

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION AT LAUTOKA**  
**APPELLATE JURISDICTION**

**CIVIL APPEAL NO. HBA 4 OF 2016**

**BETWEEN** : **DAVID FONG** of Capt. Withers Street, Lautoka, Plant Operator.

**APPELLANT**

**AND** : **BANSRAJI and RAVINDRA CHAND** sued in both their personal capacity and their capacity as Executors and Trustees of the **ESTATE OF RAM PHER.**

**RESPONDENT**

**Appearances** : Mr Vinisoni Filipe for the appellant  
Mr Vikrant Chandra for the respondent

**Date of Hearing** : 14 March 2017

**Date of Judgment** : 17 November 2017

## **J U D G M E N T**

### **Introduction**

[01] This is a timely appeal from the Magistrate's court. The learned Magistrate (the Magistrate) ordered striking out the civil action (Lautoka) number 85 of 2009 (Action) for non-appearance by the appellant on a mention date.

[02] Initially, the appeal was heard before Justice Sapuvuda (as he then was) who left the bench before delivering the judgment. The matter was listed before me for Judgment. I caused the registry to issue notice on both parties to appear before me on 6 October 2017. Accordingly, both counsel appeared and confirmed that I can deliver the judgment based on the written submission the parties had already filed. I now proceed to deliver Judgment.

## **Background**

- [03] In July 2009 Mr David Fong, the plaintiff (“the appellant”) brought a Magistrate’s Court Action (No.85 of 2009) against Bansraji and Ravidra Chand (“the respondents”) seeking among other things judgment in the sum of \$13,621.53 and general damages for breach of the agreement dated 23 October 2004.
- [04] The respondents filed their statement of defence and denied any breach of the agreement on their part.
- [05] The Magistrate’s Court Record does not indicate the action was ever listed for hearing, although the action was filed in July 2009.
- [06] After a considerable number of adjournments since 2009, the matter came on for mention only on 11 March 2015, when the appellant defaulted in appearance. The respondents appeared through their counsel made an application to the Magistrate that the matter may be taken out of the cause list as there was no appearance for the plaintiff (appellant). The Magistrate, considering the non-appearance for the plaintiff, struck out the action.
- [07] Subsequently, on 23 October 2015, the appellant filed an application under Magistrates’ Court Rules (the MCR), Order XXX Rule 3, 5 & 6 to set aside the order of 11 March 2015 and have the Action reinstated on the cause list. On 11 May 2016, the Magistrate, after hearing the application, refused to set aside the striking-out order he made and dismissed the application with costs. The present appeal is against that order.

## **The judgment of the Court below**

- [08] The Magistrate dismissing the application to relist filed by the appellant made the following orders:

- “13. Based on the above findings and conclusions of the Court, I find this application has no merit and accordingly refuse the application and dismiss it forthwith subject to a cost of \$1,000.00 to be paid to the defendant as summarily assessed by Court”.
14. 07 days to file Notice of Intention to Appeal and 30 days for grounds of appeal.”

[09] In the course of his ruling, the Magistrate made certain findings:

- “10. Court has considered the relevant case law in respect of this application. It is clear from these cases that the law on such applications is well settled. Counsels [sic] for both parties had referred the attention of this court to the test formulated in *Birkett v James (1987) AC 297*. This test had been continuously applied in Fiji. As per the test formulated in *Birkett (Supra)* it has two limbs. The first is ‘intentional and contumelious default’ and the second is ‘inexcusable or inordinate delay and prejudice’. I further consider the judgment in the recent case of *Singh v Raju; HBC13.2014 (27 March 2015)*, where this issue had been extensively dealt. I further consider the case of *Maya Wati v Niranjana Singh; HBC0403.1995L (17 March 2004)* in considering this application.
11. Having carefully considered the relevant law and the facts and circumstances in this application it is the finding of this court that the default of the plaintiff to appear is clearly intentional and contumelious. The fault of the counsel who appeared on the previous day with instructions from the counsel for the Plaintiff to obtain a date to file a formal application to withdraw as counsel for Plaintiff shall not cover up this intentional and contumelious default by the Plaintiff. As apparent from the magistrate’s minutes in this case since 2009, there is obvious inexcusable and inordinate delay on the part of the plaintiff to prosecute this action. This finding is further strengthen[ed] by the unexplained delay of over 5 months to file this application for reinstatement, after the counsel for the Plaintiff coming to know that the matter has been struck out by the court.
12. In overall consideration of facts and circumstances of this case along with the above findings by court, it is the considered view of this court that this action has been commenced and continued by the plaintiff with no intention to bring the matter to a conclusion. It is thus the conclusion of this court this action is clearly an abuse of process. Therefore, based on the judgment in *Karan Chand; HBC 43.2010 (22 October 2013)*, this court further conclude that owing to the above circumstances the

*prejudice on the defendants is obvious. It is to be noted at this stage that the 1<sup>st</sup> defendant, Bansraji, had passed away on the 2<sup>nd</sup> September 2012 during the course of this action. Thus I reiterate my conclusion that prejudice on the defendants is obvious under the circumstances of this case”.*

[10] The Appellant challenges the Magistrate’s decision on the following six grounds.

1. *The Learned Magistrate erred in law and in fact when he applied the incorrect test and principles regarding reinstatement applications.*
2. *The Learned Magistrate erred in law and in fact when he incorrectly found that because the Plaintiff’s lawyers had sought time to file an application to withdrawn as solicitors on record, it meant that the Plaintiff was not interested in prosecuting his claim.*
3. *The Learned Magistrate erred in law and in fact when he incorrectly found that because the Plaintiff’s lawyers had not filed a Reply to Defence, it meant that the Plaintiff was not interested in prosecuting his claim.*
4. *The Learned Magistrate erred in law and in fact when he incorrectly found that because the Plaintiff’s lawyers had sought time to file an application to withdraw as solicitors on record, they had no instructions from the Plaintiff – both being completely separate and distinct issues.*
5. *The learned Magistrate erred in law and in fact when he incorrectly found that the Plaintiff should have appeared in person before the Court.*
6. *The Learned Magistrate erred in law and in fact when he ordered costs of \$1,000 which was unjustified and unreasonable in the circumstances.*

#### **The Law**

[11] *On non-attendance of parties at the hearing, Order 30 of the MCR states:*

#### *Non- appearance of both parties*

*“1.Where a civil cause on the cause list has been called, if neither party appears, the court shall, unless it sees good reason to the contrary, strike the cause out of the cause list.*

*Of Plaintiff*

*2. If the Plaintiff does not appear, the court shall, unless it sees good reason to the contrary, strike out the cause (except as to any counterclaim by the defendant), and make such order as to costs, in favour of any defendant appearing, as seems just. [My emphasis]*

*Provided that, the defendant shall admit the cause of action to the full amount claimed, the court may, if it thinks fit, give judgment as if the plaintiff had appeared.*

*Of defendant*

*3. If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, The court may, upon proof or service of the summons proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant.*

*Counterclaim where plaintiff does not appear*

*4. Where the defendant to a cause which has been struck out under rule 2 has a counterclaim, the court may, on due proof of service on the plaintiff of notice thereof, proceed to hear the counterclaim and give judgment on the evidence adduced by the defendant, or may postpone the hearing of the counterclaim and direct notice of such postponement to be given to the plaintiff.*

*Setting aside of judgment made in absence of party.*

*5. Any judgment obtained against any party in the absences of such party may, on sufficient cause shown, be set aside by the court, upon such terms as may seem fit.*

*Relisting of cause struck out*

*6. Any civil cause struck out may, by leave of the court, be replaced on the cause list, on such terms as to the court may seem fit."*

**Appellant's submission**

[12] The appellant submits that there is no provision in the Magistrates' Court Rule that gives the Magistrates power to strike out any pleading and adjourn the matter for formal proof when a party fails to appear on a mention date. His submission

continues that a Magistrate can only strike out pleadings of defaulting party and hear evidence of the party in attendance when the matter is set down for hearing. He further submits that the Magistrate could have re-instated the matter and awarded costs to the defendant to avoid any prejudice due to non-appearance.

### **Respondent's submission**

[13] In contrast, the respondent submits that the appellant has taken more than 210 days before filing an application for reinstatement. This shows clear lack of interests and promptness in getting the action re-instated. He also submits that the substantial delay on the part of the appellant is purely negligent on his part.

### **Discussion and decision**

[14] This appeal raises an important question of law whether the Magistrate's Court has jurisdiction to strike out an action for default of appearance of the plaintiff and his or her solicitor on a call-over date on the ground that the plaintiff had failed to prosecute the matter with due diligence.

[15] In the court below, the appellant and his solicitor defaulted to appear in court on 11 March 2015, which was a mention date. The Magistrate struck out the action without referring to any rule of the MCR. When striking out the action, the Magistrate stated that: "*Considering the non-appearance for the plaintiff cause struck out.*" It is worthy to note that the Magistrate struck out the matter when there was no application by the defendant who was present in court on the day in question. The defendant had only made an application to take the matter off the cause list in view of the non-appearance of the plaintiff.

[16] The Magistrate struck out the action on a mention date, without referring to any rule, considering only the non-appearance of the plaintiff. The appellant then applied to the Magistrate to reinstate the matter back to the cause list. The

appellant in the affidavit in support of that application stated that he did not intentionally disregard the court process or not intentionally refused to attend the court. It seems to me that the Magistrate dismissed and refused the re-listing application filed by the appellant on the basis that the appellant had commenced and continued the action with no intention to bring the matter to a conclusion and that the action is clearly an abuse of process. The Magistrate had considered the reinstatement application on the basis the action was struck out for want of prosecution or abuse of the process of the court.

[17] The question that arises whether the Magistrate had jurisdiction to strike out a claim for want of prosecution or abuse of the process of the court. There is no rule in the entire MCR empowering the Magistrate to strike out an action for non-prosecution or for abuse of the court process. Nor had he jurisdiction to strike out the pleadings for non-appearance of a party on a mention date.

[18] In *Prasad v Rup Investment Ltd* (2012) FJHC 1396; HBC 182.2006 (19 October 2012), Justice Pradeep Hettiarachchi (as he then was) said:

*"...Therefore, it is my considered opinion that the striking out of the action by the Master on a mention date due to the non-appearance of the plaintiff's counsel was legally unacceptable..."*

[19] Justice Kumar in *Singh v Fiji Sugar Corporation* [2014] FJHC 755; HBA2.2009 said that there is no provision in the Magistrates' Court Rules that gives the Magistrates power to strike out any pleading and adjourn the matters for formal proof when a party failed to appear on a mention date.

*Appellant's reinstatement application*

[20] The appellant filed an application to re-list the matter that was struck out for default of appearance of the appellant on a mention day. The Magistrate, refusing

to re-instate the matter back to the cause list, dismissed that application as well. He had considered that application on the basis that the appellant was seeking to re-instate the matter that was struck out for want of prosecution. The appellant on affidavit explained the reason as to why his counsel was unable to appear in the court below on the day in question. The Magistrate had the discretion to replace on the cause list any civil action struck out on such term as he may seem fit (see MCR 30 (6)). Unfortunately, the Magistrate applied the principles applicable to an application for re-instatement of an action that was struck out for want of prosecution to the relisting application. The Magistrate may have considered that application and replaced the claim on the cause list with the cost order against the appellant given the fact that the action was struck out for non-appearance of the appellant on a mention day. Obviously, the Magistrate had applied the incorrect test and principles to the relisting application filed by the appellant.

## **Conclusion**

- [21] It was not open to the Magistrate to strike out a pleading for non-appearance of a party on a mention day.
- [22] The Magistrate had struck out the appellant's claim for non-appearance of the appellant on a mention day. When a party defaults in the appearance on a mention day, the Magistrate should set down the matter for hearing, notify the defaulting party of the hearing date, and deal with and dispose of the matter accordingly.
- [23] The Magistrate had acted without jurisdiction when he struck out the appellant's claim for non-appearance of the appellant on a mention day. He applied wrong test and principles to the relisting application filed by the appellant and refused to place the matter on the cause list. There are no mechanisms under the MCR for striking out a pleading for want of appearance on a mention date. The order the Magistrate Made on 11 March 2016 was capable of being set aside as of right under



Rule 6 of Order 30, MCR. I would, therefore, set aside the Magistrate orders made on 11 March 2015 striking out the claim and on 11 May 2016 refusing to relist the matter back to the cause list. I now, on appeal, replace the appellant's claim on the cause list and award the cost of \$500.00 to the respondent.

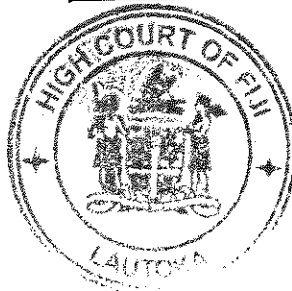
**The result**

1. Appeal allowed.
2. Magistrate's orders set aside.
3. Appellant's claim replaced on the cause list.
4. Appellant is to pay the cost of \$500.00 to the respondent.
5. The matter is now adjourned before the Magistrate for mention to fix hearing and disposal of the matter forthwith or as soon as possible at 9.00am on 8 December 2017.

*M.H. Mohamed Ajmeer*  
17/11/17  
.....

**M.H. Mohamed Ajmeer**

**JUDGE**



**At Lautoka**

**17 November 2017**

Solicitors

For the appellant: M/s Hanif Tuitoga

For respondent: M/s Vijay Naidu & Associates, Barristers & Solicitors