

In the High Court of Fiji  
At Suva  
Civil Action No. HBC 118 of 2011

Wame Niutamata  
Plaintiff

vs

Shalen Prakash

First defendant

Umlesh Chand

Second defendant

Attorney General of Fiji

Third defendant

Suresh Chand

Fourth defendant

Pioneer Concrete

Fifth defendant

COUNSEL: Mr J. Lanyon for the plaintiff  
Ms S Taueki for the third defendant  
Mr A. Narayan for the fourth and fifth defendant  
Date of hearing: 21<sup>st</sup> February, 2018  
Date of Judgment: 20<sup>th</sup> March, 2018

### **Judgment**

1. By summons filed on 14<sup>th</sup> September, 2017, the plaintiff moves to set aside the Order of the Master striking out his writ of summons on the grounds that he had breached the Unless Orders issued on 10<sup>th</sup> August, 2017 and that he be allowed to comply with the Unless Orders.
2. The plaintiff, in his affidavit in support states that his Solicitor was not aware that the Master was to deliver his Ruling on 10<sup>th</sup> August, 2017, as no notice to appear was issued. The matter had been set for Ruling on 20<sup>th</sup> July, 2017, and vacated. A date was to be advised by Court. On 4<sup>th</sup> September, 2017, his solicitors were surprised when two Orders of the Master were served on them.

3. The fourth and fifth defendants, in their affidavit in opposition state their Solicitors advised them that notice of the ruling was given by the Court clerk by a telephone call on 9<sup>th</sup> August, 2017. This case was listed in the Suva High Court Cause List for mention on 23<sup>rd</sup> August, 2017.
4. The plaintiff, in his affidavit in reply states that he has been advised that his solicitor does not recall having received a call from the Registry of the adjournment of the date of Ruling.

***The determination***

5. At the hearing before me, Mr Lanyon, counsel for the plaintiff submitted that the plaintiff's grievance is that his solicitor was not given notice that the Ruling would be delivered by the Master on 17<sup>th</sup> August, 2017. The Ruling was to be delivered on 20<sup>th</sup> July, 2017, and vacated. A date was to be advised by Court.
6. Mr Narayan, counsel for the fourth and fifth defendants urged the grounds set out in the affidavit filed on behalf of his clients and submitted that the plaintiff's remedy was to appeal the Ruling of the Master, as was reiterated by Ms Taueki, counsel for the third defendant.
7. On 10<sup>th</sup> August, 2017, the Master had delivered Ruling and made Order granting the plaintiff leave to file and serve an amended writ and statement of claim on or before 17<sup>th</sup> August, 2017, the fourth and fifth defendants to serve their defence on or before 31<sup>st</sup> August, 2017, and that the Unless Order will be activated upon non-compliance by the plaintiff or the fourth and fifth defendants.
8. On 23<sup>rd</sup> August, 2017, the Master struck out the writ of summons on the ground that the plaintiff had breached the Unless Orders issued on 10<sup>th</sup> August, 2017.

9. Mr Lanyon and Mr Narayan cited the following passage from the judgment of the Court of Appeal of Fiji in *Trade Air Engineering (West) Ltd v Taga*, [2007] FJCA 9; ABU0062J.2006 (9 March 2007).

*Although the judge rejected the Appellant's submissions he did give leave to them to apply for the action to be reinstated. Mr Haniff was unable to refer us to any provision in the rules granting the court power to reinstate an action struck out in these circumstances. **Generally, a party's only remedy following the striking out of its action is appeal. Exceptions to this general rule such as O 13 r 10, O 14 r 11, O 24 r 17 or 32 r 6 have no application to Order 25.** (emphasis added)*

10. This authority lays down that the remedy available to a party upon striking out of its action is an appeal. The exceptions are contained inter alia in Or 13, r 10.

11. The plaintiff makes this application under Or 13, r10.

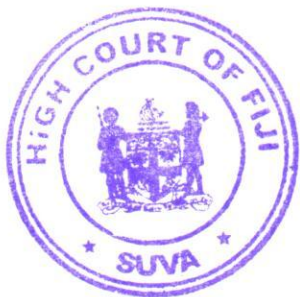
12. Or 13, r10 titled "**Setting aside judgment**" reads:

*Without prejudice to rule 8(3) and (4), the Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order*

13. In my view, the application to set aside must be made before the Master. The application before me is misconceived.

14. **Orders**

- (i) The plaintiff's summons is declined.
- (ii) I make no order as to costs.



*A.L.B. Brito-Mutunayagam*

A.L.B. Brito-Mutunayagam  
Judge  
20<sup>th</sup> March, 2018