

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

Civil Action No.: HBC 370 of 2013

**BETWEEN** : **AVIEL BAT TZION** also known as **UNISE RANADI** of Suva,  
Domestic Duties  
**PLAINTIFF**

**AND** : **GRAPHIC EQUIPMENT LIMITED** a limited liability company having  
its registered office in Suva.  
**1<sup>ST</sup> DEFENDANT**

**AND** : **MINGS LIMITED** a limited liability company having its registered  
office in Suva.  
**2<sup>ND</sup> DEFENDANT**

**Counsel** : **Mr. Lanyon J for the Plaintiff**  
**Mr. Lajendra N for the Defendants**

**Date of Hearing** : **27<sup>th</sup> September, 2018**

**Date of Judgment** : **28<sup>th</sup> September, 2018**

**JUDGMENT**

**INTRODUCTION**

1. This is an application for extension of time to serve the notice of appeal and grounds of appeal filed on 7<sup>th</sup> March, 2018. In the motion filed by the Plaintiff is seeking further 21 days to serve them. The appeal is from the decision of Master delivered on 14<sup>th</sup> February, 2018, refusing reinstatement of the statement of claim struck off for non compliance of unless order. The Plaintiff's conduct in this matter was insolent, to say the least. There were repeated non appearances as well as non compliance of the orders of the Master.

**FACTS**

2. The facts of this case and conduct of the Plaintiff that resulted unless order, is found in the Master's decision of 14<sup>th</sup> February, 2017 and is repeated below. The paragraphs 7 - 18 of the Ruling delivered by Master states,

*'On 22<sup>nd</sup> September, 2015, the Plaintiff's Counsel informed Court that the Pre Trial Conference minutes have been formalized and accordingly filed.*

Hence this Court made further orders for the Plaintiff to file its Agreed Bundle of documents, Copy Pleadings and Order 34 Summons within a months' time frame.

On the next adjourned date of 09<sup>th</sup> November, 2015, there was no appearance by the Plaintiff/Counsel. The Orders made by the Court on 22<sup>nd</sup> September, 2015 was not complied with. Defence Counsel was asked to communicate in writing to the Plaintiff and inform her of the next adjournment date which the Defence did.

On 07<sup>th</sup> December, 2015, the Plaintiff Counsel appeared and the Court still noted that even though a reminder was sent in writing, the Plaintiff Counsel has not complied with the initial Court order of 22<sup>nd</sup> September, 2015 and subsequently adjourned dates.

On 11<sup>th</sup> February, 2016 once again there was no appearance by the Plaintiff/Counsel. Defence was informed that Ms. Ulamila Fa was engaged in a hearing at the Nasinu Magistrates Court and to seek further time to allow the Plaintiff to comply with the order.

On 16<sup>th</sup> March, 2016, there was again no appearance by the Plaintiff. This Court at this adjournment noted that time and again the Plaintiff had failed to comply with the orders of the Court to the current.

On 31<sup>st</sup> March, 2016, again no appearance from the Plaintiff was noted and had failed to file the Agreed Bundle of Documents, Copy Pleadings and Order 34 Summons. This was a complete defiance of the Court's previous directives and orders and that there was a continued default and non-compliance of the Court orders on the part of the Plaintiff/Counsel.

It was on this failure of the Plaintiff/Counsel for the fourth time that prompted the Defence Counsel to seek for an "Unless Orders".

Accordingly, this Court acceded to the Defence Counsel's application for the imposition of the "Unless Order" and thus granted the orders as follows:

- Invoke unless order that would be activated if the Plaintiff within next 14 days do not pursue this case by filing Bundle of Documents, and Order 34 Summons;
- For mention on unless order if non-compliance of Copy pleadings, Bundle of Documents and Order 34 Summons; Adjourned to 21<sup>st</sup> April, 2016.

Again, on 21<sup>st</sup> April, 2016, there was no appearance by the Plaintiff/Counsel. It was also noted from the Court records that the Plaintiff had failed to comply with the "unless order" made on 31<sup>st</sup> March, 2016.

*The Defence Counsel herein on this Occasion did not hesitate to request Court that the matter be struck out due to the Plaintiff's non-compliance and default of the unless order in place.*

*This Court acceded to the request and accordingly made the following orders-*

- *Refer to minutes of 31<sup>st</sup> March, 2016;*
- *Unless orders in place to be activated if Plaintiff doesn't comply with Copy Pleadings, Bundled of Documents and Order 34 Summons.*
- *Perused Court File non-compliance by Ms. Fa/Plaintiff on Copy Pleadings and Order 34 Summons;*
- *Therefore matter on Plaintiffs Writ of Summons and Statement of Claim is hereby struck out accordingly.*
- *On Defendants Counter-Claim, for formal proof to be assigned on 05<sup>th</sup> May, 2016.*

*It was on 05<sup>th</sup> May, 2016 that the Defence Counsel appeared to proceed with his Counter-Claim when he was informed by the Court that a Reinstatement application has been filed by Ms. Fa returnable on 17<sup>th</sup> May, 2016."*

3. The conduct of the Plaintiff can be considered as contumelious. The Master utilizing the power to issue an unless order had used it. The Plaintiff did not heed to that and statement of claim was struck off. The Plaintiff filed a motion to **reinstate the action** which was struck out by Master, upon non compliance of unless order, of **31<sup>st</sup> March, 2016**.
4. Having heard the above motion for reinstatement, the Master on **14<sup>th</sup> February, 2018** dismissed the application of the Plaintiff for the reinstatement. Having aggrieved by the said decision, the Plaintiff filed a notice of appeal on **7<sup>th</sup> March, 2018** and the stamp on the back of the said Notice of Appeal indicate that it was filed at 4.10 pm.
5. It was the last day for filing a Notice of Appeal against Master's decision and if the service could not be made to the other party an application can be made seeking an extension.
6. An affidavit of service is filed and it is sworn by a legal clerk, who had sworn that the said Notice of Appeal was served on **8<sup>th</sup> March, 2018**, without seeking extension of time. There is provision in the High Court Rules of 1988 for seeking extension either before or after the due date.

7. The default of Plaintiff did not end there, as no summons for directions was filed in terms of the Order 59 rule 17(2) of the High Court Rules and the result was that purported Appeal was deemed abandoned in terms of Order 59 rule 17(3) of the High Court Rules. I used the word purported due to non compliance of the High Court Order, 1988.
8. The purported appeal was heard and dismissed on 10<sup>th</sup> May, 2018. Now the Plaintiff is seeking to extend the time of service.

#### ANALYSIS

9. Appeals from the Master are dealt in Part II of the Order 59 of the High Court Rules of 1988 and state as follow

#### **PART II – APPEAL FROM THE MASTER**

##### ***Appeal from Master's decision (o.59, r.8)***

- (1) *An appeal shall lie from a final order or judgment of the Master to a single judge of the High court.*
- (2) *No appeal shall lie from an interlocutory order or judgment of the master to a single judge of the High Court without the leave of a single judge of the high court which may be granted or refused upon the papers filed.*

##### ***Time for appealing (O.59, r.9)***

*An appeal from an order or judgment of the Master shall be filed and served within the following period –*

- (a) *21 days from the date of the delivery of an order or judgment.*  
*Or*
- (b) *in the case of an interlocutory order or judgment, within 7 days from the date of the granting of leave to appeal.*

##### ***Extension of time (O.59, r.10)***

- (1) *An application to enlarge the time period for filing and serving a notice of appeal or cross-appeal may be made to the Master before the expiration of that period and to a single judge after the expiration of that period.*
- (2) *An application under paragraph (1) shall be made by way of an inter-parte summons supported by an affidavit.*

##### ***Application for Leave to Appeal (O.59, r.11)***

*Any application for leave to appeal in interlocutory order or judgment shall be made by summons with a supporting affidavit, filed and served within 14 days of the delivery of the order or judgment.*

**Notice of appeal (O.59, r.12)**

An appeal shall be brought by way of a notice of appeal, which may be given in respect of the whole or any specified part of the order or judgment of the Master.

**Cross-appeal (O.59, r.13)**

Where a respondent to an appeal under this part wishes to appeal, the respondent shall file and serve a notice of cross-appeal within 7 days from the service of the notice of appeal.

**Contents of notice of appeal and cross-appeal (O.59, r.14)**

A notice of appeal or cross-appeal filed under rules 12 or 13 shall state –

- (a) Whether the appeal is from the whole or part only and what part of the order or judgment of the Master;
- (b) The grounds of appeal succinctly;
- (c) The precise form of the order which is sought in place of the order or judgment of the Master.

**Amendment of notice of appeal and cross-appeal (O.59, r.15)**

- (1) A notice of appeal or cross-appeal may be amended by or with leave the Court.
- (2) An application for amendment under paragraph (1) shall be by way of a summons filed and served on each of the parties to the appeal not less than 14 days before the date on which the appeal is listed for hearing.

**Stay of proceedings or execution (O.59, r.16)**

- (1) The filing of a notice of appeal or an application for leave shall not operate as a stay of execution or proceedings, or any step therein, unless the Court so directs.
- (2) An application under paragraph (1) shall be made by way of an inter-parte summons supported by an affidavit.

**Procedure after filing appeal (O.59, r.17)**

- (1) The appellant shall, upon serving the notice of appeal on the party or parties to the appeal, file an affidavit of service within 7 days of such service.
- (2) The appellant shall, within 21 days of the filing of notice of appeal, file and serve a summons returnable before judge for directions and a date for the hearing of the appeal.
- (3) If this rule is not complied with, the appeal is deemed to have been abandoned."  
(underlining is added)

10. Though the Appeal was filed within 21 days (i.e 21st day around 4.10 pm) it was not served within the 21 days. This is non-compliance of Order 59 rule 9, and Order 59 rule 10 of the High Court Rules of 1988 deals with the extension of the time period for the filing of

an Appeal and or service of the same. Such an application is made by inter partes summons. (See O. 59 r10 (2)). After dismissal of the purported Appeal on 10<sup>th</sup> May, 2018 the Plaintiff sought an extension of time to serve the Notice of Appeal, which they did not, do till the dismissal of the purported appeal served outside 21 day time period.

11. In an application seeking extension of time the Plaintiff needs to explain the length of delay, reasons and also merits of the appeal, and if there is time extended it would prejudice other party (see Suva City Council v Saumatua Court of Appeal decision delivered on 6.12.2017).
12. The application seeking extension of time to serve the Notice of Appeal filed on 7<sup>th</sup> March, 2018, the last day for filing, was on 14<sup>th</sup> June, 2012. No explanation was granted for the said delay of more than 3 months.
13. In the affidavit in support at paragraph 12 states  
*'Upon being informed by the Honourable Court by way of its Ruling on 10.5.18 that we needed to file an application for extension of time since our appeal was only a purported in nature we immediately proceeded to file this application'*
14. Even from the said Ruling delivered on 10.5.2018 by this court, the Plaintiff had taken more than one month to file this application, seeking extension of time to serve Notice of Appeal. No explanation given for that delay of more than 30 days, if this application was made due to findings of the court.
15. The delay from 7<sup>th</sup> March, 2018, which was the last day for service of the Appeal, was over 3 months. The conduct of the Plaintiff is contemptuous and it is continuing. (See Court of Appeal decision Suva City Council v Saumatua (supra).
16. A Plaintiff should be diligent to prosecute his case without delay and if not due to delay in one matter is wasted time for another matter as the time of court is limited and resources are limited and maximum utilization is need of the hour. A party cannot file an action and wait without taking appropriate action.

17. Since there is no explanation given for the delay of this application filed more than a month from the delivery of ruling this application for extension is struck off.
18. I do not need to consider the merits of the appeal since the reasons for delay is not satisfactory, but I consider the merits for completion, which I have also done in my Ruling delivered on 10<sup>th</sup> May, 2018.
19. The proposed grounds of appeal are contained in the Notice of Appeal and Grounds of Appeal filed on 7<sup>th</sup> March, 2018. They are;
  1. *That the Master erred in fact and in law in his decision of the 14<sup>th</sup> of February 2018 when he did not consider that both parties had mutually agreed with the Defendant consenting for the Plaintiff's late filing of the Bundle of Document, Copy Pleadings and Order 34 Summons sometimes in August 2016.*
  2. *That the Master erred in fact and in law in not providing reasons as to why due process was not followed when the Plaintiff/Appellant was not given an opportunity to offer explanation for non-compliance to the unless orders issued on 31<sup>st</sup> March 2016,*
  3. *That the Master erred in fact and in law in holding in paragraph 33 that "...from the date of the Order of 22<sup>nd</sup> September 2015 and until the 04<sup>th</sup> May, 2016 when the Plaintiff filed the current Reinstatement application, no proactive steps were taken by the Plaintiff/Counsel to ensure that he Orders were complied with expeditiously" without taking into account the following:*
    - a) *Both parties me, discussed and agreed for an adjournment foe filing of order 34 Summons and Plaintiff's/Appellant's Bundle of Documents which was ready for filing by 31<sup>st</sup> March 2016.*
  4. *That the Master erred in fact and in law in stating in paragraph 35 that his order striking out the Plaintiff/Appellant's claim on 21<sup>st</sup> April 2016 for breach of Unless Orders issued on 31<sup>st</sup> March 2016 was final order and the only remedy following striking out was via an appeal (paragraph 36) when the leading case of Samat v Oelelai [2012] FJHC 844; HBC201.2002 at paragraphs 26, 27, 28, 29 and 30 clearly outlines that the Master has powers to reinstate actions that had been struck out for breach of unless orders if it was made ex-parte.*
  5. *That the Master erred in fact and in law in failing to consider that the action instituted by the Plaintiff/Appellant in this matter is of great public interest which involves the claiming of unpaid salary and FNPF contributions for a period of 13 years and being wrongfully accused of a criminal offence. The Master's action of striking the matter out will cause injustice and prejudice to the Plaintiff/Appellant*

*as it will leave her without a remedy of claiming the substantial unpaid salary and contributions and seeking justice from the Defendants.*

6. *That the Master erred in law and in fact in striking out the Plaintiff/Appellant's action when there was no evidence before him that the reinstatement would cause serious prejudice to the Defendants/Respondents.*
  7. *The Plaintiff/Appellant reserves the right to amend and file further grounds of appeal.*
20. 1<sup>st</sup> Ground of appeal - is regarding consent of the other party to default orders of the court which cannot be consider as a valid ground when a guillotine order is made where non-compliance will result in serious consequence such as striking out of the claim. So there is no error in Master not considering such matters. The first ground of appeal has no merits and doomed to fail.
  21. 2<sup>nd</sup> Ground of Appeal - the reason for non compliance of the Master's order was considered in the decision of the Master in paragraphs 22 to 33 of the Ruling delivered on 14.2.2018 and I cannot see any error on the part of Master's Ruling. So this ground of appeal has no merits and cannot sustain.
  22. 3<sup>rd</sup> Ground - is also consent of the parties to delay filing which is not a matter to consider when there is an unless order and has no merits for an appeal ground.
  23. 4<sup>th</sup> Ground - has some merits but considering that ground in favour of Plaintiff will not be sufficient to reinstate the Plaintiff's action or appeal being allowed. So it is futile to grant extension of time when it is clear that there are no prospects of reinstatement.
  24. In Fiji High Court decision, *Peters v Seashell @Momi Ltd* [2012] FJHC 868; HBM09.2011L (15 February 2012) it was held,

**"RE-INSTATE OR APPEAL?"**

*[14] There appears to be much confusion as to whether the striking out or dismissal of an action pursuant to an "unless" order where no hearing on the merits took place should be appealed or whether it should be the subject of an application to re-instate before the Master or Judge that made the order.*

*Recently, several decisions of this Court were delivered on the question:*

*Westmall Ltd v CUL (Fiji) Ltd [2010] FJHC 448; HBC175.2001L (6 October 2010); Nakesu v Lakoiniusiladi [2012] FJHC 828; HBC113.2009*



(27 January 2012); *Samat v Oeelalai* [2012] FJHC 844; HBC201.2002L (30 January 2012); *Gulf Seafood (Fiji) Ltd v Native Land Trust Board* [2012] FJHC 853; HBA28.2011 (2 February 2012); *NBF Asset Management Bank v Krishna* [2012] FJHC 835; HBC129.1999L (2 February 2012). The consensus is that the proper procedure is an application to reinstate rather than any appeal.

[15] That being the case, the applicant's current application to enlarge time to appeal is misconceived. But, having regard to the fact that his counsel had filed and later withdrew an application to re-instate, on a misapprehension of the proper procedure, I would deal with his current application as if it were an application to re-instate rather than an application to enlarge time to appeal.

[16] Further, it is common ground that the initial appeal was filed in time. So in that sense the respondent could not be said to be disadvantaged or prejudiced if the appeal were to be re-instated.

25. In the Fiji High Court decision of, *Samat v Oeelalai* [2012] FJHC 844; HBC201.2002L (30 January 2012) again this issue was raised and it was held,

"[16] The courts must be able to freely apply the useful armory of unless orders in their day to day case management. Currently in Fiji, the Master of the court handles most of the pre-trial steps and the cases are adjourned before a judge for hearing. Therefore, the Master must have the flexibility to exercise this discretionary powers of making unless orders. I will reason out the jurisdiction of the Master to make unless orders later on in my judgment. When exercising such powers the Master must ensure that the unless orders are fair and reasonable and the consequences are proportionate to the breach. In appropriate situations the Master could vary or set aside the unless order. However, care should also be taken that unless orders are not construed as an idle threat, not intended to be carried out.

[29] 'Unless orders' that are made in the exercise of inherent powers of the court and solely for the purpose of compelling parties on procedural compliance are not made on merits. Therefore in my mind, an unless order made either by a Master, a Magistrate or a Judge exercising original or appellate jurisdiction can re-instate their own orders without appeal, and the court is not functus officio. This however would be in contrast to a ruling made by the Master in exercising the statutory powers under O. 25 r. 9 where matters could be struck out for want of prosecution. A decision made by the Master considering the objections placed before him on a show cause notice under O.29 r.9, is final in nature although not considered on the merits of the cause. Therefore, an aggrieved party would be required to appeal against such an order vis à vis an application to re-instate.

26. From the above decisions of the Fiji High Court, it is clear that the proper course for a party who had not complied with an unless order is to make an application to the same court with an explanation as to the non-compliance.

27. In Marcan Shipping (London)Limited Vs George Kefalas et al [2007] EWCA Civ 463. UK Supreme Court considered the plight of non compliance of an unless order, in the light of the CPR which had introduced specific provisions for case management. It was held that there was no significant difference between the former rules (i.e Supreme Court Rules of UK) and the present CPR. At paragraph 10 it was held,

*'In order to ensure that its process is not subverted so as to become an instrument of injustice every procedural system must place at the disposal of the court the power to manage proceedings before it, if necessary by imposing sanctions on litigants who fail to comply with its rules and orders. The ultimate sanctions of course, is to dismiss the claim or strike out the defaulting party's statement of case. A well-recognized way of imposing a degree of discipline on dilatory litigant is to make what is known as an "unless" order by which a conditional sanction is attached to an order requiring performance of a specified act by a particular date or within a particular period. Although the CPR have given the court greater powers to control proceedings and a greater responsibility for ensuring that they are conducted fairly and efficiently, for reasons which will become clear in due course I do not think that there is a significant difference between the approach to this problem adopted under the former Rules of the Supreme Court and that which is now embodied in the CPR.'*<sup>4</sup>

28. In Marcan (supra) it was further discussed the history of the conditional orders and how they have been considered by the court in early decisions where it was held that once the time period for unless order had lapsed there is no jurisdiction for the same court to determine non-compliance of the conditional order. This position changed in Samuels v Linzi Dresses Ltd [1981] Q.B. 115 at p 126 and held, that a court which imposed unless order can even extend the time even after the expiration time. It was further held that power 'was one which should be exercised cautiously and with due regard to the necessity for maintaining the principle that orders are made to be complied with and not to be ignored'.<sup>1</sup>

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<sup>4</sup> Marcan Shipping (London)Limited Vs George Kefalas et al [2007] EWCA Civ 463 paragraph 12

29. In *Samuels v Linzi Dresses Ltd* [ 1980] 1 All ER 803 at p812 held,
- 'In my judgment, therefore, the law today is that a court has power to extend the time where an 'unless' order has been made but not been complied with; but that it is a power which should be exercised cautiously and with due regard to the necessity for maintaining the principle that order are made to be compelled with and not to be ignored. Primarily it is question for the discretion of the master or the judge in chambers whether the necessary relief should be granted or nor'*
30. So, there is jurisdiction for Master to consider extension of time given for an unless order but this is an exercise that should be left in very limited circumstances. Though there is an error on reasoning of Master's decision that will not result in appeal being allowed.
31. Bill of Rights contained in Section 15 of the Constitution of The Republic of Fiji while emphasizing that every person in civil suit has a right to have the matter determined by a court or law or by impartial and independent tribunal, in Section 15(3) states that there is a 'right to have the case determined within a reasonable time'.
32. It is important to obtain evidence from witnesses before their minds are faded. I was told at the hearing the criminal prosecution relating to the alleged incident involving the Plaintiff, failed due to death of main witness as it had taken 13 years since the investigation to frame charges against Plaintiff. The same could happen to counter claim of the Defendants and there is a need for case management.
33. It should be noted that there is a counter claim filed by the Defendants and this invariably delays when the Plaintiff's claim is delayed. This is prejudicial to the interest of the Defendant. The counter claim of the Defendants should not suffer or fail due to the inaction of the Plaintiff. So there is prejudice to Defendants if extension of time to serve the Notice of Appeal and Grounds of Appeal is allowed.
34. What is reasonable opportunity for a party to prosecute the case, will be determined considering the circumstances of the case, and the Plaintiff cannot delay the proceedings which he initiated thus violating the rights of the Defendants. So, a Master or a judge needs to control the conduct of the proceedings and should not give in to the parties and cases cannot proceed at the phase that Plaintiff or Defendant desire. The control of the

case is entirely with Master or judge who is seized of the matter, at that stage of the matter.

35. Appeal Ground 5- there is no public interest in the appeal. What needs to be considered is the importance to the public regarding the appeal and not the substantive matter. What needs to be considered here is public importance in determining grounds of appeal. None of the grounds have public importance.
36. Ground 6-serious prejudice to the other party is not a consideration in activation of an unless order hence not an error on the part of Master.
37. Ground 7- was not a ground of appeal as it state' Plaintiff/Appellant reserves the right to amend and file further grounds of appeal.'

#### **CONCLUSION**

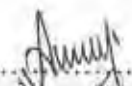
38. The conduct of the Plaintiff before Master is insolent. Even appeal from decision of Master was not prosecuted with due diligence. There is no public interest in the appeal and grounds of appeal are doomed to fail, except for the power of the Master to deal unless order once it expired. If the Plaintiff's application is allowed it will prejudice Defendant's Counter Claim as it will delay. The summons seeking extension of time to serve the Appeal is struck off. The cost of this application is summarily assessed at \$1,000 to be paid within 21 days.

#### **FINAL ORDERS**

- a. The summons for extension of time for service of Notice of Appeal filed on 28.08.2018 is struck off.
- b. The cost of this application is summarily assessed at \$1,000 to be paid within 21 days.

**Dated at Suva this 28<sup>th</sup> September, 2018**



  
Justice **Deepthi Amaratunga**  
High Court, Suva