

**IN THE HIGH COURT OF FIJI**

**WESTERN DIVISION AT LAUTOKA**

**APPELLANTE JURISDICTION**

**CIVIL ACTION No. HBC 149 OF 2013**

**BETWEEN :** **SAYLESH SANTU PRASAD** of Cuvu, Sigatoka, as the Administrator in the **ESTATE OF DIPIKA SULOCHNA NAND, late of Namaka, Nadi.**

**Applicant/Plaintiff**

**AND :** **EMORI RABO** of Davuilevu Housing, Suva, Circulation Officer.

**1<sup>st</sup> Respondent/1<sup>st</sup> Defendant**

**AND :** **THE FIJI TIMES LIMITED** a limited liability company having its registered office in Suva.

**2<sup>nd</sup> Respondent/2<sup>nd</sup> Defendant**

**Appearances** : Mr Janend Sharma for plaintiff /applicant  
Ms Vikaili Buli for defendants/respondents

**Date of Hearing** : 04 April 2017

**Date of Ruling** : 15 September 2017

## **R U L I N G**

### **INTRODUCTION**

[01] This is an application for Leave to Appeal the decision of the learned Master of the High Court (the Master) delivered on 14 October 2016.

[02] The Master ordered:

- a) The Plaintiff's action against the defendant is dismissed for Want of Prosecution and abuse of process of Court.
- b) The Plaintiff to pay costs of \$500.00 to the Respondents/Defendants within 14 days hereof.

[03] The plaintiff/applicant (the plaintiff) is seeking leave of the Court to appeal the Master's decision pursuant to Order 59, Rule 11 of the High Court Rules 1988, as amended (the HCR). Alternatively, the plaintiff seeks, where necessary, leave to appeal out of time.

[04] The defendants/respondents (defendants) oppose this application.

[05] At the hearing, both parties made oral submissions and additionally, they have also filed written submissions. Their submissions greatly assisted me in arriving at my decision. I am grateful to counsel for their valuable submissions.

#### **PROPOSED GROUNDS OF APPEAL**

[06] The proposed grounds of appeal include:

- 1) *That the Learned Master of the High Court erred in Law and in fact in dismissing the Appellant's action for Want of Prosecution and abuse of process of the Court.*
- 2) *That the learned Master of the High Court erred in law in failing to apply the relevant principles relating application to strike out proceedings for want of prosecution.*
3. *That the Learned Master of the High Court erred in law allowing case management principles as a factor in determining the Application and thereby undermining the delivery of justice to the Appellant.*
4. *That the learned Master of the High Court erred in law and in fact in holding that the Appellant/Original Plaintiff maintained the action in existence notwithstanding that he had no interest in bringing it to a conclusion.*
5. *That the learned Master of the High Court erred in fact in holding the conduct on the part of the plaintiff constituted an abuse of process.*

6. *That the learned Master of the High Court erred in law and in fact in applying and/or holding that this case falls within the category of “abuse of process” held in “Grovit and Others v Doctor and Others”.*
7. *That the Learned Master of the High Court erred in law and in fact in holding that the fact of more than two years having elapsed since the last proceedings tend to show that the Plaintiff has intended to abandon his claim or there is either the inability to pursue the Claim with reasonable diligence and expedition or lack of interest in bring it to a conclusion.*
8. *That the learned Master of the High Court erred in Law in holding that it is not essential that the Defendant demonstrates prejudice.*
9. *That the learned Master of the High Court erred in law and in fact in refusing to accept the Plaintiff’s explanations, reasons and excuse for the delay.*
10. *That the Learned Master of the High Court erred in Law in holding that the Court still has power under its inherent jurisdiction to strike out or stay actions on the grounds of abuse of process irrespective of whether the classic tests enunciated in **Birket v James** (supra) for dismissal for want of prosecution have been satisfied.*
11. *That the learned Master of the High Court erred in Law and in Fact in holding that the delay is inordinate and inexcusable.*
12. *That the Appellant/Original Plaintiff reserves the right to include or amend the grounds of appeal appearing hereinabove on the receipt of the records of the proceedings before the Learned Master of the High Court.*

## **BACKGROUND**

[07] On 27 August 2013 the plaintiff issued proceedings by way of writ of summons against the defendants for damages. His claim arise out of an accident, which caused death of Dipika Sulochna Nand, the late wife of the Plaintiff (the deceased). The pleadings were completed in October 2013. Thereafter, the plaintiff did not file summons for direction to move the case further and bring the matter to termination. The case was stagnant without any step being taken. On 8 February 2016, the defendants, pursuant to High Court Rule, Order 25 Rule 9, filed an application before the Master to strike out the claim for want of prosecution. The plaintiff

appeared in court and filed a show cause affidavit as to why the action should not be struck out for want of prosecution. The plaintiff stated that he was unable to give instructions to his solicitor due to his medical condition and that he was being treated abroad. The Master did not accept the explanation and reasons given by the plaintiff for the delay. He struck out the plaintiff's action for want of prosecution and for abuse of the process of the court. The plaintiff seeks leave of the court to appeal that order.

## **THE LAW**

[08] The HCR O.59, r. 8 to 11 would be relevant to this application, which provides:

*Appeal from Master's decision (O.59, r.8)*

*'8.-(1) An appeal shall lie from a final order or judgment of the Master to a single judge of the High Court.'*

*Time for appealing (O.59, r.9)*

*'An appeal from an order or judgment of the Master shall be filed and served within the following period-*

- (a) 21 days from the date of delivery of an order or judgment;*
- (b) In the case of an interlocutory order or judgment, within 7 days from the date of the granting of leave to appeal.*

*Extension of time (O.59, r.10)*

*'10.-(1) An application to enlarge the time period for filing and serving a notice of appeal or cross-appeal may be made to the Master before the expiration of that period and to a single judge after expiration of that period.*

*(2) An application under paragraph (1) shall be made by way of an inter-partes summons supported by an affidavit.'*

*Application for leave to appeal (O.59, r.11)*

'11. Any application for leave to appeal an interlocutory order or judgment shall be made by summons with the supporting affidavit, filed and served within 14 days of the delivery of the order or judgment.'

## TEST FOR GRANTING LEAVE

- [09] His Lordship Justice Gates (as he then was) in **Prasad v Republic of Fiji & Attorney General** [2000] FJHC 265; [2000] 2FLR 81 dealing with an application for leave to appeal to set aside an interlocutory order states as follows:

### Test for granting Leave to Appeal

"In an application for **leave to appeal** the order to be appealed from must be seen to be clearly wrong or at least attended with sufficient doubt and causing some substantial injustice before leave will be granted see **Rogerson v. Law Society of the Northern Territory** [1993] 88 NTR 1 at 5-33; **Niemann v. Electronic Industries Ltd** [1978] VR 451; **Nationwide News Pty. Ltd (t/a Centralian Advocate) v. Bradshaw** (1986) 41 NTR 1.

"Fiji's legislative policy against appeals from interlocutory orders appears to be similar inter alia to that of the State of Victoria, **Perry v Smith** (1901) 27 VLR 66 at 68; and also with appeals to the High Court of Australia, see *Ex parte Bucknell* [1936] HCA 67; [1976] 56 CLR 221 at 223. If it is necessary for instance to expose a patent mistake of law in the judgment or to show that the result of the decision is so unreasonable or unjust as to demonstrate error, then leave will be given *Niemann (supra)* at 432. If is not sufficient for an appeal court to gauge, that when faced with the same material or situation. It would have decided the matter different. The Court must be satisfied that the decision is clearly wrong (*Niemann* at 436).

"Leave could be given for an exceptional circumstances such as if the order has the effect of determining the rights of the parties *Bucknell (supra)* at 225; **Dunstan v Simmie & Co. Pty Ltd** [1978] VR 669 at 670. This is not the case here. Leave could also be given if "substantial injustice would result from allowing the order, which it is sought to impugn to stand," *Dunstan (supra)* at 670; *Darrellea (Vic.) Pty Ltd v Union Assurance Society of Austria Ltd* [1969] VR 401 at 408."

## DISCUSSION

### *Whether the impugned order is interlocutory or final*

- [10] The Master delivered his order dismissing the plaintiff's claim for want of prosecution following the hearing of an application filed by the defendants pursuant to O.25, r.9.
- [11] The Fiji Court of Appeal in ***Goundar v Minister for Health*** [2008] FJCA 40; ABU0075.2006S (9 July 2008) said that an application to strike out pleading is an interlocutory application.
- [12] Pleadings include the claim, the defence and counterclaim (if any) and reply to defence and defence to counterclaim. An application to strike out the claim might be considered an application to strike out a pleading. Logically, an application for striking out a claim for want of prosecution made pursuant to rule 9 of O.25 might fall under the category of interlocutory application. I apply the application approach and decide the Master's order pronounced on the application to strike the claim for want of prosecution is an interlocutory order, which may be appealed with the leave of the court.

### *Preliminary issue*

- [13] Counsel appearing for the defendants has raised a preliminary issue at the hearing that the leave to appeal application was not served within 14 days of the date of the Master's ruling as mandated in O.59, r.11.
- [14] The preliminary objection would have been relevant if there was no alternative application seeking leave to appeal out of time. I would accordingly disregard the preliminary objection raised by the defendants and proceed to consider the alternative application for leave to appeal out of time.

### *Application for extension of time.*

- [15] The plaintiff alternatively seeks leave to appeal out of time. The plaintiff was in confusion as to whether the Master's order striking out the claim on account of want of prosecution is a final or an interlocutory order. I have decided that the Master's order made on the striking out application for want of prosecution to be an interlocutory order.

*Governing principles for grant of leave to appeal out of time*

- [16] The principles to be followed in an application for extension of time include:
- (i) *The reason for the failure to file within time.*
  - (ii) *The length of the delay*
  - (iii) *Whether there is a ground of merit justifying the appellate court's consideration.*
  - (iv) *Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
  - (v) *If time is enlarged, will the respondent be unfairly prejudiced?*
- [17] The Master delivered his order on 14 October 2016. The plaintiff filed his application for leave on 28 October 2016, which is one day out of time. That application was served on the defendants on 3 November 2016, which is 6 days late. The application for leave ought to have been filed and served within 14 days of the date of the Master's ruling, i.e. on or before 27 October 2016 (see O.59, r.11).
- [18] I now consider the plaintiff's application as an application seeking leave to appeal out of time.
- [19] An application to enlarge the time period for filing and serving a notice of appeal against the order or judgment of the Master may be made to a single judge after expiration of that period (appealable period) (see O.59, r.10). The plaintiff alternatively seeks leave to appeal out of time. Therefore, there is an application for enlargement of time period for filing and serving a notice of appeal.
- [20] The delay in this case is one day and therefore not substantial.
- [21] As the defendant submits, the delay has not been sufficiently explained. The plaintiff is relying on his medical condition for setting aside the Master's ruling.

[22] In *Atami Beci and Others v Jonetani Kaukimoce and Others* (Misc. Action No.2 of 2009), the reasons for the delay were unsatisfactory. However the court granted leave to appeal out of time primarily because of the important questions of law involved.

[23] Although the defendant vigorously opposing the extension of time, he has failed to demonstrate any specific prejudice that would be caused to them if the time is extended.

[24] The Court of Appeal of Fiji in *Pratap v Christian Mission Fellowship* [2006] FJCA 41; ABU0093J.2005 said:

[25] In *New India Assurance Co. Ltd v Rajesh Kumar Singh* (ABU 0031/1996 – FCA B/V 99/946) this court emphasized that ***while inordinate and inexcusable delay might be established, these factors were not, on their own, sufficient to warrant the striking out of the action. What additionally had to be clearly demonstrated (and could not be presumed) was that the Defendant had been or would be materially prejudiced by the delay that had occurred.*** Although the categories of prejudice are not closed (see, for example, remarks by Lord Denning in *Biss v. Lambeth Southwark and Lewisham Health Authority* [1978] 2 All ER 125) *the principal consideration is whether, in view of the delay, a fair trial can still be held (Department of Transport v. Chris Smaller (Transport) Ltd [1989] AC 1197).*

[25] The Master in his ruling stated that:

**“It seems to me perfectly plain that under *Grovit and Others v Doctor and Others*” (supra) is no need to show prejudice any more for it says 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.”**

[26] The plaintiff submits that the delay in the proceeding is not inordinate or intentional and any delay has been due to the plaintiff’s ill-health and the delay is not contumelious and the plaintiff has not disobeyed any orders



of the court. He also submits that the defendant in this matter has not suffered any prejudice or great injustice or any injustice at all.

[27] The defendant contends that the plaintiff failed to adduce any evidence of prejudice though he states that he will suffer irreparable prejudice if he is not allowed to pursue the substantive action.

[28] The Master appears that he did not consider the issue of prejudice in his ruling. He states in his ruling 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.

[29] Ground 8 raises that that the Master erred in Law in holding that it is not essential that the Defendant demonstrates prejudice while ground 9 complains that the Master erred in law and in fact in refusing to accept the Plaintiff’s explanations, reasons and excuse for the delay.

[30] The Plaintiff told the Master that he was unable to fully and adequately instruct his solicitors enabling them to proceed with his claim and that he had not disobeyed any orders of the court.

[31] The principal consideration in an application to strike a claim for want of prosecution is whether, in view of the delay, a fair trial can still be held.

[32] *In New India Assurance Co. Ltd* (supra) Fiji Court of Appeal emphasized that inordinate and inexcusable delays, on their own, were not sufficient to warrant the striking out of the action and that what additionally had to be clearly demonstrated was that the Defendant had been or would be materially prejudiced by the delay that had occurred.

[33] It appears that the Master had erred when he held 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. He should have considered, as a principal factor, whether the defendant had been or would be materially prejudiced by the delay that had occurred.

## **CONCLUSION**

[34] The length of delay in this case is one day. There is no substantial delay. I am satisfied that there is a ground of appeal justifying the appellate court's consideration. The defendant will not unfairly be prejudiced if time is enlarged. In the circumstances, I would grant leave to the plaintiff to appeal the Master's ruling dated 14 October 2016 with costs in the cause. The plaintiff is to comply with O.59, r.9 of the High Court Rules

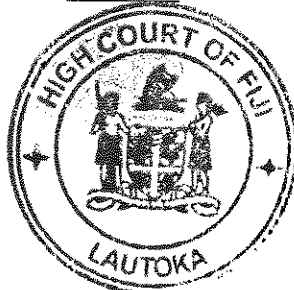
## **Final outcome**

1. Leave to appeal out of time is granted.
2. Plaintiff is to comply with O. 59, r.9 of the High Court Rules.
3. Costs shall be in the cause.

*M.H. Mohamed Ajmeer*  
15/9/17

**M.H. Mohamed Ajmeer**

**JUDGE**



**At Lautoka**

**15 September 2017**

Solicitors:

For plaintiff: M/s Janend Sharma Lawyers, Barrister & Solicitors

For defendants: M/s AK Lawyers, Barristers & Solicitors