

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

HBC NO. 144 OF 2014

BETWEEN : **PRABHA WATI**, as an administratrix of the State of Vijay Singh of 14 Tewkesbury St Chipping Norton, Sydney, Australia 2170, Insurance Broker, Deceased, Inestate.
Plaintiff

AND : **SATYA WATI**, as administratrix of Estate of Shiv Charan of 86 Tavewa Avenue, Lautoka.
1st Defendant

AND : **PETER JOHN RAM NARAYAN**, of 86 Tavewa Avenue, Lautoka.
2nd Defendant

AND : **THE DIRECTOR OF LANDS**, Government Buildings, Suva.
3rd Defendant

AND : **ATTORNEY GENERAL**, Attorney Generals Chambers, Lautoka.
4th Defendant

Counsel : Mr. Anil J. Singh for the Plaintiff.
: Ms. Arthi Bandan Swamy for the 1st & 2nd Defendants.
: Ms. M. Faktaufon for the 3rd & 4th Defendants.

Date of Hearing : 19th September, 2017.

Date of Ruling: : 19th September, 2017.

Ruling by : Justice Mr. Mohamed Mackie

R U L I N G

[A] BACKGROUND

1. This matter comes up before me today for hearing into the Summons dated 16th December, 2016, filed on behalf of the plaintiff, seeking leave to appeal against the ruling dated 02nd December, 2016, made by the learned Master (Master).

2. By the said ruling dated 2nd December, 2016, the learned Master dismissed the Summons dated 30th May, 2016, that had been filed by the Solicitors for the Plaintiff, moving for reliefs, among other things, to vacate the bench order made by the same Master on 25th April, 2016 striking out the Plaintiff's statement of claim.
3. According to the records, the reason for striking out the Plaintiff's statement of claim, by the Master on 25th April, 2016, was the alleged non-compliance of an unless order- made by the Master on 14th April, 2016.
4. It is also on record that, when the solicitor for the Plaintiff, on 14th April, 2016, had sought time to seal the Order, that had already been made permitting the amendment of the Statement of Claim, Master had accordingly given 7 days to the Plaintiff's solicitor for that purpose and adjourned the matter for 25th April, 2016.
5. When granting time to seal and serve the order as aforesaid, the Master on 14th April, 2016, had made further Order to the effect that; unless the Plaintiff's Solicitors seal and serve the Order on or before 21st April, 2016 Plaintiff's statement of claim would be struck out.
6. Accordingly, when the matter was mentioned on 25th April, 2016, to see the compliance of the said unless order, the Master, having found that none was appearing on behalf of the Plaintiff and no the Order had been filed, sealed and served, struck out the Plaintiff's claim on the ground of alleged non-compliance.
7. Subsequently, it was for the purpose of vacating said striking out order, the Plaintiff's solicitors filed the Summons dated 30th May 2016, which was heard and dismissed by the Master by his impugned ruling made on 2nd December, 2016 as stated in paragraph 1 and 2 above. It is against this ruling the summons in hand for leave to appeal is heard before me today.

[B] ANALYSIS

(1) Legality of the unless order and subsequent Striking Out Order

8. When the entirety of the above ruling is carefully read, it appears that the Master has struck out the Plaintiff's claim solely on the ground of the alleged failure on the part the Plaintiff's solicitors to seal the order made on 28th August, 2015, by which permission had been granted to file the amended statement of claim.
9. It is also on record that the Plaintiff's Solicitors, acting on the permission given on 28th August, 2015, to file the amended statement of claim, had duly filed the same on 10th of September 2015, amending only the name of the plaintiff,

however, well before the impugned unless order dated 14th April, 2016 and the striking out order dated 25th April, 2016 were made.

10. The fault, if any, committed by the solicitors for the Plaintiff was only not filing the Order dated 28th August, 2015, for subsequent sealing and serving.
11. The preparation of the text Order, in terms of any direction, ruling, order or judgment delivered by the Court, is an administrative function of the Court and as a matter of practice it is prepared, printed and filed by the Solicitors to assist the Court, as they too are considered to be the officers of the Court and same is subsequently sealed, however, subject to corrections.
12. Even, if it is considered as a legal duty on the part of the Solicitors, the Court cannot penalize the parties for the failure of this nature on the part of solicitors. The averments in the affidavit filed on behalf of the Plaintiff's Solicitors are self-explanatory as to what was the actual reason for their failure to file the Order for sealing within the stipulated time of 7 days.
13. Preparation, filing, sealing and serving the Order are among the administrative functions of the Court and a task ably assisted by the Solicitors on the expense of time, money and other resources, for which they should be thanked profusely. Filing, sealing and even, serving of the Order in question were not mandatory requirements, in order to proceed with the action, as the order in question had been made inter-parte and the amended statement claim had already been filed in terms of the order made.
14. It appears that, when the learned Master made the "unless" and the subsequent striking out orders, the aforesaid well recognized , generally adopted practice of our Courts seem to have had escaped the attention of the Master.

[C] LAW ON UNLESS ORDERS

15. 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 sledge hammer 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.
16. *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.
17. 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.

18. 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:

*"Before 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".*

19. *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.

20. Within this jurisdiction Justice Wickramasinghe in *Smart v Qeelai* (2012) FJHC 844; HBC201.2002L (30 January 2012) has discussed the applicable principles on unless orders, follows:

"Fundamentally, courts are required to determine cases on merit rather than dismissing them summarily on procedural grounds. However, for better case

management, the courts at time are required to exercise its inherent jurisdiction and make unless orders against parties who persistently default adhering to court orders. The court therefore makes unless orders requiring the defaulting party to comply with the order by a certain date and specify the consequence of the default. Clearly, unless orders can only be made by courts in exercising its inherent jurisdictions. Further, an unless order should only be made when the court determines that the defaulting party is breaching the court order made relating to procedural compliance either intentionally or contumaciously or acting lethargically and dragging his feet- so to say, thereby causing delays in the conclusion of the case. When making unless orders, a court must act fairly and reasonably.”

21. Wickramasinghe J in *Smart v Qeelai (supra)* further discussed the jurisdiction of re-instatement of action when it was struck out on the ground of noncompliance of an unless order , and:

“Unless orders ’ that are made in the exercise of inherent powers of the court and solely for the purpose of compelling parties on procedural compliance are not made on merits. Therefore in my mind, an unless order made either by a master, a magistrate or a judge exercising original or appellate jurisdiction can re-instate their own orders without appeal, and the court is not functus officio”.

22. *The decision of Lal Abeygoonaratne J in Rafiq v R. C. Manubhai & Co. Ltd [2016] FJHC 288; HBC10.2004 (21 April 2016)* is another example and the facts of this case are similar to that of the case in hand.

23. In the above case the defence was struck out by the Master on 28 August 2009 and judgment was entered in favour of the Plaintiff without any evidence being led on account of non-serving the 3rd party notice as per the unless order that had been made by the predecessor Master on 10th March,2009.

24. Lal Abeygoonaratne J, Observed that the Defendant had taken leave of the Court to take steps to issue notice on a 3rd party as provided by Order 16 Rule 1(i) of the High Court Rules after serving his defence on the Plaintiff. It is evident from the case record that the Defendant had taken several dates to take this step and finally failed to comply with the Court order to issue the said notice by way of substituted service. The question arises as to whether the Master is entitled to issue an unless order to strike out the Defence and enter Judgment for Plaintiff on pleadings alone without any evidence being led on account of the default of the Defendant serving the 3rd Party Notice on a 3rd party.

25. It was his view that as the Defendant had filed his Statement of Defence, trial could have proceeded with the pleadings filed without the 3rd party notice being

served. It was not essential to add a 3rd party for the matter to proceed to trial on the pleadings filed. No orders could have possibly been made entering Judgment for the Plaintiff based on pleadings alone in the absence of proof.

26. It was further observed that *"As such I find that striking out the Defendant's Statement of Defence pursuant to an " unless order " without trial as to merits of the case was not correct and therefore said ' unless order " is defective, thereby bad in Law"*.

[D] FURTHER ANALYSIS

27. Therefore, making an **unless order** on a matter of this nature and **striking out** the Statement of Claim of the plaintiff on account of alleged non-compliance, on the part of the Solicitors, are uncalled and unwarranted and the Plaintiff cannot be penalised for same by dismissing her action without the merits of the action being gone into, particularly, when the 1st and 2nd Defendants in the case had admitted that the Plaintiff's late Husband is a beneficiary of the estate of his late father as per the last will, which is the bone of contention in the substantial action.

(2) Legality of the Ruling made on 2nd December, 2017

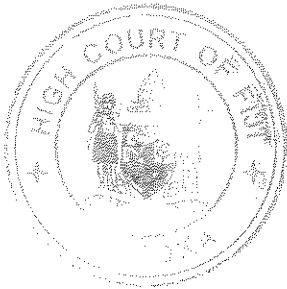
28. Another severe blow dealt on the Plaintiff's action was, through the subsequent ruling made by the learned Master on 2nd December, 2016, dismissing her Summons dated 30th May, 2016, that had been filed to have the aforesaid striking order vacated. It is against this ruling the present leave to appeal application is pending before me for hearing today.
29. The only reason adduced by the learned Master, for the dismissal of the said summons, was the alleged failure on the part of the Solicitor's Clerks to file an authority from the Plaintiff to swear the affidavit on her behalf.
30. When the relevant portions of the impugned ruling dated 2nd December, 2016, are carefully scrutinized, it is clear that the learned Master had chosen to dismissed the Plaintiff's summons dated 30th May, 2016, purely relying on the ground that the affidavit had been sworn by the Solicitor's Clerk ATEKA TICONATABUA without any authority from the Plaintiff.
31. It is apparent that the learned Master had not considered as to what was, in fact, required to be submitted to the Court, by the Plaintiff's Solicitors at that juncture, for the resolution of the issue in hand. Obviously, it was nothing but the actual reasons for the failure on the part of the Solicitors for not filing the order in question for sealing and service. It is evidence in the affidavit of the Solicitor's Clerk that the above failure had occurred, purely, due to certain inadvertency

- occurred on the part of the Solicitor's Office. The Plaintiff, who was, admittedly, beyond the shores of Fiji, had nothing to do with this failure or non-compliance.
32. Given the nature of the proceeding that was in hand at that juncture, which was only for the reinstatement of the action, that was struck out due to the admitted failure on the part of the Plaintiff's Solicitors, no authority from the plaintiff was a requirement for the Solicitor's Clerk to swear an affidavit to salvage the action that was struck out for no fault on the part of the Plaintiff.
 33. Learned Master, could very well have acted on the affidavit of the Solicitor's clerk, who, along with the others in the office was, admittedly, responsible for the debacle. The facts contained in the averments of the affidavit of the law Clerk explaining the reasons for the failure, could only have emanated from relevant Clerk's knowledge and not from that of the Plaintiff.
 34. Further, the averments contained in the affidavit were not a contentious as far as the substantial issues of the action are concerned for the Plaintiff to get involved.
 35. Accordingly, it is clear that the above ruling dated 2nd December, 2016 too cannot stand as a valid one, in the eyes of the law. However, in view of the illegality of the unless and the subsequent striking out orders made on 14th and 25th April, 2016 respectively, the aforesaid ruling dated 2nd December, 2016, which is under attack before me, too bound to collapse, even in the absence of the above findings.
 36. When the attention of the learned Counsels were drawn towards the above observations, both the Counsels for the Defendants were considerate, and readily agreed to vacate the above inimical orders made by the learned Master on 14th, 25th, April 2016 and 02nd December, 2016.
 37. In fairness to learned Counsel for the 3rd and 4th Defendants, it has to be stated that she had already indicated to the Court that 3rd and 4th Defendants will not be objecting for the summons of the Plaintiff for reinstatement.

[E] FINAL ORDERS

38. Accordingly, for the reasons adumbrated above, this Court having granted leave, makes following orders:
 1. The ruling pronounced by the learned Master on 02nd December, 2016, dismissing Plaintiff's summons dated 30th May, 2016, is hereby set aside,
 2. The bench order made striking out Plaintiff's claim by the learned Master on 25th April, 2016, is hereby set aside,

3. The unless order made by the learned Master on 14th April,2016 stands set aside,
4. Plaintiff's Amended Statement of Claim dated 10/9/2015 stands reinstated.
5. Plaintiff will pay \$250 to 1st and 2nd Defendants and \$250 to 3rd and 4th Defendants totalling \$500 being cost (of consent).
6. Matter will proceed on the normal course.



A handwritten signature in black ink, appearing to read "A.M. Mohammed Mackie", is written over a horizontal dotted line.

A.M.Mohammed Mackie

Judge

**At Lautoka
19th September, 2017**

Copies to be served to

1. Anil J. Singh Lawyers for the Plaintiff
2. Patel & Sharma Lawyers for the 1st & 2nd Defendants
3. Office of the Attorney General for the 3rd & 4th Defendants