 'unless' orders were only made by a court when the party in default had already failed to comply with the requirement of the rules or an order , the court was satisfied that the time already allowed had been sufficient and the failure of the party to comply with the orders was inexcusable.........

....

Accordingly, I have come to the conclusion that although the terms of Ord 24 , r 16(1) gave the judge jurisdiction to make the order that he did, he none the less erred in principle in striking out a defence for breach of a non-peremptory order , that he should have made a final or 'unless' order and that he was plainly wrong in the exercise of his discretion in making such an order .

The only question which remains is whether the judge was under an obligation to make an unless order in the absence of a specific application to do so supported by an affidavit. In my judgment the judge had an inherent power to do so of his own initiative and the absence of an application and affidavit did not preclude him from doing so.

24. The Singaporean Court of Appeal in **Mitora Pte Ltd v Argritrade International (Pte) Ltd** [2013] 3 SLR 1179 cautions that a routine use of unless orders would be the forensic equivalent of using a sledgehammer to crack a walnut. That is a warning that Courts should be wary of granting unless orders in light of the drastic consequences of the slightest non-compliance.

25. In **Syed Mohamed Abdul Muthaliff v Arjan Bhisham Chotrani** [1999] 1 SLR (R) 361., the Singaporean Court of Appeal opined that, when dealing with the consequences of non-compliance of an unless order , the Court is not concerned with why the unless order was made, but rather, why it was not complied with.

26. **Tan Boon Heng, Case Note - Mitora: The Mantra of " Unless Orders "?** (2014) 26 SAcLJ at page 295 cites case law in Singapore which endorse the view that the enforcement of an unless order would be harsh and unjust where the consequences or the penalty for non-compliance is grossly disproportionate to the default in question.

    The decision in Teeni Enterprise had created a renewed awareness that the courts must balance the importance of compliance with Court Orders with the need to ensure that a party would not be summarily deprived of its legal rights without any hearing of the merits especially when the non-compliance or breach was not so serious or aggravating as to warrant such a serious consequence. The Court in **Teeni Enterprise** agreed with the party who breached the unless order that it was a draconian punishment to allow the massive counterclaim of over $1.2 million and that the dismissal of the whole of the plaintiff's claim was disproportionate, taking into account the relatively trivial breach by the plaintiff which did not occasion any real prejudice to the defendant.

27. The English Court of Appeal shares the same view in **Marcan Shipping (London) Ltd v Kefalas** [2007] 1 WLR 1864 where, at [36] Moore-Bick LJ said:

    [B]efore making conditional orders, particularly orders for the striking out of statements of case or the dismissal of claims or counterclaims, the judge should consider carefully whether the sanction being imposed is appropriate in all the circumstances of the case. Of course, it is impossible to foresee the nature and effect of every possible breach and the party in default can always apply for relief, but a conditional order striking out a statement of case or dismissing the claim or counterclaim is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified. I find it difficult to imagine circumstances in which such an order could properly be made for what were described in Keen Phillips v Field as "good housekeeping purposes".

28. Browne-Wilkinson VC in **In re Jokai Tea Holdings** [1992] 1 WLR 1196 at 1203B said:

> In my judgment, in cases in which the court has to decide what are the consequences of a failure to comply with an "unless" order, the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed.

29. Parker LJ opined at 1206 that:

> I have used the expression "so heinous" because it appears to me that there must be degrees of appropriate consequences even where the conduct of someone who has failed to comply with a penal order can properly be described as contumacious or contumelious or in deliberate disregard of the order, just as there are degrees of appropriate punishments for contempt of court by breach of an undertaking or injunction. Albeit deliberate, one deliberate breach may in the circumstances warrant no more than a fine, whilst another may in the circumstances warrant imprisonment.

CONCLUSION

30. In this case, there was no unless or peremptory order given. In terms of the authorities cited above, the onus would then be upon the plaintiff to establish contumacious conduct and/or deliberate disobedience of the non-peremptory orders on the part of the defendants. No such clear evidence has been placed before me.
31. In any event, I am of the view that the plaintiff's application under Order 24 Rule 16 is rather premature. General discovery can only be ordered against a party who has indicated that he has relevant documents in his possession and yet refuses or neglects to discover them to the other party.
32. However, where, as in this case, a defendant has indicated that he has no documents to discover, it would be most inappropriate for the plaintiff to apply to this Court to strike out the defence on account of the defendant's non-compliance with general discovery orders. If the plaintiff is adamant that the defendants have documents in their possession (or within their power to produce) which they are "hiding", the plaintiff should first apply for specific discoveries. Alternatively, or in addition, the plaintiff could apply for interrogatories.
33. Accordingly, I dismiss the application. Costs in the cause. Case adjourned to Thursday 08 September 2016 for mention at 10.30 a.m.

CONCLUSIONS

12. The Fiji Court of Appeal in **Rapchand** is authority that a Court may strike out a defence on account of a defendant's failure to comply with a non-peremptory order, if there is evidence of contumacious conduct and/or deliberate disobedience of the non-peremptory order. The onus to establish contumacious conduct and/or deliberate disobedience of the non-peremptory orders lies with the plaintiff who seeks to strike out the defence.

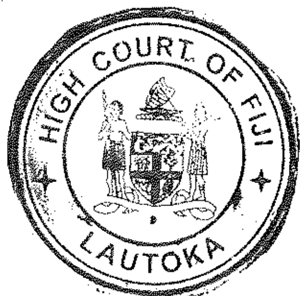
13. However, where the defendant disobeys a peremptory order or an unless order, that in itself is sufficient evidence of contumacious conduct, enough to justify striking the defence out.

14. I would apply the same principles in this case where the plaintiff fails to comply with discovery Orders. I accept the plaintiff has delayed considerably. However, it is hard to accept that it has deliberately disobeyed or delayed the Orders given the reasons set out in the affidavits filed for the plaintiff. This matter was almost ready for trial when this application was made. The defendants' allege that their witnesses will not be able to recall events which are alleged to have occurred on 31 August 2006 which will affect their reliability. The affidavit of Vananalagi deposes that an investigation carried out for the defendant revealed that no witnesses are available or having any recollection of the fire and that none are likely to be found and that students and teachers have moved on. The names of these witnesses are not given. No written statements from any students were ever taken.

15. Vananalagi also deposes that the station officer of Namaka Police Station had died in December 2010. He had confirmed that no file was ever opened on any investigation and the incident was classified as IR or investigation refused. As Mr. Saini has passed on, it will not be impossible to ascertain whether he visited the scene at all and what he may have seen. There is no written statement available of him.

16. In my view, the fact that there was no thorough investigation done should not deprive the plaintiff from its right to have its claim determined in a Court of law. There is simply no nexus between the alleged lack of investigation and the alleged delay in this case, which, in any event, as I have found, in not contumelious.

17. Defendant's application struck out. Costs in the cause. Matter adjourned to **Wednesday 05 October 2016 at 10.30 a.m.** for further directions.



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Anare Tuilevuka
JUDGE
29 September 2016.