IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 105 of 2011

BETWEEN : **AZAM ALI** father's name Rahim Tullah trading as **R. AZZAM INVESTMENTS** of Moto, Ba, Postal Address, P.O. Box 2987, Ba, Businessman

Plaintiff

AND : **MERCHANT FINANCE & INVESTMENT COMPANY LIMITED** a limited liability company having its registered address at Level 1, 91 Gordon Street, Suva.

Defendant

Before : Acting Master U.L. Mohamed Azhar

Counsel : Mr. Mark Anthony for the Plaintiff
Mr. K. Patel for the Defendant

Date of Ruling : 2nd March 2018

RULING

01. This is the summons dated 08th November 2016 and filed by the defendant pursuant to Order 25 rule 9 of the High Court Rules and the inherent jurisdiction of this court. The defendant based this summons on the following grounds:

1. *The plaintiff failed to prosecute the proceedings expeditiously without any real interest in bringing the matter to trial; and /or*
2. *The plaintiff had abused the process of the court; and/or*
3. *The plaintiff caused prejudice to the defendant; and/or*
4. *The delay by the plaintiff has created a substantial risk that there will not be a fair trial.*

02. The summons was supported by an affidavit sworn by the manager of Lautoka branch of the defendant company. The plaintiff filed series of affidavits and all were opposed by the defendant on the basis of irregularity. Finally, this court, having heard the counsels for both parties on 23.05.2017 on the said alleged irregularity, by its ruling dated

24.05.2017 ordered the plaintiff to file a proper affidavit on the following date i.e. on 25.05.2017 and the plaintiff complied with the said order.

03. The fact of the case, albeit brief, is that, the plaintiff took out the writ of summons issued by this registry on 11.07.2011 against the defendant, seeking general and special damages together with the interest and cost based on two different causes of action. One is that, the defendant company, through its employee, acted negligently and/or in bad faith in respect of plaintiff's loan contract and thereby failed to transfer certain machineries to the plaintiff, which caused the loss and damages to the latter. The second cause of action was on the alleged breach of Commerce Commission Act 2010 by making misrepresentation in respect of the hire purchase agreement. The defendant filed the defence and counter claim and thereafter the plaintiff filed the reply to the defence. The parties then filed their respective affidavits verifying list of documents after the directions were given by the court. They finalized the pre-trial conference and filed the minutes on 24.05.2013. In between there were some injunctions on the delivery of certain vehicles. Thereafter, there was no appearance for the plaintiff on three consecutive dates, namely on 29.08.2013, 14.10.2013 and 22.11.2013, though the defendant was duly represented. Therefore, the matter was taken out of the cause list on 22.11.2013. Since then, the plaintiff took no step in the matter until the defendant filed its first summons for striking out under Order 25 rule 9. The said summons was dismissed on the alleged irregularity of the supporting affidavit. The defendant having rectifying the alleged regularity filed the instant summons.

04. The Order 25 rule 9 provides for the jurisdiction of the court to strike out any cause or matter for want of prosecution or as an abuse of process of the court if no step has been taken for six months. The said rule reads;

> *"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.*
>
> *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".*

05. The court's power under the above rule has been discussed in many cases and the law on striking out an action is well settled now. This, therefore, does not warrant a lengthy discussion. However, for the benefit of the discussion in the instant case, I briefly point out the law as this court held in some other cases before. The grounds provided in the above rule are firstly, want of prosecution and secondly, abuse of process of the court. This rule was introduced to the High Court Rules for the case management purpose and is effective from 19 September 2005. The main characteristic of this rule is that, the court is

conferred with power to act on its own motion in order to agitate the sluggish litigation (**see: *Trade Air Engineering (West) Ltd v Taga [2007] FJCA 9; ABU0062J.2006 (9 March 2007***). Even before the introduction of this rule, the courts in Fiji exercised this power to strike out the cause for want prosecution following the leading English authorities such as ***Allen v. McAlpine*** [1968] 2 QB 229;[1968] 1 All ER 543 and ***Birkett v. James*** [1978] AC 297; [1977] 2 All ER 801. Justice Scott, striking out of plaintiff's action in ***Hussein v Pacific Forum Line Ltd [2000] Fiji Law Report 24; [2000] 1 FLR 46 (6 March 2000),*** stated that;

> *"The principles governing the exercise of the Court's jurisdiction to strike out for want of prosecution are well settled. The leading English authorities are* ***Allen v. McAlpine*** *[1968] 2 QB 229;[1968] 1 All ER 543 and* ***Birkett v. James*** *[1978] AC 297; [1977] 2 All ER 801 and these have been followed in Fiji in, for example,* ***Merit Timber Products Ltd v. NLTB*** *(FCA Reps 94/609) and* ***Owen Potter v. Turtle Airways Ltd*** *(FCA Reps 93/205)".*

06. The Court of Appeal of Fiji in ***Trade Air Engineering (West) Ltd v Taga*** (supra) reiterated that, the new rule (Or 25 r 9) does not confer any additional or wider power to the court except the power to act on its own motion. It was held in that case that;

> *"In our view the only fresh power given to the High Court under Order 25 rule 9 is the power to strike out or to give directions of its own motion. While this power may very valuably be employed to agitate sluggish litigation, it does not in our opinion confer any additional or wider jurisdiction on the Court to dismiss or strike out on grounds which differ from those already established by past authority".*

07. The above decision of the Court of Appeal made it abundantly clear that the principles set out in ***Allen v. McAlpine*** (supra) and ***Birkett v. James*** (supra) are still applicable to strike out any cause where no step is taken for six months, despite the introduction of new rule (Or 25 r 9). Lord Diplock, whilst articulating the principles for striking out the actions for want of prosecution and abuse of the court process in ***Birkett v. James*** (supra), explained the emerging trend of English courts in exercising the inherent jurisdiction for want of prosecution. His Lordship held that;

> *"Although the rules of the Supreme Court contain express provision for ordering actions to be dismissed for failure by the plaintiff to comply timeously with some of the more important steps in the preparation of an action for trial, such as delivering the statement of claim, taking out a summons for direction and setting the action down for trial, dilatory tactics had been encouraged by the practice that had grown up for many years prior to 1967 of not applying to dismiss an action for want of prosecution except upon disobedience to a previous peremptory order that*

the action should be dismissed unless the plaintiff took within a specified additional time the step on which he had defaulted.

To remedy this High Court judges began to have recourse to the inherent jurisdiction of the court to dismiss an action for want of prosecution even where no previous peremptory order had been made, if the delay on the part of the plaintiff or his legal advisers was so prolonged that to bring the action on for hearing would involve a substantial risk that a fair trial of the issues would not be possible. This exercise of the inherent jurisdiction of the court first came before the Court of Appeal in Reggentin vs Beecholme Bakeries Ltd (Note) [1968] 2 Q.B. 276 (reported in a note to Allen v Sir Alfred McAlpine & Sons Ltd [1968] 2 Q.B. 229) and Fitzpatrick v Batger & Co Ltd [1967] 1 W.L.R. 706

The dismissal of those actions was upheld and shortly after, in the three leading cases which were heard together and which, for brevity, I shall refer to as Allen v McAlpine [1968] 2 Q.B. 229, the Court of Appeal laid down the principles on which the jurisdiction has been exercised ever since. Those principles are set out, in my view accurately, in the note to R.S.C, Ord. 25, R. 1 in the current Supreme Court Practice (1976). ***The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party***".(emphasis added)

08. As Lord Diplock clearly explained in his judgment, the above principles were set out in the notes to Order 25 rule 1 of Rules of Supreme Court 1976 which is equivalent to our Order 25 rule 4 under the Summons for Directions. However those principles of prophesy had caused to the development of the new rule such as Order 25 Rule 9. The first limb in the above case is ***the intentional and contumelious default***. Lord Diplock in his wisdom did not leave the first limb unexplained, but, His Lordship gave two examples for that first limb. One is ***disobedience to a peremptory order of the court*** and the other is ***conduct amounting to an abuse of the process of the court.*** Thus the second ground provided in Order 25 Rule 9, which is 'abuse of the process of the court', is a good example for '***the intentional and contumelious default'*** as illustrated by Lord Diplock in

Birkett v. James (supra). According to Lord Diplock abuse of the process of the court falls under broad category of '***the intentional and contumelious default'*** However, Lord Diplock did not explain what act does exactly amount to an abuse of the process of the court.

09. There is a latest judgment by the House of Lords in ***Grovit and Others v Doctor and Others (1997) 01 WLR 640, 1997 (2) ALL ER, 417,*** where Lord Woolf held that, commencing an action without real intention of bringing to conclusion amounts to an abuse of the process of the court. It was held as follows;

> *"The court exists to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in **Birkett v James** [1978] A.C 297. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings where there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings".*

10. The Fiji Court of Appeal in ***Thomas (Fiji) Ltd –v- Frederick Wimheldon Thomas & Anor, Civil Appeal No. ABU 0052/2006*** followed the principles of ***Grovit and Others v Doctor and Others*** (supra) and held that;

> *"During the course of his careful and comprehensive ruling the judge placed considerable emphasis on the judgment of the House of Lords in **Grovit and Ors v Doctor** [1997] 2 ALL ER 417. That was an important decision and the judge was perfectly right to take it into account. It should however be noted that Felix Grovit's action was struck out not because the accepted tests for striking out established in **Birkett v James** [1977] 2 ALL ER 801; [1978] AC 297 had been satisfied, but because the court found that he had commenced and continued the proceedings without any intention of bringing them to a conclusion. In those circumstances the court was entitled to strike out the action as being an abuse of the process of the Court. The relevance of the delay was the evidence that it furnished of the Plaintiff's intention to abuse the process of the Court"*

11. Both, the ***The Grovit*** case and ***Thomas (Fiji) Ltd*** (supra) which follows the former, go on the basis that, *"abuse of the process of the court"* is a ground for striking out, which is independent from what had been articulated by Lord Diplock in ***Birkett v James*** (supra). However, it is my considered view that, this ground of *"abuse of the process of the court"* is part of '***the intentional and contumelious default'***, the first limb expounded by Lord Diplock. The reason being that, this was clearly illustrated by Lord Diplock in ***Birkett v. James*** (supra). For the convenience and easy reference I reproduce the dictum of Lord Diplock which states that; "...***either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court...***" (Emphasis added). According to Lord Diplock, the abuse of the process of the court, with its all forms, falls under broad category of '***the intentional and contumelious default'***. In fact, if a plaintiff commences an action and has no intention to bring it to conclusion it is an abuse of the process of the court. Thus the default of a plaintiff intending not to bring it to conclusion would be intentional and contumelious. Accordingly, it will fall under the first limb of the principles expounded in ***Birkett v. James*** (supra). This view is further supported by the dictum of Lord Justice Parker who held in ***Culbert v Stephen Wetwell Co. Ltd***, *(1994) PIQR 5* as follows;

> *"There is however, in my view another aspect of this matter. An action may also be struck out for contumelious conduct, or abuse of the process of the Court or because a fair trial in action is no longer possible. Conduct is in the ordinary way only regarded as contumelious where there is a deliberate failure to comply with a specific order of the court. In my view however a series of separate inordinate and inexcusable delays in complete disregard of the Rules of the Court and with full awareness of the consequences can also properly be regarded as contumelious conduct or, if not that, to an abuse of the process of the court. Both this and the question of fair trial are matters in which the court itself is concerned and do not depend on the defendant raising the question of prejudice."*

12. Sometimes, it is argued that, ***Birkett v. James*** (supra) deals with the ground of 'want of prosecution' only and not the ground of abuse of the process of the court. However, it is evident from the illustrations given in that case that, it deals with both the grounds of 'abuse of the process of the court' and 'want of prosecution' as well. In any event, the defendant is under no duty to establish the prejudice in order to strike out an action if he can prove the abuse of the process of the court. Suffice to establish plaintiff's inactivity coupled with the complete disregard of the Rules of the Court with the full awareness of the consequences.

13. The second limb of the ***Birkett v. James*** (supra) is (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants. In short, it is inordinate and inexcusable delay and the prejudice which makes the fair trial impossible.

14. Their Lordships the Justices of Fiji Court of Appeal in ***New India Assurance Company Ltd v Singh [1999] FJCA 69; Abu0031u.96s (26 November 1999)*** unanimously held that, *"We do not consider it either helpful or necessary to analyse what is meant by the words 'inordinate' and 'inexcusable'. They have their ordinary meaning. Whether a delay can be described as inordinate or inexcusable is a matter of fact to be determined in the circumstances of each individual case"*. However, in ***Deo v Fiji Times Ltd [2008] FJCA 63; AAU0054.2007S (3 November 2008)*** the Fiji Court of Appeal cited the meaning considered by the court in an unreported case. It was held that;

> *"The meaning of "inordinate and inexcusable delay" was considered by the Court of Appeal in **Owen Clive Potter v Turtle Airways Limited v Anor** Civil Appeal No. 49 of 1992 (unreported) where the Court held that inordinate meant "so long that proper justice may not be able to be done between the parties" and "inexcusable" meant that there was no reasonable excuse for it, so that some blame for the delay attached to the plaintiff".*

15. According to Order 25 Rule 9, the acceptable and or tolerable maximum period for inaction could be six months. The threshold is six months as per the plain language of the rule. It follows that, any period after six months would be inordinate and inexcusable so long that proper justice may not be able to be done between the parties and no reasonable excuse is shown for it. Therefore, whether a delay can be described as inordinate or inexcusable is a matter of fact which to be determined in the circumstances of each and every case. As established by courts delay of itself, without being shown that the delay is seriously prejudicial to the defendant, is not sufficient to strike out of an action under the second limb of the ***Birkett v. James*** (supra). The Fiji Court of Appeal in ***New India Assurance Company Ltd v Singh [1999] FJCA 69; Abu0031u.96s (26 November 1999)*** has reaffirmed the burden of the defendant to establish that serious prejudice would be caused to it by the delay. It was held that;

> *"Where principle (2) is relied on, both grounds need to be established before an action is struck out. There must be both delay of the kind described and a risk of an unfair trial or serious prejudice to the*

defendants. In Department of Transport v Smaller (Transport) Limited [1989] 1 All ER 897 the House of Lords did not accept a submission that the decision in Birkett should be reviewed by holding that where there had been inordinate and inexcusable delay, the action should be struck out, even if there can still be a fair trial of the issues and even if the defendant has suffered no prejudice as a result of the delay. Lord Griffiths, after a review of the authorities and relevant principles, said at 903 that he had not been persuaded that a case had been made out to abandon the need to show that post-writ delay will either make a fair trial impossible or prejudice the defendant. He went on to affirm the principle that the burden is on the defendant to establish that serious prejudice would be caused to it by the delay".

16. In ***Pratap v Christian Mission Fellowship [2006] FJCA 41; ABU0093J.2005 (14 July 2006)*** the Fiji Court of Appeal cited the dictum of Eichelbaum CJ in Lovie v. Medical Assurance Society Limited [1992] 2 NZLR 244. It was held in that case at page 248 by Eichelbaum CJ that;

> *"The applicant must show that the Plaintiff has been guilty of inordinate delay, that such delay is inexcusable and that it has seriously prejudiced the defendants. Although these considerations are not necessarily exclusive and at the end one must always stand back and have regards to the interests of justice. In this country, ever since NZ Industrial Gases Limited v. Andersons Limited [1970] NZLR 58 it has been accepted that if the application is to be successful the Applicant must commence by proving the three factors listed."*

17. The above analysis of law on striking out of an action clearly shows that, the courts in Fiji had, before the introduction of Order 25 rule 9, exercised the jurisdiction to strike out following the principles expounded in ***Allen v. McAlpine*** (supra) and ***Birkett v. James*** (supra). Even after the introduction of the above rule the same principles apply as confirmed by the superior courts. The ground of '*abuse of the process of the court* advanced by the recent case of ***Grovit v. Doctor*** (supra) too comfortably falls into the first limb of ***Birkett v. James*** as Lord Diplock cited *'the abuse of the process of the court'* as one of the two examples for the first limb expounded by him. The rationale is that, commencing an action without the intention of bringing it to conclusion amounts to an abuse of the process of the court and in turn it is an intentional and contumelious default. A series of separate inordinate and inexcusable delays in complete disregard of the Rules of the Court together with full awareness of the consequences can be regarded as contumelious conduct or, an abuse of the process of the court under the second limb of Order 25 rule 9. On the other hand the inordinate and inexcusable delay together with the

prejudice should be established in order to succeed in an application under first limb of Order 25 rule 9.

18. The plaintiff did not take any step in the matter since the matter was taken out of the cause list on 22.11.2013 for the absence for three consecutive dates. The first summons by the defendant for striking out was filed on 20.05.2016 and the ruling was given on 27.09.2016 dismissing the said summons. The instant summons was filed on 07.11.2017. The only reason, given by the plaintiff in his all affidavits for this long delay of almost three years is that, his previous solicitor was suspended in year 2013 and all the files were moved to Suva. He requested the Legal Practitioners Unit in Suva and was advised that, his file would be sent to him, once it was located. However, the plaintiff has not attached any of his requests made to the Legal Practitioners Unit seeking his file. The only letter the plaintiff attached with his affidavit is the letter dated 07.03.2017. This was sent by the plaintiff to the Legal Practitioners Unit after 04 months from the date of the instant summons, which was filed on 07.11.2016. The Legal Practitioners Unit within two weeks responded and released the file on 27.03.2017 after the plaintiff signed the Indemnity Form as required. This clearly shows that, the file would have been returned to the plaintiff immediately, had he made any request immediately after the suspension of former solicitor. Though the plaintiff merely averred in his affidavit that, he made requests to the LPU, I am unable to believe on those averments in the absence of any documents to substantiate them.

19. In addition, if the plaintiff was really interested in his case, he could have made request to the receiver appointed by the Chief Registrar on suspension of plaintiff's former solicitor. However, he did not take any of such steps and no evidence either before the court of such an attempt. Apart from that, the plaintiff could have instructed another lawyer and obtained the copies of the pleadings in order to construct the file. The plaintiff, who was so interested in getting the first summons filed by the defendant for striking out, technically dismissed on the alleged irregularity, did not bother to retrieve his file from the Legal Practitioners Unit and take necessary steps in the case which was inactive for almost three years from the date on which it was taken out of the cause list for his three consecutive non-appearance without any valid reason. This is evident that, the plaintiff did not have real intention of bringing this case to conclusion, but only wanted to prevent the defendant from filling summons under Order 25 rule 9. This clearly amounts to an abuse of the process of the court as held in ***Grovit and Others v Doctor and Others*** **(supra).** This conclusion is alone sufficient to strike out his case on the ground of abuse of the process of the court. In fact, the counsel for the defendant too, was mainly relying on this ground, whilst supporting other ground as well.

20. As I said above, the acceptable inactive period is six months and any delay thereafter would be inordinate and inexcusable as long as proper justice may not be able to be done between the parties and no acceptable reason is adduced. In this case, the only reason for this long delay as per the plaintiff was the suspension of his former solicitor and transfer of his file to Legal Practitioners Unit in Suva. As discussed in the preceding paragraph, the plaintiff was responsible for the delay in retrieving his file from LPU. Furthermore, the plaintiff has been continuously supported by another solicitor who claimed to be the *amicus curiae,* though the court rejected the said claim of *amicus curiae* stating that, the amicus curiae is the one, who is invited by the court when there is a danger of an important and difficult point of law being decided without the court hearing relevant argument. The role of the amicus curiae is to assist the court, when invited by the court, on the relevant law and its application to the particular facts of the case [See: ***Beneficial Owners of Whangaruru Whakaturia No 4 v Warin [2009] NZCA 60; [2009] NZAR 523; (2009) 19 PRNZ 296 (9 March 2009)***] and definitely not like the said counsel who appeared in this case for the plaintiff stating that, he was assisting the plaintiff in the hearing of the instant summons and thereafter would continue his case, if he win in dismissing this summons. In any event, it is clear that, the plaintiff was assisted by the self-claimed amicus curiae even though his former solicitor was suspended. Therefore, the reason adduced by the plaintiff, for this long delay, becomes unacceptable. It follows that, the delay is inordinate and inexcusable.

21. The next question is the prejudice to the defendant. The Court of Appeal in ***New India Assurance Company Ltd v Singh*** **(supra)** stated that, prejudice can be of two kinds. It can be either specific, that is arising from particular events that may or may not have occurred during the relevant period, or general, that is prejudice that is implied from the extent of the delay. The prejudice in this case could be implied from the long delay which spans over three years in this case. The prejudice that may be caused to a party due to the long delay of the other party was also discussed in ***Biss v. Lambeth, Southwark & Lewisham Health Authority [1978] 2 All E.R. 125*** where Lord Denning stated at page 131 that:

> *"The prejudice to a defendant by delay is not to be found solely in the death or disappearance of witnesses or their fading memories or in the loss or destruction of records. There is much prejudice to a defendant in having an action hanging over his head indefinitely , not knowing when it is going to be brought to trial; like the prejudice to Damocles when the sword was suspended over his head at the banquet. It was suspended by a single hair and the banquet was a tantalizing torment to him. So in the President of India case, [1977] Court of Appeal Transcript 383, which we heard the other day. The business house was prejudiced because it could*

not carry on its business affairs with any confidence, or enter into forward commitments, whilst the action for damages was still in being against it".

22. The above analysis fortifies me to conclude that, the defendant have been more than minimally prejudiced by the plaintiff's inordinate and inexcusable delay and contravention of rules of the court since the matter was taken out of the cause list to date. This too, justifies the court in dismissing the plaintiff's case for want of prosecution.

23. Interestingly, the counsel for the plaintiff citing section 15 (2) of the Constitution submitted that, the plaintiff has the right guaranteed by the Constitution to have his matter determined by a court of law or if appropriated, by an independent and impartial tribunal. I feel that, I cannot reply to this submission in batter way than repeating what the Master of the Rolls, Lord Denning stated in ***Allen v. Sir Alfred McAlpine & Sons Ltd [1968] 2 QB 229***. His Lordship held at page 245 that:

> *"It was urged that we ought not to strike out a man's action without trial because it meant depriving him of his right to come to the Queen's Courts. Magna Carta was invoked against us as if we were in some way breaking its provisions. To this there is a short answer. The delay of justice is a denial of justice. Magna Carta will have none of it. "To no one will we deny or delay right or justice.*
>
> *All through the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time. Dickens tells how it exhausts finances, patience, courage, hope. To put right this wrong, we will in this court, do all in our power to enforce expedition; and, if need be, we will strike out actions when there has been excessive delay. This is a stern measure. But it is within the inherent jurisdiction of the court. And the Rules of Court expressly permit it. It is the only effective sanction they contain. If a plaintiff fails within the specified time to deliver a statement of claim, or to take out a summons for directions, or to set down the action for trial, the defendant can apply for the action to be dismissed..."*

24. What the counsel for the plaintiff, conveniently and in my opinion intentionally, missed out in his submission is the following subsection (3) of the same section 15 of the Constitution which reads that:

(3) Every person charged with an offence and every party to a civil dispute has the right to have the case determined within a reasonable time.(Emphasis added)

25. The plaintiff, who did nothing for long period of three years in this case, is trying to claim the constitutional right, forgetting the right of the defendant which has equal right to have this matter determined within a reasonable time and which is having the action suspended indefinitely over its head for such longer period. At this point I wish to reiterate below what this court said recently in ***Prakash v Hassan [2017] FJHC 658; HBC25.2015 (4 September 2017).***

26. There are litigants who pursue their cases according to the timetable set out by the rules or within the reasonable time, diligence and expeditions. On the other hand there are some who pursue their cases sporadically or make default with the intention to keep the matters pending against the defendants forever. The courts should not ignore the second category of practice. It should be disallowed for several reasons. Firstly, it is an abuse of the process of the court. Secondly, it is the waste of court's time and resources which are not infinite. '*The more time that is spent upon actions which are pursued sporadically, the less time and resources there are for genuine litigants who pursue their cases with reasonable diligence and expedition, and want their cases to be heard within a reasonable time'* (see; ***Singh v Singh*** -supra). Thirdly, it violates the fundamental rights guaranteed by the sections 15 (2) and (3) of the Constitution which read;

(2) Every party to a civil dispute has the right to have the matter determined by a court of law or if appropriate, by an independent and impartial tribunal.
(3) Every person charged with an offence and every party to a civil dispute has the right to have the case determined within a reasonable time.(Emphasis added)

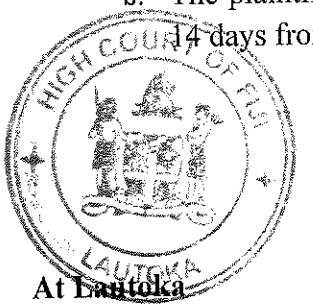
Fourthly, it constitutes as a serious prejudice to the other party as justice may not be able to be done between the parties if the matter is pending idle without any steps being taken by the relevant party. Therefore, the power of the court under Order 25 rule 9 neither prevents anyone coming before the court, nor it is detrimental to the right of any party under the Constitution, but it is a preventive and punitive measure on the party who abuses the process of the court and constitutional rights with the malice to prevent other party enjoying the right (to have the mater determined within reasonable time) guaranteed under the Constitution. Thus, the misleading argument of the counsel for the plaintiff is rejected.

27. For the above mentioned reasons, this court should take stern measure to strike out the plaintiff's case, as it is within the jurisdiction of this court. Though the facts of the case do not warrant the indemnity cost, there should be some reasonable cost for the defendant for bringing this summons after waiting for such a long period.

28. Accordingly, the final orders are;

a. The plaintiff's action is struck out for want of prosecution and abuse of the process of the court, and

b. The plaintiff should pay a summarily assessed cost of $ 500 to the defendant within 14 days from today.



U.L. Mohamed Azhar
Acting Master

At Lautoka
02/03/2018