

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 103 of 2013

BETWEEN : HAFIZUD DEAN KHAN and MOHAMMED TAABISH AKBAR and NISAR AHMED ALI as Trustees of the FIJI MUSLIM LEAGUE, a body duly registered under the Registration of Religious Bodies Act.

PLAINTIFF

AND : FERUZ GULAM MOHAMMED of Nakasi, Nausori, Businessman.

1<sup>ST</sup> DEFENDANT

AND : SUN (FIJI) NEWS LIMITED trading as FIJI SUN

2<sup>ND</sup> DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Mr. Shelvin Singh - for the Plaintiff  
Mr. O'Driscoll - for the 1<sup>st</sup> Defendant  
Mr. Naidu - for the 2<sup>nd</sup> Defendant

DATE OF RULING: 23<sup>rd</sup> May, 2018

**RULING**

*[Court's own motion for the Plaintiff to show cause why the Statement of Claim should not be struck out for want of prosecution and abuse of the process of the Court pursuant to Order 25 Rule 9 of the High Court Rules, 1988]*

(A) INTRODUCTION

1. The Court issued Notice of its own motion pursuant to *Order 25 Rule 9 of the High Court Rules, 1988* for the Plaintiff to show cause as to why the action ought not to be struck out for want of prosecution or an abuse of the process of the Court.
2. The Plaintiff filed the Notice of Intention to Proceed. He also filed the Affidavit opposing the striking out for want of prosecution.
3. The 1<sup>st</sup> Defendant did not file any Affidavit but in his submissions supported the strike out of the Plaintiff's action.
4. The 2<sup>nd</sup> Defendant also did not file any affidavit but informed court that he supported the striking out of the Plaintiffs claim.
5. Written skeletal submission was filed by the 2<sup>nd</sup> Defendant only.

(B) THE LAW AND PRACTICE

6. *Order 25 Rule 9 of the High Court Rules 1988, which inter-alia states as follows:*

*"9. - (1) 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.*

*(2) 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.'*

(C) ANALYSIS and DETERMINATION

7. The Plaintiff is required to show cause herein and the Court to determine as to why the Plaintiff's action ought not to be struck out for want of prosecution or an abuse of the process of the Court.
8. Both Defendants have supported the striking out of the Plaintiff's Substantive action.
9. It is noted upon the perusal of the Affidavit of the Plaintiff deposed by Saiyad Hussain in his capacity as the Manager and Trustee, that he has failed to annex any authority from the other Trustees as per the requirement of *Order 41 Rule 9 (2) of the High Court Rules 1988* which stipulates:

*(2) Every affidavit must be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without the leave of the Court.*

10. The Affidavit was also deposed on behalf of the other Trustees and no authority was annexed. Accordingly, no leave was sought from the court to file and/or use such Affidavit into evidence.
11. The principles to be applied on the basis upon which the discretion to **strike out proceedings** for **want of prosecution** should be exercised is well established in the decision of the House of Lords in the case of Birkett v James [1978] AC 297 and in particular the statement by Lord Diplock at 318:

*"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."*

12. In the present case the court is concerned with the application of both principle (1) and (2) (a) and (b) within the Birkett v James [1978] AC 297 case.
13. '*Inordinate*' and '*inexcusable*' within Birkett v James have their ordinary meaning. Whether delay can be described as inordinate or inexcusable is a matter of fact to be determined in the circumstances of each individual case. The New India Assurance Company Limited -v- Rajesh K. Singh and Anr. Civil Appeal no: ABU 0031 of 1996S (26 November 1999) C.A.
14. Where principle (2) is relied on, both grounds of inordinate and inexcusable delay needs 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.
15. Reference is therefore made to the case 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. (*In this case the burden is on the 2<sup>nd</sup> Defendant to establish any prejudice.*)

16. I have perused the court file in terms of the documents filed as required by the set down procedures and the High Court Rules 1988 and set out hereunder the Chronology of Events that has taken place in this case accordingly.

CHRONOLOGY OF EVENTS

- 15<sup>th</sup> April, 2013 - Writ of Summons filed  
14<sup>th</sup> June, 2013 - Statement of Claim filed  
09<sup>th</sup> July 2013 - 1<sup>st</sup> Defendant's Statement of Defence filed.  
17<sup>th</sup> February, 2014 - 2<sup>nd</sup> Defendant's Statement of Defence filed.

Delay

17. In considering whether **delay** of the kind required in terms of *Birkett v James* case has been established, the court is concerned only with **delay** on the part of the Plaintiff or their lawyer. It is that delay which must be shown to be **inordinate** and **inexcusable**.
18. It can be clearly ascertained from the chronology of events as set out in paragraph 16 hereinabove, as to what documents and/or pleadings were filed and what proactive steps were taken by the parties to this proceedings to ensure that the pleadings were expeditiously completed and the file was ready to be allocated to a Hon. Judge for hearing and determination accordingly.
19. In the present case before this Court, the Plaintiff has submitted in his oral submissions that there is no **intentional** and **contumelious default** in this case since the Plaintiff has not **disobeyed** any orders of this Court. The perusal of the Court file does confirm that the Plaintiff has not disobeyed any orders of this Court. In fact no orders were made as such by the court for the Plaintiff to comply.
20. The Plaintiff commenced with the Writ Action against the Defendants on 15<sup>th</sup> April, 2013 and subsequently filed the Statement of Claim on 14<sup>th</sup> June, 2014. The 1<sup>st</sup> Defendant had already filed his **Statement of Defence on 09<sup>th</sup> July, 2013** and the 2<sup>nd</sup> Defendant filed his **Statement of Defence on 17<sup>th</sup> February, 2014** respectively. The **final document** filed by the Plaintiff as can be ascertained from the chronology of events was his **statement of Claim on 14<sup>th</sup> June, 2013** and no further **proactive** steps were taken by the Plaintiff to file and serve a **Reply to Defence** to both the Statement of Defence. Thus, the substantive matter remained impending for a period of about **1 year and 8 months**, the period calculated from the commencement of the Writ to the issuance of the **Order 25 Rule 9 Notice** by the Court on 26<sup>th</sup> February, 2015. Needless to say that if the High Court Civil Registry had not picked up on this delay in terms of the issuance of the Order 25 Rule 9 Notice, then to date no further action would have been taken by the parties rather the matter would have remained impending.
21. The Plaintiff has enumerated the reasons and endeavoured to explain the **delay** at paragraphs 9-14 of his Affidavit filed on 02<sup>nd</sup> July, 2015. In summary, he stated that "*Lawyer Mr Shelvin Singh handled the Plaintiff's case whilst employed by Ms. Parshotam Lawyers and later resigned. The Plaintiff's proceeded on the basis that all the usual steps required in completing litigation of this nature were being taken by the firm. An update was provided to the Plaintiffs once the Order 25 Rule 9 Notice was served on Parshotam Lawyers. Since then the Plaintiff has engaged the services of Mr Shelvin Singh Lawyers who was well versed with the matter and will advance the claim on his behalf.*"
22. The 1<sup>st</sup> Defendant orally submitted to court that "the Delay was not explained by the Plaintiff. Therefore, that Delay was inordinate and inexcusable."
23. The 2<sup>nd</sup> Defendant submitted that "over 18 months has elapsed since the last action on the matter by the 2<sup>nd</sup> Defendant and the Plaintiff has not taken any action in the proceedings since the filing of the Writ of

*Summons and the Statement of Claim. He added that the passage of time and circumstances of the case has made the Plaintiff's claim moot and academic".*

24. Upon a careful perusal of the court record together with the chronology of events, I find that the Plaintiff after filing his Statement of Claim failed to take any proactive steps to move the matter further at least by filing and serving the Reply to the Defendant's Statement of Defence.
25. The Plaintiff's explanation that Mr Shelvin Singh handled the matter when he was employed by Ms. Parshotam Lawyers and that after he resigned, the Plaintiff proceeded with the matter on the basis that all the litigation will be completed by the firm of Ms. Parshotam Lawyers.
26. The Plaintiff in fact engaged and instructed the firm of Ms. Parshotam Lawyers and not Mr Shelvin Singh Lawyers to commence the litigation and represent him in this matter. Mr Shelvin Singh was only assigned with the brief/case to handle the litigation and represent the Plaintiff. After Mr Shelvin Singh resigned and left the firm, Ms. Parshotam Lawyers had the responsibility to handle and pursue the matter and ensure its final disposition to the satisfaction of the Plaintiff.

The Plaintiff should have been informed by Ms. Parshotam Lawyers that since Mr. Shelvin Singh has resigned, the Plaintiff's case will be continued to be handled by the firm of Ms. Parshotam Lawyers unless the Plaintiff wanted to engage Mr Shelvin Singh as his Counsel henceforth and accordingly a notice as to the change of Solicitors was filed informing the Defendants of the change of representation.

Whatever it may be, the Plaintiff should have known better what he was required to do when he was faced with such circumstances, either to stick with Ms. Parshotam's and/or go with Mr Shelvin Singh Lawyers to represent him and have the conduct of his matter until the final disposition.

Nothing concrete was done to ensure that proactive measures and steps were taken to complete the cause and enter the action for hearing and determination, rather the matter left in abeyance for a long period of time and remained stagnant before this court.

It is also noted that even upon the service of the *Order 25 Rule 9 Notice* that required the Plaintiff to file and serve a *Notice of Intention to Proceed* with the matter, was not adhered to and/or filed to at least show the Defendants that the Plaintiff had the intention to proceed with the matter.

27. For every case which takes up time [*a good example is the current case*], another case is potentially delayed, bearing in mind that a number of cases are impending for hearing and determination by the court. If the case which takes up time [*As in the current case*] and delays another case is, on any view, an utter waste of time and resources and stands in the way of other more deserving being heard at an earlier time, then that is a factor which the courts cannot ignore.
28. However, the overriding objective of the procedural rule and the requirement in '*Birkett v James*' is to enable the court "*to deal with cases justly*". Dealing with a case justly includes "allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases".
29. Whether Delay is inordinate must be related to the particular circumstances of the case. It is obvious to me that when viewed by reference to the particular circumstances of this case as discussed hereinabove, that it was incumbent on the Plaintiff [no matter who he was being

represented by] to move forward with the matter with substantially more expedition and caution than was seen in the current case. The Plaintiff seemed to have gone off to sleep and only awoke when served with the Court's *Order 25 Rule 9 Notice seeking to strike out the matter for want of prosecution*.

30. I find for the aforesaid rational that the Plaintiff's explanation for the period of **Delay** as mentioned hereinabove is unacceptable. Therefore, the period of inactivity is **inexcusable**. **Inexcusable** and **inordinate Delay** has been established against the Plaintiff by the Defendants accordingly.

#### Prejudice

31. 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.
32. It should be borne in mind that *presumption of prejudice is not a presumption of law*. It is a *presumption of fact* in the sense that, in most cases, it will only be the **Defendant** who is in a position to offer evidence as to the existence of *specific prejudice*. The *presumption* is *rebuttable*.
33. In order to establish **prejudice**, the **Defendant's** are required to show that the **Delay** has prejudiced them in the conduct of their Defences. This will involve them in having to demonstrate, for example, that they have lost contact with their witnesses, their witnesses are untraceable, death of their witnesses, the witnesses recollections has been adversely affected, the destruction of documentary evidence without fault on the part of the Defendants.
34. The **1<sup>st</sup> Defendant** submitted that *"The Plaintiff's substantive claim for Defamation must proceed in timely fashion. When the Plaintiff failed to get the order for injunction then he thought that was the end of the matter. Affidavit doesn't state the Delay and when Mr Singh left firm of Ms. Parshotams. It is trite law where the Defendant is faced with serious allegation that needs to be prosecuted expeditiously and therefore the Defendant is prejudiced. Delay was also ordinate and inexcusable."*
35. The **2<sup>nd</sup> Defendant** stated *'that the passage of time and circumstances of the case has made the Plaintiff's claim moot and academic. The action was left in abeyance for such a long time by the Plaintiff in itself is evidence of prejudice to the 2<sup>nd</sup> Defendant.'*
36. The Plaintiff has not mentioned anything in terms of **Prejudice** but stated that *"paragraphs 9-14 explains the Delay sufficiently and asked that the matter proceeds to hearing with appropriate directions made."*
37. I find that both the **1<sup>st</sup>** and **2<sup>nd</sup> Defendant** have made out a case for **prejudice** against them in one way or the other.

#### Interest of Justice and Fair Trial

38. The demonstration of inordinate Delay, inexcusable Delay and Serious Prejudice does not lead necessarily to a dismissal of the action. Further, even if the **1<sup>st</sup>** and **2<sup>nd</sup> Defendants** satisfy the

requirements in *Birkett v James*, the courts in exercise of its jurisdiction must decide as to whether a fair trial is still possible. The Court of Appeal in *Chandar Deo v Ramendra Sharma and Anor: Civil Appeal No. ABU 0041* of (23 March 2007) (Unrep) stated as follows:-

[15] A more fundamental difficulty for the Respondent is that the judge failed to make any finding at all on the final question to be asked when applying the *Birkett v. James* principles namely: 'In view of the delays which have occurred, is a fair trial now possible?' (Also case of *Department of Transport v, Chris Smaller (Transport Limited [1989] AC 1197* refers.

39. In *Lovie v Medical Assurance Society Limited [1992] 2 NZLR 244 at 248*. Eichelbaum CJ reviewed the authorities and concluded:

'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 defendant. Although these considerations are not necessarily exclusive, and *at the end one must always stand back and have regard to the interests of justice, in this country, ever since NZ Industrial Gases Ltd v Andersons Ltd [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.'

40. Even the courts are reluctant to strike-out any matter summarily which has certain merits in it on the grounds of abuse of process. In *Dey v. Victorian Railway Commissioners* (1949) 78 CLR 62, at 91 Dixon J said:-

'26. This principle was restated by the Court of Appeal of Fiji in *Pratap v Kristian Mission Fellowship [2006] FJCA 41*. Also refer to; *New India Assurance Co Ltd v Singh [1999] FJCA 69*.

*The principle as enunciated in these cases reflects the principles on this topic in other common law jurisdictions. These decisions include; Metropolitan Bank Ltd v Pooley (1885) 10 App Cas 210; Dey v. Victorian Railway Commissioners (1949) HCA 1; (1949) 78 CLR 62; Birkett v James [1978] AC 297; Lovie v Medical Assurance Society Limited [1992] 2 NZLR 244; Agar v Hyde (2000) 201 CLR 552. Indeed the passage from Abdul Kadeer Kuddus Hussein v Pacific Forum Line reflects closely Birkett v James (above). These authorities also make the point that in exercising a peremptory power of the kind under contemplation in these proceedings, the court must be cautious and to put the matter in another way, the court must stand back and ensure that sufficient regard is ahead of the interests of justice.'*

41. I reiterate that neither the Plaintiff nor the Defendants have addressed this court on anything on the possibility of having a fair trial in terms of having lost contact with their witnesses, their witnesses are untraceable, death of their witnesses, the witnesses recollections has been adversely affected, the destruction of documentary evidence without fault on the part of the Defendants and so forth.
42. Taking into consideration both parties oral and written submissions, there is no indication as such that in the interest of justice a fair trial is still very much possible in this matter to allow the

matter to proceed to trial with the completion of the cause accordingly. Further, this matter remains pending in court since its commencement on 15<sup>th</sup> April, 2013.

43. I find in the given circumstances that whilst the Defendants have been dragged into this court with the allegation of Defamation as the substantive issue for this court to determine and the Plaintiff failing to take any proactive measures to conclude the pleadings and enter the action for trial, in the interest of justice a fair trial is not possible.

Abuse of Court Process

44. Inordinate and inexcusable delay alone, however great, does not amount to an abuse of the Court process. Reference is made to *Abbuthnot Latham Bank Ltd v Trafalgar Holdings [1998] 1 WLR 1426 (per Lord Woolf)*.
45. For this purpose, **Delay alone**, even delay of 11 years does not amount to an abuse of process. Reference made to *Barclays Bank Plc v Mailing (Unreported) 23 April 1997; CA (Civil Division) cited in Abbuthnot (supra)* at pg 1432, para G-H.
46. However, **Delay** which involves complete, total or wholesale disregard of the Rules of the Court with full awareness of the consequences is capable of amounting to such an abuse, so that, if it is fair to do so, the action will be struck out or dismissed on that ground. Case Reference *Choraria v Sethia [1998] CLC 625 9 per Nourse LJ [1998] EWCA Civ 24*.
47. In the current case, I find from the pleadings and Affidavits filed so far, although the pleadings remains to be completed by the Plaintiff that the Plaintiff had no **intention** to pursue this matter forward. If he had any intention whatsoever, then he would have proceeded with the matter expeditiously. In that, he would have filed the **Reply to both Defendant's Defenses** and moved on with the matter to ensure the same is maintained until such time that the matter is heard and eventually brought to its conclusion. It cannot be ascertained from the evidence on the Court Record that the Plaintiff has commenced this action without having any intention whatsoever of bringing it to a conclusion.
48. It is also appropriate to briefly allude to the issue of **Costs**. The conduct of the substantive matter in the proceedings has been such that the actions of the Plaintiff failed to maintain the proceedings until such time the matter is heard and determined by court. I find that there has been failure in the conduct of the Plaintiff to maintain his proceedings as was required of him. I accordingly order the Plaintiff to pay each of the two Defendants (1<sup>st</sup> and 2<sup>nd</sup>) a sum of \$500 each as summarily assessed cost and paid within 14 days' time frame.
49. I have carefully perused the substantive application, the pleadings filed so far, the written and oral submissions coupled with the applicable laws and the case authorities and my findings are as follows:-



FINAL ORDERS

- (i) The delay in terms of inordinate and intentional has been established against the Plaintiff;
- (ii) Explanation has not been satisfactorily provided by the Plaintiff for the period of delay as such the Plaintiff has not overcome the factor of inexcusable;
- (iii) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have suffered prejudice; and
- (iv) In the interest of justice, a fair trial is still not possible to the current.
- (v) There is abuse of the Court process by the Plaintiff;
- (vi) The Order 25 Rule 9 Notice hereby succeeds accordingly; and
- (vii) The substantive matter is Struck Out for want of prosecution in terms of Order 25 Rule 9.
- (viii) The Plaintiff is ordered to pay a summarily assessed cost of \$500 each to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants within a period of 14 days' timeframe.

Dated at Suva this 23<sup>rd</sup> Day of May, 2018



Master  
VISHWA DATT SHARMA

cc: Shelvin Singh Lawyers, Suva.  
Messers O'Driscoll & Co, Suva.  
Patel Sharma Lawyers, Suva.