

IN THE HIGH COURT OF FIJI
IN THE WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 92 of 2015

BETWEEN : **RUBINA MAHARAJ** of Korovuto, Nadi as the Administratrix of
the Estate of Shalvin Kumar late of Maro, Sigatoka (deceased)

PLAINTIFF

AND : **JONE MATAKULA** of Sekoula Lane, Laucala Bay, Suva.

FIRST DEFENDANT

AND : **ROVEENA SHAINAZ** of 8 Sekoula Lane, Laucala Bay, Suva.

SECOND DEFENDANT

AND : **ANAND** of c/o - On Calls Crane (Fiji) Limited, 10 Miles, Nakasi,
Fiji.

FIRST THIRD PARTY

AND : **MOHAMMED IRSHAAD** of Martintar, Nadi, Fiji.

SECOND THIRD PARTY

AND : **CREDIT CORPORATION (FIJI) LIMITED** a body duly
incorporated and registered under the Laws of Fiji as a limited liability
company having its registered office at Suva, Fiji.

THIRD THIRD PARTY

AND : **RAHAMAT ALI** of 153 Vomo Street, Lautoka.

FOURTH THIRD PARTY

Counsel : **Mr. Eparama Sailo for the plaintiff**
Mr. Shirish Rattan for the first and second defendants
(Ms) Jotishna Nair for the first and second third party
(Ms) Kartika Kumar for the third third party
The fourth third party is absent and unrepresented

Hearing : **Monday, 22nd July, 2019**
Ruling : **Friday, 04th October, 2019**

RULING

(A) INTRODUCTION

(01) The matter before me stems from the plaintiff's summons filed on 18.04.2019 seeking the grant of the following Orders;

(01) *That the matter which was taken off the cause list on the 20.07.2018 be reinstated to the cause list.*

(02) *The costs of this application be costs in the cause.*

(02) The application is made pursuant to the inherent jurisdiction of the Court.

(03) The application is opposed by the first and second defendants. The first, second and third third parties consented to the application for reinstatement. The fourth third party did not take part in the proceedings. **[I shall refer to the 1st and 2nd defendants simply as the 'defendants.]**

(04) The parties have filed four (04) affidavit for consideration;

(i) The affidavit in support of Mr. Abdul Islam, sworn on 17.04.2019, filed on behalf of the plaintiff.

(ii) The affidavit in answer of (Ms) Roveena Shainaz, sworn on 20/05/2019, filed on behalf of the defendants.

(iii) The supplementary affidavit of Mr. Abdul Islam, sworn on 03.07.2019, filed on behalf of the plaintiff.

(iv) The affidavit of (Ms) Rubina Maharaj, the plaintiff, sworn on 03.07.2019.

(B) CHRONOLOGY OF EVENTS

15/06/15	Writ of Summons filed.
24/07/15	First & Second defendants statement of defence filed.
27/07/15	Third Party Notice filed.
03/08/15	Reply to Defence filed.
03/08/15	Summons for Directions filed.
23/09/15	Summons for Third Party Directions filed.
02/10/15	Order made on Summons for Third Party Directions.

23/10/15 Statement of Claim by First and Second defendants against First and Second Third Party filed.

23/10/15 First and Second defendants affidavit verifying list of documents filed.

16/11/15 Second Third Party's statement of defence filed.

19/11/15 Plaintiff's affidavit verifying list of documents filed.

04/12/15 First and Second defendants reply to Second Third Party's Statement of defence filed.

14/03/16 Second Third Party's affidavit verifying list of documents filed.

06/05/16 Ex-parte motion for leave to join third third party filed by Second Third Party.

02/06/16 Summons for leave to join Third Third Party filed by Second Third Party.

10/06/16 Order made on Second Third Party's Summons for leave to join Third Third Party.

25/07/16 Third Party Notice against Third Third Party filed by Second Third Party.

04/08/16 Notice of Intention to defend filed by Third Third Party.

01/09/16 Summons for Third Party Directions filed by Second Third Party.

02/09/16 Statement of Defence and counter-claim of the First Third Party filed.

26/09/16 Statement of Claim of Second Third Party against Third Third Party filed by Second Third Party.

05/10/16 Order on Summons for Third Third Party Directions by Second Third Party filed.

17/10/16 First and Second Defendant's reply to First Third Party's defence filed.

26/10/16 Statement of Defence of Third Third Party to Statement of Claim of Second Third Party filed.

05/11/16 Order on Third Third Party's Summons for leave to join Third Party filed.

16/11/16 Reply to Statement of Defence of Third Third Party filed by Second Third Party.

- 17/11/16 Summons for leave to join Third Party filed by Third Third Party.
- 28/11/16 Order made on Third Third Party's Summons for leave to join Third Party.
- 12/12/16 First Third Party's reply to First and Second defendant's statement of defence filed.
- 14/02/17 Third Party Notice against Fourth Third Party filed by Third Third Party.
- 08/03/17 Minutes of Pre-Trial Conference between Plaintiff and First and Second Defendants filed.
- 21/03/17 First Third Party's affidavit verifying list of documents filed.
- 15/05/18 Copy Pleadings filed.
- 18/05/18 Order 34 Summons to enter action for Trial filed by Plaintiff, returnable date 31/05/18.
- 31/05/18 Order made on Order 34 Summons. File referred to DR for allocation.
- 21/06/18 Matter adjourned to 10th September 2018 for mention to fix Hearing date.
- 10/07/18 Tentative trial date set for 12th to 15th February, 2019. Adjourned to 12th July for mention for parties to confirm their availability.
- 12/07/18 Matter adjourned to 16th July, 2018 for mention for parties to confirm trial dates for first week of March, 2019.
- 16/07/18 No appearance for and on behalf of the Plaintiff. Matter adjourned to 20th July, 2018 for mention.
- 20/07/18 No appearance for and on behalf of Plaintiff. Matter taken off the cause list.

(C) **THE AFFIDAVITS IN SUPPORT OF THE APPLICATION FOR REINSTATEMENT**

(1) The affidavit sworn by **Mr. Abdul Islam** is substantially as follows;

1. *I am employed by Messers KLAW Chambers & Partners.*
2. *That I am duly authorised by the Principal solicitor of the Legal Firm, Mr Eparama Sailo to make and swear this Affidavit.*

3. *That the contents of this Affidavit are true in so far as they are within my personal knowledge. Where the contents are not within my personal knowledge, they are true to the best of my knowledge, information and belief. The facts and information deposed herein are gathered from the file and instructions from the Principal solicitor of this firm.*
4. *That this action was struck out due to non-appearance on 20th July, 2018 by the Plaintiff and/or her solicitor.*
5. *That being the Plaintiffs solicitors our legal firm filed an application by way of Notice of Motion on 25 September, 2018 which was heard and the ruling was delivered on 5th April, 2019.*
6. *In his Ruling, His Lordship granted leave to the Plaintiff "to cure the defects in the proceedings".*
7. *In other words, His Lordship has granted leave to the plaintiff to file an application for re-instatement of the matter to the cause list which was struck out on 20th July, 2018 according to the Rules provided by High Court Rules 1988.*
8. *The reasons why the matter was struck out on 20th July, 2018 had been explained by Mr. Niven Padarath in his Affidavit in Support filed on 25th September, 2018 (annexed herein and marked A1 1" is a copy of the said Affidavit).*
9. *Further, there was no appearance by the Plaintiff on 16th July, 2018 and the matter was adjourned to 20th July, 2018 and when there was no appearance on 20th July, 2018, His Lordship struck out the matter from the Cause List.*
10. *There was non-appearance by the Plaintiff on 16th July, 2018 because the solicitors who we instructed Messers Iqbal Khan & Associates were engaged in the Lautoka Magistrate's Court. (Annexed herein and marked "A1 2" is a copy of the instructions sheet.)*
11. *The matter is ready for trial and if it is struck out the Plaintiff will suffer irreparable damages.*
12. *I seek order in terms of the application.*

(2) The affidavit in support of **Mr. Niven Padarath**, the Barrister & Solicitor is as follows;

1. *That I am the Barrister & Solicitor employed by Messers Samuel K.Ram.*
2. *That in so far as the contents of this Affidavit are within my personal knowledge it is true and in so far as it is not within my personal knowledge, it is true to the best of my knowledge and information and belief.*

3. *That this matter was listed for mention on 20th July, 2018.*
4. *I was instructed by Messers KLAW Chambers & Partners to appear for this matter as I had a matter to attend before Justice Nanayakarra.*
5. *That I was travelling from Ba on Friday morning and encountered traffic near the Pacific Service Station when entering Lautoka was struck for about 15 minutes.*
6. *I arrived at about 9.50am and was informed that the matter was called and because there was no appearance the matter was taken off the cause list.*
7. *I sincerely apologise to this Court for arriving late. However, the circumstance was beyond control.*
8. *My instruction was to seek for a hearing dated on behalf of the Plaintiff.*
9. *That I humbly seek the matter be re-instated to the cause list.*

(3) The affidavit in support of **(Ms) Rubina Maharaj**, the plaintiff, is as follows;

1. *That I am the plaintiff in the action herein.*
2. *That in so far as the contents of this Affidavit are within my personal knowledge it is true and in so far as it is not within my personal knowledge, it is true to the best of my knowledge and information and belief.*
3. *That I refer to the Summons filed by my solicitors on 18th April, 2019 in the action herein.*
4. *That I also refer to the Affidavit in Support of the said Summons sworn by the Legal Assistant of my Solicitors namely, Abdul Islam.*
5. *That I have been explained by my Solicitors the reason for the matter being taken off the cause list.*
6. *That I authorised Abdul Islam to swear Affidavit in a reinstatement application of the action to the cause list. (Annexed herein and marked "RMI" is a written authority confirming that I did authorised Abdul Islam to swear Affidavit on my behalf in a reinstatement application).*
7. *That I confirm the facts to be true deposed by Abdul Islam in his Affidavit in Support filed on 18th April, 2019 and the Affidavit of the Solicitor, Mr. Niven Padarath which annexed in the Affidavit in Support of Abdul Islam filed on 18th April, 2019 being annexure "AII".*

8. *That the facts on reinstatement application were well known by Abdul Islam and the Solicitor Mr. Niven Padarath.*
9. *Further, Abdul Islam is well versed with the reasons for the matter being taken off the cause list as in his capacity as a Legal Assistant employed by my Solicitor whom I have been advised by my Solicitor that Abdul Islam handle client's filed on his instructions.*
10. *That I reiterate that the matter was taken off the cause list on 20th July, 2018 and not struck out.*
11. *That my Solicitor received duly sworn Affidavit from Mr. Niven Padarath on or about 25th September, 2018 even though it was sworn on 23rd August, 2018 and the reinstatement application was duly filed upon receiving Affidavit from Mr. Padarath and which was heard on 31st January, 2019 after complying with all the directions of this Honourable Court.*
12. *That the ruling was delivered on 5th April, 2019 wherein this Honourable Court granted leave to cure the defects in the reinstatement application filed by my Solicitor.*
13. *Thereafter, my Solicitor filed the present application for reinstatement on 18th April, 2019-upon consulting with me after the ruling dated 5th April, 2019.*
14. *That I have been further advised by my Solicitor that the action was not struck as emphasised by the solicitor of other parties. It was taken off the cause list on 20th July, 2018 and on 25th September, 2018 an application reinstatement was filed by my Solicitor. I am also advised by my Solicitor that Order 25 Rule 9 of the High Court Rules provides that if no step taken on any cause for six (6) months then any party on an application or the court on its own motion may list the cause for the party to show cause why it is should not be struck out for want of prosecution.*
15. *That my Solicitor made an application for reinstatement within the period of six (6) months from the date the cause was taken off the cause list.*
16. *That I humbly seek the matter be re-instated to the cause list and costs of the application be cost in the cause.*

(D) THE AFFIDAVIT IN OPPOSITION

The second defendant **(Ms) Roveena Shainaz** swore an affidavit in answer (to the application for reinstatement) which is substantially as follows;

I am the second defendant in these proceedings.

1. *I am authorised by the first defendant to make this affidavit on his behalf.*

2. *THE matters to which I hereinafter depose are true to the best of my knowledge and belief and are within my personal knowledge unless expressly stated to the contrary and whereso stated, I verily believe the same to be true.*
3. *I make this affidavit in answer to the application filed by the plaintiff for an order for reinstatement. I have read the affidavit of Abdul Islam sworn on 17 April 2019 and filed herein on 18 April 2019 (hereinafter referred to as "Abdul's affidavit") and respond to it below.*
4. *I admit paragraph 1 of Abdul's affidavit.*
5. *I do not have any personal knowledge of the matters contained in paragraphs 2 and 3 of Abdul's affidavit and therefore do not accept the same.*
6. *AS to paragraph 4 of Abdul's affidavit I am under legal advice and verily believe there was no appearance by counsel for the plaintiff on 20 July 2018 hence this action was taken off the cause list.*
7. *I admit paragraph 5 of Abdul's affidavit.*
8. *I admit paragraph 6 of Abdul's affidavit.*
9. *I am under legal advice and verily believe paragraph 7 of Abdul's affidavit tantamount to a submission which my counsel will address at the hearing.*
10. *AS to paragraph 8 of Abdul's affidavit:*
 - (1) *I do not have any personal knowledge of the reasons behind counsel's failure to attend court on 20 July 2018 and therefore do not accept the same. I further say that the reason given is not good enough. I am under legal advice and verily believe that the onus was on plaintiff's counsel and/or his agent to ensure that there was appearance in court for and on their behalf.*
 - (2) *I am under legal advice and verily believe the annexed affidavit of Niven Padarath has not been filed in its proper form and my counsel will address this at the hearing.*
11. *AS to paragraph 9 of Abdul's affidavit.*
 - (1) *I do not have any personal knowledge of the reason behind counsel's failure to attend court on 16 July 2018 and therefore do not accept the same. I further say that the reason given is not good enough. I am under legal advise and verily believe that the onus was on plaintiff's counsel and/or his agent to ensure that there was appearance in court for and on their behalf.*

- (2) *I am under legal advice and verily believe the onus was on plaintiff's counsel to arrange for another counsel if Messrs Iqbal Khan & Associates were engaged in the Lautoka Magistrate's Court.*
12. *I do not fully accept paragraph 11 of Abdul's affidavit. This claim was filed on 15 July 2015. I am being prejudiced by the delay in the prosecution of this claim and having the stress of the claim hanging over my head for almost over 3 ½ years. I am also incurring substantial cost and agency fees in defending these proceedings which is being unnecessarily prolonged due to laxity and/or the inactions of the plaintiff's counsel and/or its agents.*
13. *THE plaintiff was not prompt in making this application. They filed the first application for reinstatement approximately 67 days after the order was made on 20 June 2018. This application has been filed approximately 300 days after the order was made on 20 June 2018.*
14. *I am under legal advice and verily believe this application is not properly constituted and should be struck out for irregularity.*
15. *ACCORDNIGLY, I respectfully request that this application be dismissed with costs on an indemnity basis.*

(E) CONSIDERATION OF THE APPLICATION FOR REINSTATEMENT

- (01) At the commencement of the hearing before the Court, Counsel for the defendants raised preliminary objections to the supporting affidavits of Mr. Abdul Islam and Mr. Niven Padarath.

Mr. Abdul Islam's affidavit - The preliminary point *in limine*

- (02) Mr. Abdul Islam is a legal assistant in the employment of K Law Chambers & Partners, the Solicitors for the plaintiff. Counsel for the defendants submitted that the supporting affidavit of Mr. Abdul Islam cannot be admitted as evidence in these proceedings because;
- ❖ The deponent Abdul Islam is not the litigant nor a competent person to swear an affidavit in this matter [Counsel relied on **In the matter of Media Metro Limited, High Court Lautoka, Winding Up Cause No:-33 of 2015 and Roweena Grace Cross and Another v Diana Giesbrecht, High Court, Suva, Civil Action No:- HBC 540 of 2007**]
 - ❖ Paragraph (02) of Abdul Islam's affidavit states that he has been authorised by his principal Mr. Eparama Sailo to make and swear the affidavit. There is no prove that he was duly authorised by the plaintiff to swear the affidavit on her behalf.

- ❖ In paragraph (4) of the supporting affidavit, Mr. Abdul Islam has wrongly deposed that the plaintiff's action was struck out on 20.07.2018. What happened on 20/07/2018 was that the action was taken off the cause list.

Mr. Niven Padarath's affidavit - The preliminary point *in limine*

- (03) Mr. Niven Padarath's affidavit in support is annexed to the affidavit of Abdul Islam and marked as "AI-2". Counsel for the defendants submitted that Mr. Padarath's supporting affidavit cannot be admitted as evidence in the proceedings because;
- ❖ It is improper to exhibit an affidavit to an affidavit.
 - ❖ There is no proof that the plaintiff authorised Mr. Niven Padarath to swear an affidavit on her behalf.
- (04) Regrettably Counsel for the plaintiff did not respond to the preliminary objections raised by the defendants to the supporting affidavits of Mr. Abdul Islam and Mr. Niven Padarath. In my view, Counsel for the plaintiff should have responded.
- (05) At this stage, it is appropriate to point out that the plaintiff's action was not struck out on 20/07/2018. What happened on 20.07.2018 was that the plaintiff's action was taken off the cause list due to second consecutive non appearance by or on behalf of the plaintiff. The order sought in the plaintiff's summons filed on 18.04.2018 is "*That the matter which was taken off the cause list on the 20.07.2018 be reinstated to the cause list*". The plaintiff should have prayed in the summons for an Order to *restore the matter to the cause list*.

Abdul Islam is neither the litigant nor the competent person to swear an affidavit in this matter

As I understand the submissions, counsel for the defendant raised an objection that the supporting affidavit sworn by the deponent Abdul Islam on behalf of the plaintiff was insufficient on the ground that Abdul Islam, being a law clerk employed by the plaintiff's solicitors firm, lacked the competence to depose an affidavit.

Counsel for the defendant's argument missed the point. The fundamental point which this court is concerned to underline is that an affidavit deposed by a law clerk in the employment of a party's solicitor is sufficient in so far as the facts deposed to are within the personal knowledge of the law clerk swearing the affidavit and as long as the law clerk does not depose to matters of facts or law not within the law clerk's knowledge.

- (06) A similar objection that an Affidavit sworn by a law clerk was insufficient was raised in **Varani v Aanuka Island Resort Ltd [2005] FJHC 72 (6 February 2015)** where Ajmeer J at paragraph 12 stated:

*"12. The general rule and practice of the Court is not to allow an Affidavit deposed by a lawyer's clerk **dealing with substantive issues pertaining to the relevant litigation**. I have been referred to the case of **Repeni Sulimuana Momoivalu –v- Telecom (2006) (Unrep) Suva High Court Civil Action No.:527/1997s** where His Lordship, Mr Justice Winter,*

in respect of Affidavits deposed by the lawyers clerks had this to say at pages 3 & 4 of the judgment:-

“The habit of supporting or opposing applications to decide the rights of parties based on the information and belief of law clerks is an embarrassment to the clerk, her firm and the court file. Justice Madraiwiwi (as he then was) had this to say about the practice of using law clerks in this way:

“It is being made clear to Counsel that Affidavits by law clerks were not being entertained other than in non-contentious matters such as service of documents were not disputed...”

(Emphasis added)

- (07) It is clear from the affidavit of Mr. Abdul Islam that he was not deposing to contentious matters but was only deposing to reasons why the plaintiff’s Solicitor’s firm had failed to enter an appearance in court in this matter on two consecutive mention dates, which information was within Mr Islam’s knowledge as he is a litigation clerk in the plaintiff’s Solicitors’ firm and the matters deposed to were from the firm’s file which was in custody of Mr. Islam. The matters deposed to were non-contentious and the defendants via their answering affidavit sworn on 20/05/2019 did not contend or challenge (and in fact could not have contended or challenged) the facts relating to the internal conduct of this matter in the plaintiff’s Solicitors firm as such matters would not be within the defendants knowledge to enable them to sufficiently contend and challenge those facts. This is verified via paragraphs 11(1) and 12(1) of the Roveena Shainaz’s, the second defendant’s answering affidavit sworn on 20-05-2019 where the second defendant states that “*I do not have any personal knowledge of the reasons behind counsel’s failure to attend court on 20 July 2018.....*” The defendants have made no challenge to the reasons behind counsel’s failure to attend court and It is therefore clear that the deposition by Mr Abdul Islam were on non-contentious issues and accordingly, his affidavit can be regarded for the purpose of the exercise of the court’s discretion to reinstate or restore the plaintiff’s action to the cause list.
- (08) In Vatukoula Gold Mines Ltd v Anand [2010] FJHC 46 (16 February 2010) Master Tuilevuka (as he then was) at paragraph 7 and 8 stated:

“(7) Master Robinson in Chand v Hussein [2009] FJHC 286 (14 October 2009) warned of the inherent danger in such practice:

“I do not wish to delve into the possible implications of Solicitor’s clerks swearing affidavits on behalf of clients except as to say that personal knowledge of the facts by the deponent is a necessary ingredient”.

(8) Swamy’s Affidavit does not raise any contentious issue of fact. It is more like a legal submission and whatever little fact it deposes is merely to provide background – none of which is in dispute.”

(Emphasis added)

- (09) In the case of **Bromley v Gerish [1843] EngR 1165**, the Court of Common Pleas had before it an affidavit sworn by a clerk (who had the conduct of the defendant's case) in support of an application to set aside a default judgment. The Court required an Affidavit of merits and the defendant's Solicitor's clerk swore an Affidavit stating that he had the conduct and management of the case and that he was "appraised and believed" that the defendant had good grounds of defence upon the merits. The Court at paragraph 751 per Erskine J stated:

"The ordinary form of Affidavit is that the defendant has 'a good defence to this action on the merits.' Where it is made by the party the words, 'as he is advised and believes,' are added; where by the attorney or managing clerk to the attorney, the form is 'as he is informed and verily believes'."

(Emphasis added)

- (10) In the text **Forms of Practical Proceedings in the Court of Queens Bench, Common Pleas and Exchequer of Pleas (10th Edition) 1866** the learned author Thomas Chitty in relation to Affidavits filed in Support of applications to set aside default judgment at page 526 states:

"As to the setting aside the judgment, see 2 Pr. 12th ed. 986-987. The affidavit of merits must, in express terms, state that the defendant has 'a good defence to this action upon the merits.' (Lane v Isaacs, 3 Dowl 652). It may be made either by the defendant himself or his attorney or agent, or the clerk of the attorney who has the sole management of the cause, or some person who has had such a connection with the cause as acquaints him with its merits, and this must appear on the face of the Affidavit (Rowbotham v Dupree 5 Dowl 557; Morris v Hunt 1 Chit Rep 97)...An Affidavit by an agent thathe believed that the Defendant had a good defence to the action on the merits has been held sufficient (Schofield v Huggins 3 Dowl 427)....."

(Emphasis added)

- (11) It is therefore clear from the above-cited cases that the common law (as followed in our jurisdiction) accepts that law clerks do have the capacity to depose affidavits on behalf of litigants in interlocutory applications so far as the facts deposed to are within the personal knowledge of the law clerk swearing the affidavit. Hence there is **no stringent or blanket rule that an affidavit sworn by a law clerk is strictly inadmissible or defective on the face of it.** Accordingly, in absence of Mr. Islam's affidavit containing any statements, expressions or opinions on matters of law or arguments on the merits of the case, the Affidavit can be read by the court as the deponent had personal knowledge of the information contained in the client's (plaintiff's) file which was in the custody of the deponent's employer (solicitors for the plaintiff). Therefore, there is no merit in the point raised *in limine*.
- (12) Furthermore, Mr. Rattan erred in requiring that the plaintiff herself ought to have deposed an affidavit instead of Mr. Islam. It is significant to note that the details as to the internal conduct and carriage of the matter within the plaintiff's Solicitors firm could not as a matter of propriety be deposed to by the plaintiff as the plaintiff, merely being a client of the firm, would not have had knowledge of the operation of the firm or as to how the matter was administratively handled by the staff of the firm. Hence, only

a staff of the firm could depose to such matters as to why a failure to enter an appearance in the matter in court by the firm and which was rightfully done by Mr. Islam being a law clerk involved in this case, who had the conduct and management of the case and who had acquired the facts of the matter from the client's file. Therefore, there is no merit in the point raised *in limine*.

Authority to depose?

Counsel for the defendants contended that "*There is no prove that he was duly authorised by the plaintiff to swear the affidavit on her behalf*".

The challenge was apparently to the deponent Mr. Abdul Islam's authority to depose to the founding affidavit.

The paragraph six (6) of the supplementary affidavit of Rubina Maharaj, the plaintiff, sworn on 03-07-2019 states; "*That I authorised Abdul Islam to swear affidavit in a reinstatement application of the action to the cause list. (Annexed herein and marked "RM1" is a written authority confirming that I did authorised Abdul Islam to swear affidavit on my behalf in a reinstatement application.)*"

The plaintiff has subsequently authorised the supporting affidavit of Abdul Islam sworn on 17-04-2019. In my view the subsequent authority (Annexure RM 1) validates the supporting affidavit of Abdul Islam. I am satisfied that there is ostensible authority for Abdul Islam to depose the supporting affidavit on behalf of the plaintiff. There can be no uncertainty about the authority of deponent Mr. Islam to depose the founding affidavit. In my view, there is no merit in the point raised *in limine*.

Abdul Islam not conversant with what happened in court on 20-07-2018 ?

Counsel for the defendants argued that in Islam's affidavit in support he has stated that the action was struck out on 20-07-2018 and this averment is incorrect. The defendants argued that Abdul Islam is not conversant with what happened in court on 20-07-2018.

It should be emphasised that Abdul Islam lacked competence to depose as to what happened in court on 20-07-2018. What happened in court on 20-07-2018 is not an issue. The issue is the reason for non-appearance in court by the plaintiff's solicitors. Abdul Islam has deposed to reasons for non-appearance and that is sufficient for this court to exercise its discretion.

Mr. Niven Padarath's supporting affidavit

Counsel for the defendants raised an objection that Mr. Padarath's affidavit cannot be admitted as evidence in the proceedings because; (1) There is no proof that the plaintiff authorised Mr. Padarath to swear an affidavit on behalf of her (2) Mr. Padarath's affidavit is annexed to the affidavit of Abdul Islam and it is improper to exhibit an affidavit to an affidavit.

The defendants' objection that Mr. Padarath's affidavit has not been filed in its proper form is a highly technical objection. The court permits the affidavit to be read by virtue of Order 41, Rule 4 and 11 of the High Court Rules bearing in mind the court's

paramount function is to look at the overall interests of justice, and allow the matter to be properly disposed of on its merits.

The Plaintiffs' Summons for reinstatement

- (13) On the day of the hearing, Counsel for the defendants raised a preliminary objection from the bar table to the plaintiff's summons for reinstatement. Mr. Rattan submitted from the bar table; (Reference is made to page (4) of the transcript of hearing).

Now, we submitting this unto the reason that the Plaintiffs have not asked this particular Court, this honourable Court to set aside the Orders of 20th July, 2018. I have a Ruling, it is your Ruling my Lord, where you had stated; I just refer the Court's attention to page 3, my Lord, paragraph 8. This Ruling dealt with an application for reinstatement of a striking out of a Statement of Defence. The Court said that, for the reason which I have endeavoured to explain, my apologies, paragraph 8, I must confess that I am unaware of any Rule that would enable the Court to entertain an application for reinstatement of the Statement of Defence without a formal application to obtain an Order setting aside that Order, that struck out the Statement of Defence. The reason which I have endeavoured to explain and I have no hesitation and reaching the conclusion of the Defendants. That the Defendants Notice of Motion is defective. The Defendant is not entitled to be heard in support of its application for reinstatement of the Statement of Defence unless and until he asks that the first an essential step to setting aside the Order that struck out the Statement of Defence. Now, we understand that this matter was actually taken off the List and it was not struck out. Nevertheless, it was an Order of the Court. And that Order still stands todate. When my learned friends, they have a Summons seeking this honourable Court reinstate this matter, that's the words that they have used, to reinstate the matter back on the List, they must first ask the Court to actually set aside the Orders which you had made. Because if they don't do that, that Order still stands and you have stated my Lord, that the Court cannot entertain an application for reinstatement of the same defence without a formal application of setting aside. There's no formal application before this Court to actually set aside the Orders of 20th July, 2018 to begin with. So, we can't seem to my Lord, with all due respect jump the gun and go one to seek for this matter to be reinstated back on the List. That's actually the first argument, which and 1st and 2nd Defendants are raising, my Lord.

I did not hear one word against this from counsel for the plaintiff. I cannot accept that it would be in any way proper to entertain such a bald submission which effectively sprung on the plaintiff and the court at the last minute. I get the distinct impression that Mr. Rattan's argument was formulated and perhaps conceived as the proceedings developed.

- (14) Be that as it may, as I understand Mr. Rattan's submission, his argument is that the plaintiff is not entitled to be heard in support of her application for reinstatement until she takes the first step towards setting aside the Order that took the matter off the cause list. Counsel relied on the decision of this court in "**Michael Fench v Moape Nagata**" **Civil Action No:- HBC 246 of 2010, Date of decision 18.12.2015.**

- (15) The case referred to by counsel for the defendants which I do not find it necessary to examine in detail, differed in material respects from the facts of the present case. It is important to appreciate the distinction between reinstating a pleading which was struck out and restoring an action to the cause list which was taken off the cause list. Thus, I could not see how the case of 'Michael French' (supra) could have been any assistance to the defendants. In the case of "Michael French" the action was terminated by striking out. In the present case, the action was not struck out. What happened was that the action was taken off the cause list. Thus, the action is still on foot. The primary issue before this Court is whether the Court should exercise its discretion to restore the matter back to the cause list. The defendant's submission that "to restore the matter to the cause list, first the plaintiff must ask the Court to set aside the "taking off the matter from the cause list" is both surprising and unacceptable to me. That way of putting the matter, tends, with respect, to look at the issue from the wrong end. I dismiss the defendant's objections to the plaintiff's summons for reinstatement.

The principles to be applied

- (16) The power to reinstate an action is discretionary. The principles to be applied to the exercise of the judicial discretion to reinstate an action are;
- (A) Adequate reason must be given for non-appearance.
 - (B) The application to reinstate must be made promptly.
 - (C) Prejudice.

Reason for non-appearance

- (17) In this case, the action was taken off the cause list on 20.07.2018 due to second consecutive non-appearance by or on behalf of the plaintiff. There was no appearance for or on behalf of the plaintiff on 16.07.2018 and 20.07.2018.
- (18) As to the reason for non-appearance in court on 16-07-2018, Mr. Abdul Islam, states this in paragraph (10) of his supporting affidavit sworn on 17-04-2019;

(10) There was non-appearance by the plaintiff on 16-07-2018 because the solicitors who we instructed, Messers Iqbal Khan & Associates were engaged in the Lautoka Magistrates Court (annexed herein and marked AI 2 is a copy of the instruction sheet.)

As to the reason for non-appearance in court on 20-07-2018, the deponent Mr. Niven Padarath states this in his affidavit sworn on 23-08-2018;

10. That this matter was listed for mention on 20th July, 2018.

11. I was instructed by Messers K LAW Chambers & Partners to appear for this matter as I had a matter to attend before Justice Nanayakarra.

12. That I was travelling from Ba on Friday morning and encountered traffic near the Pacific Service Station when entering Lautoka was struck for about 15 minutes.

13. I arrived at about 9.50am and was informed that the matter was called and because there was no appearance the matter was taken off the cause list.

14. I sincerely apologise to this Court for arriving late. However, the circumstance was beyond control.

15. My instruction was to seek for a hearing dated on behalf of the Plaintiff.

Counsel for the defendants submitted that;

- * there is no good and a reasonable excuse for the non-appearance.
- * It is up to plaintiff to pursue her claim. The plaintiff cannot shelter behind the failure of her Counsel. The defendants relied on the following decisions;

(i) **Nemia Codro v NBF Asset Management Bank, High Court Suva, Civil Action No:- 337 of 2001 (05.04.2005)**

(ii) **Tebara Transport Limited v Ram Narayan, High Court Suva, Civil Action No:- HBC 0550 of 1996 (14.08.2003)**

(19) The two cases referred to, which I do not find it necessary to examine in detail, differed in material respects from the facts of the present case. They are decided on an entirely different footing.

In "**Tebara**" (supra), the court struck out the action on the day the action was fixed for hearing and neither plaintiff nor its counsel appeared. The court refused to reinstate the action because the reinstatement of the action would serve no purpose as it would result in a stay in any event due to the receiving order against the defendant.

That is not the case here. That is not the situation in the case before me.

In the present case, the plaintiff's claim was not struck out. The plaintiff's action was not terminated. What happened on 20.07.2018 was that the plaintiff's action was taken off the cause list. It is important to appreciate the distinction between reinstating an action which was struck out on the day the action was fixed for hearing and restoring or reinstating an action to the cause list which was taken off the cause list on a mention date. Besides, in **Tebara** (supra) the court refused to reinstate the action because the reinstatement of the action would serve no purpose as it would result in a stay any event due to the receiving order against the defendant. Thus, I could not see how the decision in **Tebara** (supra) could have been of any assistance to the defendants. The case before me stands on an entirely different footing.

- (20) The plaintiff's solicitor has accepted the responsibility for their failure to attend court on 16.07.2018 and 20.07.2018. However, even there is room for criticism for failure to attend court, in my view the failure do not amount to any lack of intention to proceed. Indeed there are **no** significant periods of time in which the prosecution of the action appears to have stagnated. It is draconian approach to visit the sins of the solicitors on the plaintiff who would appear not having a sophisticated background and refuse the plaintiff the opportunity of continuing the action which was not terminated or struck out. I do not consider that the doors of the court should, at this stage, be closed to her by visiting the sins of the solicitors on her. Our courts are open to all and it is only in very exceptional circumstances that the doors of the court will be closed upon anyone who desires to prosecute an action. A refusal will have a devastating effect upon the plaintiff's right of access to justice, to have her case decided in a fair public hearing before a court. On the facts of this case, **it would not be** unreasonable to give the plaintiff an indulgence. There will be cases in which justice will be better served by allowing the consequences of the negligence of the solicitors to fall on their own heads rather than by reinstating or restoring the matter to the cause list. **This is not such a case.** The plaintiff's solicitors in the present case frankly admitted they were at fault. It is important to remember that the plaintiff's action was never struck out or never terminated on 20.07.2018. Thus, some latitude or indulgence should be extended to the plaintiff.

Length of the delay

- (21) The action was taken off the cause list on 20/7/2018. On 25/09/2018, the plaintiff filed the first application for reinstatement. Turning to the period of the delay, it is, at least approximately, 65 days after the Order was made on 20/07/2018.
- (22) The second application for reinstatement [which is the present application] was filed on 18/04/2019, which is 13 days after this Court delivered the ruling granting the plaintiff leave to cure the defects in the proceedings.

As to the reasons for the delay in filing the first application for reinstatement, the plaintiff states this in her supplementary affidavit sworn on 30/07/2019;

(11) That my solicitor received duly sworn affidavit from Mr. Niven Padarath on or about 25th September 2018, even though it was sworn on 23rd august 2018, and the reinstatement application was duly filed upon receiving affidavit from Mr. Padarath and which was heard on 31st January 2019, after complying with all the directions of this Honourable Court . "

As I see it, the reason for the delay in filing the application for reinstatement was the delay in obtaining the affidavit of Mr. Padarath. However, even if there is room for criticism of an apparent delay on the part of Mr.Padarath in forwarding the affidavit, in my view the delays do not amount to an abuse of court process.

- (23) Counsel for the defendants argued;
- (i) The application for reinstatement was not made promptly/within a reasonable time.
 - (ii) The delay is inordinate.

- (iii) The delay of 67 days cannot be described as reasonable.
- (iv) The plaintiff has not given any explanation for the delay in filing the application for reinstatement.

(24) Counsel for the defendants relied on the following decisions;

- ❖ **Tebara Transport Limited** (supra)
- ❖ **Rajendra Deo Prasad**

-v-

**Land Transport Authority and Others,
Suva High Court,
Misc. Action:- HBA 29 of 2015
(Decision 26/02/2016)**

In my view, the delay of 65 days in filing the application for reinstatement is not a significant period of delay. It is not materially longer than the time which was usually regarded by the courts as an acceptable period of time.

The defendants heavily relied on the High court decision in **Rajendra Deo Prasad** (supra) in support of their argument. In **Rajendra Deo Prasad** (supra), the applicant sought an extension of time for appeal against the decision of the Land Transport Tribunal. The delay in filing the application was two months. **The applicant in that case only stated that he filed a wrong application and tries to justify it by stating that because of that the respondents were aware of his intention. The court held that this was far from giving any explanation as to the delay.**

That is not the case here. Indeed, that is not the situation here. In the case before me the plaintiff's instructing solicitor Mr. Padarath frankly admitted that he arrived late to court and sincerely apologized to court for his late arrival. For, to my mind it is axiomatic that the reason for non-appearance does **not** lack candour. The plaintiff deposed in her affidavit that the fault in her solicitors not being able to present in court lies mainly on the shoulders of Messers Iqbal Khan and Associates and Mr. Niven Padarath. 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. What constitutes inordinate delay?

In **Owen Clive Potter v Turtle Airways Ltd**, Civil Appeal No. 49/1992, the Court of Appeal held;

“(Inordinate)...means so long that proper justice may not be able to be done between the parties. When it is analysed, it seems to mean that the delay has made it more likely than not that the hearing and/or the result will be so unfair vis a vis the Defendant as to indicate that the court was unable to carry out its duty to do justice between the parties.”

And at page 4, their Lordships stated:

“Inexcusable means that there is some blame, some wrongful conduct, some conduct deserving of opprobrium as well as passage of time. It

simply allows the Judge to put into the scales the Plaintiff's conduct or reasons for not proceeding, as well as the lapse of time and the prejudice that would result to him from denying him opportunity from pursuing his action or perhaps any action against the defendant."

In **Tabeta v Hetherington** (1983) The Times, 15-12-1983, the court observed;

"Inordinate delay means a delay which is materially longer than the time which is usually regarded by the courts and the profession as an acceptable period."

- (25) Applying those principles to the case before me and carrying those principles to their logical conclusion, I have no hesitation in concluding that the delay of 65 days in this case cannot be described as inordinate. In **Norwich and Peterborough Building Society v Steed (1991) (1) WLR 449**, the delay was 6 months. Though it was felt prejudice would occur to the respondent, leave was granted. Every case turns on its own special facts, though the principles for approaching such applications remain the same and all must be weighed.

Prejudice

- (26) The Court of Appeal in "**New India Assurance Company Ltd v Rajesh K.Singh and Another**, Civil Appeal No:- ABU 0031/1996 defined the term 'prejudice' as follows;

"Prejudice can be of two kinds. It can be either specific that is arising from particular event that may or may not occur during the relevant period or general prejudice that is implied from the extent of delay".

- (27) The defendants submitted; (reference is made to paragraph 8.01, 8.02, 8.03 and 8.04 of the defendants written submissions dated 26/06/2019);

8.01 *This claim was filed on 15 July 2015.*

8.02 *The defendants are being prejudiced by the inordinate delay in the prosecution of the claim and having the stress of the claim hanging over their head for over 3 ½ years. The plaintiff is also incurring substantial costs and agency fees in defending these proceedings which is being unnecessarily prolonged due to the laxity and/or in actions of the plaintiff's counsel and/or its agents.*

8.03 *This is the second application for reinstatement filed by the plaintiff which again is not in its proper form for the reasons aforementioned. Despite the court giving the plaintiff a second chance to cure the defects and regularise the application the plaintiff has failed to do so.*

8.04 *There is loss of the parties time as well as a total waste of Court's time.*

(28) Counsel for the defendants submitted that the defendants would be prejudiced by the reinstatement. As I understand his submissions, Counsel did not rely on **specific prejudice** resulting from the non-availability of material witnesses.

(29) I now turn to consider whether prejudice should be inferred from the extent of the delay. This is a case of motor traffic accident. By writ issued on 15/06/2015, the plaintiff claimed damages from the defendants under the **Law Reforms (Miscellaneous Provisions) Death and Interest Act [Cap 28]** and **Compensation to Relatives Act [Cap 29]** for the death of her husband, as a result of an accident which occurred on 30/04/2014 when the vehicle driven by the first defendant collided with motor vehicle No:- FH 400 at Lomawi, Queens Road, Sigatoka. The deceased was a passenger travelling to Nadi in the vehicle registration No:- LM 246 driven by the first defendant. The second defendant was the owner of the vehicle registration No:- LM 246.

(30) The claim was filed on 15/06/2015. The plaintiff issued the Writ 14 months after the accident. For the next 3 ½ years various steps were taken including the Summons for Directions, the defendants issuing three third party notices and the listing for hearing. However, given that (5) years had already elapsed since the accident, it seems that progress **was not** desultory. The defendants have not shown that the plaintiff's non-appearance on 16/07/2018 and 20/07/2018, since the issuance of the Writ on 15/06/2015 (the Post-Writ delay) will either make a fair trial, impossible or prejudice the defendant. The court should not wear blinkers. I cannot shut my eyes to the fact that since the issuance of the Writ, the defendants have defaulted appearance on nine (09) occasions.

❖ Since the issuance of the Writ on 15/06/2015, the plaintiff defaulted appearance only on two occasions, i.e. 16.07.2018 and 20.07.2018. **But since the issuance of the Writ, there was no appearances for or on behalf of the defendants on the following dates:**

- (1) 11.05.2016
- (2) 11.07.2016
- (3) 23.10.2017
- (4) 16.01.2018
- (5) 16.02.2018
- (6) 16.05.2018
- (7) 12.07.2018
- (8) 16.07.2018
- (9) 20.07.2018

} three consecutive non appearances by the defendants.

❖ Is this the conduct of the defendants opposing the plaintiff's application for reinstatement? The conduct of the defendants is an important element for consideration. Isn't it the defendant who slept on the matter and caused the post-writ delay? Both the plaintiff and the defendants did not appear in Court on 16.07.2018 and 20.07.2018. I confess to a feeling of some bewilderment and some indignation at the defendants argument that the plaintiff should adduce reasons for non-appearance on 16.07.2018 and 20.07.2018. It is hard to believe that the court should be powerless to prevent such a manifest injustice. At least the plaintiff made an attempt to explain the reason for non-appearance. The defendant did not. I am bound to say that this is most unsatisfactory. As I can

tell from the record, the defendants have defaulted appearance on nine (9) occasions including three consecutive non –appearances.

- ❖ Assessing the facts relating to the delay in defending the proceedings, it is evident that indeed there are significant periods of time in which the defending the proceedings appears to have stagnated. However, the question to be asked is whether these periods of time are indicative either of vexatious delaying tactics on the part of the defendants , or of a dilatoriness that amounts to an abuse of the court process , or of a level of disinterest on the part of the defendants which amounts to an abandonment of their defence.

Thus, the defendants cannot argue that serious prejudice has been caused to them by the plaintiff's non-appearance on two occasions since the issuance of the Writ. There is no prejudice to the defendants nor did the defendants claim that it would suffer any irreparable injury if the action is reinstated. Indeed, the defendants made no effort to excuse their delay. The defendants gave no explanation or reason why they defaulted appearance on nine (09) occasions since the issuance of the Writ. This does not leave a good impression. The fundamental question is whether the defendants are serious about defending the proceedings.

In the circumstances, the reinstatement would not be prejudicial to the defendants.

[F] CONCLUSION


Fundamentally, the Courts' are required to determine cases on merits rather than dismissing them summarily on procedural grounds.

It is fundamental principle of any civilized legal system that all parties in a case are entitled to the opportunity to have their case dealt with at a hearing at which they or their representative are present and heard.

[G] ORDERS

- (i) The plaintiff's application to reinstate the action is allowed.
- (ii) The plaintiff's action is reinstated (restored) to the cause list.
- (iii) There will be no order as to costs.




04/10/2019
Jude Nanayakkara
[Judge]

At Lautoka,
Friday, 04th October, 2019