

THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 423 of 2009

BETWEEN : **MCGREGOR INVESTMENTS LIMITED** a limited liability company having its registered office at Suva in the Republic of Fiji Islands.

PLAINTIFF

AND : **HOUSING AUTHORITY** a statutory body established by the Housing Act [Cap 267] having its registered office at Suva in the Republic of Fiji Islands.

DEFENDANT

AND : **RYDA LIMITED** a limited liability company having its registered office at Suva in the Republic of Fiji Islands.

THIRD PARTY

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Ms. Bhavna Narayan - for the Plaintiff
Mr. Nilesh Lagendra - for Defendant

Date of Ruling: 12th October, 2017

RULING

[Motion filed by the Plaintiff seeking orders made ex-parte be set aside and the Action be reinstated to the cause list made pursuant to Order 32 Rule 6 of the High Court Rules, 1988]

INTRODUCTION

1. This is Plaintiff's application seeking the following orders-
 - (a) That the order made on 03rd March, 2015 be set aside;
 - (b) That the within action which was struck out on 03rd March, 2015 be reinstated to the cause list; and
 - (c) That the costs of this application be costs in the cause.
2. The application is made pursuant to *Order 32 Rule 6 of the High Court Rules, 1988*.

THE LAW

3. *Order 32 Rule 6 of the High Court Rules, 1988* deals with Order made ex-parte may be set aside and provides as follows-

"The Court may set aside an order made ex parte."

CHRONOLOGY OF EVENTS

4. In summary, the following Documents and actions were taken by the Parties to the current proceedings as set out hereunder-
 - *The Plaintiff filed and commenced with this proceedings by way of writ of summons and the Statement of Claim on 23rd December, 2009.*
 - *Statement of Defence and the Counter-Claim was filed by the Defendant on 15th January, 2000.*
 - *Reply to Defence and the Counter-Claim was filed on 16th February, 2010.*
 - *Summons for Directions was filed and thereafter the Defendant filed a Motion seeking an order to join Third Party.*
 - *Summons filed by the Defendant for Third Party Directions.*
 - *Summons to Strike out Third Party Proceedings filed.*
 - *Statement of Claim of the Defendant against the Third Party and a Statement of Defence of the Third Party filed.*
 - *Affidavit verifying parties to the proceedings Lists were filed.*
 - *No steps were taken by the Plaintiff for more than 6 months, hence the court after issuing the notice On 12th February, 2015 pursuant to Order 25 rule 9 asked the Plaintiff to appear in court to show cause on the returnable date of 03rd March 2015 why the matter should not be struck out for want of prosecution.*

- *The Court noted that there was no appearance made on behalf of the Plaintiff to show cause and the matter was struck out and dismissed accordingly.*
- *On 01st June, 2016, a Notice of Motion to reinstate the matter to the list was made on behalf of the Plaintiff with returnable date of 15th June, 2016 assigned.*
- (i) *Parties filed their respective Affidavits/Affidavits in Opposition together with the Written Submissions and the matter was argued on 06th October, 2016 and thus for Decision.*

ANALYSIS AND DETERMINATION

5. The issues to be dealt with by this Court are-
 - (i) *Whether the Plaintiff's application seeking orders for the setting aside of orders made on 03rd March, 2015 be granted ; and /or*
 - (ii) *Whether the within action Struck out on the 03rd March, 2015 be reinstated to the cause list.*
6. *The Court Registry issued a Notice on 12th February, 2015 pursuant to Order 25 rule 9 since no step was taken for a period of 6 months and asked the Plaintiff to appear in court to show cause on the returnable date of 03rd March 2015 why the matter should not be struck out for want of prosecution.*
7. *There was no appearance by the Plaintiff/Counsel on the returnable date of 03rd March, 2015, and the Court proceeded to Strike out the matter and hence dismissed the same accordingly.*
8. *The matter was struck out for want of prosecution pursuant to Order 25 Rule 9 of the High court Rules of 1988.*
9. *The Plaintiff filed the current application on 01st June, 2016 seeking Court orders that the orders of 03rd March, 2015 be set aside and that the within Action be now reinstated to the Cause list accordingly.*
10. *The Plaintiff's argument has been that the Plaintiff and the Counsel were never served with the Order 25 Rule 9 Notice and that was the very reason why the Plaintiff/Counsel failed to appear in Court and show Cause why the Plaintiff's case should not be struck out for want of prosecution.*
11. *It can be clearly ascertained and confirmed from the hand written minutes of the Presiding Judicial Officer of 03rd March, 2015 that the Plaintiff/Counsel was served with the Order 25 Rule 9 Notice and records that the Defendant's Counsel was present but there was no appearance by the Plaintiff/Counsel for the reasons best known by the Plaintiff/Counsel.*

12. Therefore, the Plaintiff cannot in any way challenge the accuracy of the Judicial Officer's hand recorded minutes on the Court file.
13. Fiji Court of Appeal in the case of Trade Air Engineering (West) Ltd V Taga 2007 FJCA 9 ABU62J2006 (9th March 2007) held as follows-

"Where the matter was struck out due to want of prosecution that the court which struck out does not have jurisdiction to deal with the application to reinstate as the High Court rules do not allow such applications.

Further, the Court also stated that "Generally, a party's only remedy following the striking out of its action is appeal. Exceptions to this general rule such as O13r10, O 14 r 11, O 24 r 17 or O 32 r 6 have no application to Order 25".
14. It is to be noted the powers conferred in Order 25 Rule 9 can be exercised by the court on its own motion and the Court of Appeal stated that such powers are rarely conferred within our present High Court Rules citing *Order 34 rule 2(6) and Order 52 rule 4* as examples.
15. I cannot find any provision within the High Court Rules, 1988 that deals with reinstatement of a struck out action for want of prosecution.
16. Therefore, when a court is granted jurisdiction in certain instances to deal with its own decision, but silent on the *Order 25 rule 9* such jurisdiction to reinstate it has to be considered as a clear exclusion of jurisdiction. The inherent powers of the court cannot be resorted in such instance to confer a jurisdiction that has not been granted in the High Court Rules.

CONCLUSION

17. The Fiji Court of Appeal decision hereinabove in the case of Trade Air Engineering (West) Ltd V Taga is the *authority* which clearly *excludes* jurisdiction to deal with reinstatement application by the same court that struck out the application.
18. In this instance it was the Master's Court that **Struck Out** the Matter in terms of *Order 25 Rule 9* application and the application to reinstate was also filed before the same Court to determine the reinstatement that is not possible.
19. For the aforesaid rational, the application to set aside the orders and to reinstatement the Action to the Court list is accordingly struck out.
20. In terms of the issue of costs. The Plaintiff/Counsel should have known better that the application to set aside the orders and seek an order for **reinstatement** will fail in light of case authorities (as hereinabove) that have decided that Master's Court does not

have the Jurisdiction to deal with Reinstatement of Order 25 Rule 9 applications once struck out since the order made is final and subject to appeal only.


21. The Plaintiff is hereby ordered to pay Costs to the Defendant summarily assessed at \$1,500.

FINAL ORDERS

- (a) That the Plaintiff's Motion filed on 01st June, 2016 seeking orders to set aside orders and to Reinstate the Action to the Court List fails and is accordingly Dismissed.
- (b) The Plaintiff is hereby ordered to pay costs to the Defendant summarily assessed at \$1,500 to be paid within 14 days timeframe.
- (c) Orders accordingly.

Dated at Suva this 12TH Day of October, 2017




MR VISHWA DATT SHARMA
Master of High Court, Suva

cc: Ms. Bhawna Narayan (Lateef & Lateef Lawyers) for the Plaintiff
Mr. Nilesh Lajendra (Lajendra Law) for the Defendant