IN THE HIGH COURT OF FIJI
AT LAUTOKA

CIVIL APPELLATE JURISDICTION

Civil Appeal No. HBA 18 of 2018

(On an Appeal from the Ruling of the Magistrates Court of Fiji at Tavua Civil Action No.2 of 2015 dated 21st May 2019]

BETWEEN : **ANAND PRASAD** of Maqere, Tavua, Fiji, Farm Labourer.

APPELLANT

AND : **ARITESH**, Student.

FIRST RESPONDENT

AND : **SHARMAS RENTAL CARS** a business registered under Registration of Business Names Act Cap 249 having its office at Sharma Arcade, Main Street, Nadi Town, Fiji.

SECOND RESPONDENT

Appearances : **(Ms.) Kritishna Chang Maharaj for the appellant**
: **First Respondent is absent and unrepresented**
: **(Ms.) Saleshni Jyotika Devi for the second respondent**

Hearing : **Monday, 09th December, 2019.**

Ruling : **Tuesday, 03rd March, 2020.**

RULING

[A] INTRODUCTION

(01) The matter before me stems from the appellant's notice of motion filed on 10th September, 2019 seeking the grant of the following orders;

(01) *That the above appeal was struck out on the 26th July, 2019 due to the non-appearance of Counsel for the Appellant be re-instated on the grounds contained in the Affidavit of Priyanka Nirmita Roy Prasad sworn and filed herein and in the inherent jurisdiction of this Honourable Court.*

(02) *Any other Orders the Court deems just.*

(02) The application is made pursuant to Order 32, rule 5(4) of the High Court Rules 1988 and the inherent jurisdiction of the High Court.

(03) The first respondent did not take part in the proceedings. The application for re-instatement is vigorously opposed by the second respondent.

(04) The parties have filed three (03) affidavits for consideration.

(i) The affidavit in support of (Ms.) Priyanka Nirmita Roy Prasad [**Ms. Prasad**], the Legal Executive in the employment of Mishra Prakash & Associates, solicitors for the appellant, sworn on 28-08-2019, filed on 10-09-2019, on behalf of the appellant.

(ii) The affidavit in response of Mr Manoj Kumar Rai, [**Mr Rai**], the Litigation Clerk with Messrs Faiz Khan Lawyers, the solicitors for the second respondent, sworn on 08-11-2019, filed on 18-11-2019, on behalf of the second respondent.

(iii) The affidavit in reply of (Ms.) Priyanka Nirmita Roy Prasad, sworn on 28-11-2019, filed on 29-11-2019 on behalf of the appellant.

[B] BACKGROUND

(i) On the 07th July, 2015, the appellant issued a writ and a statement of claim seeking damages and interest against the respondents for personal injuries sustained by him in an accident which occurred on 12-07-2012, when the rental car registration number LR - 1063 driven by the first respondent collided with a farm tractor driven by the appellant (Registration No- E 9102) at Kings Road, Maqere, Tavua.

The appellant claimed that the accident was caused by the negligence of the first respondent.

The appellant also alleged that the first respondent drove the rental car registration no-LR 1063 with the express and/or implied consent and authority of the second respondent who is the owner of the rental car. The second respondent was joined on the basis of vicarious liability.

(ii) **It is undisputed that at the material time the appellant was driving the farm tractor on a public road without a license and he was found guilty of that offence after trial and he was fined by the Magistrate at Tavua. [Traffic Case No. 61-13].**

(iii) When the matter was set for hearing at Tavua Magistrate Court on 21st May, 2019, the plaintiff's/appellant's solicitors failed to appear before the Magistrate and made an oral application for adjournment of hearing through their agent. The appellant says his counsel had written a letter to the Tavua Magistrate's Court on 17-05-2019 informing the court that they will be making an application for adjournment of the trial date because of their engagement in two hearings at the Fiji Court of Appeal. **However, I note with concern that the hearing date in the Magistrates Court was set in the presence of both counsel on the last occasion.**

(iv) On the date of the trial, an agent of the appellant's solicitors made an application for adjournment of the trial. (Ms.) Devi on instructions of the second respondent objected to the said application of the appellant/plaintiff on the basis that they had prepared for the hearing and had travelled to Tavua Magistrate Court along with an expert witness from Suva and a representative of second respondent from Nadi. (Ms.) Devi has also informed the Resident Magistrate that she was not informed by the appellant's solicitors of their intended application for adjournment.

(v) (Ms) Devi also informed court that the second defendant/second respondent had incurred significant litigation costs since 2015 when the matter was instituted at Tavua Magistrate Court in 2015.

(vi) Ms. Devi had further informed the Magistrate that the matter was set for hearing on 5th December, 2017 but was unfortunately vacated. The matter was then set for hearing on 21st May, 2019 after almost two further prolonged years. If the hearing was to be vacated it would have been unlikely to be re-fixed until year 2020.

(vii) **The Magistrate declined the application of the plaintiff/appellant and dismissed the claim of the plaintiff/appellant with costs to be taxed.**

(viii) When delivering his Ruling the Magistrate had highlighted that the second respondent was taken by surprise on the plaintiff's/appellant's application for an adjournment. The learned Magistrate has also stated in his Ruling that " ***It is very likely that if the trial is vacated today the case will be heard for trial next year."***

(ix) Being aggrieved by the order, the appellant filed its notice of intention to appeal on 24th May, 2019 at Tavua Magistrates Court.

(x) The appeal was first called before the High Court on 19-07-2019 and due to non-appearance of the appellant and the first respondent, it was adjourned to 26-07-2019.

(xi) On 26-07-2019, again there was no appearance for the appellant and the first respondent. The court struck out the appeal due to second consecutive non-appearance by the appellant.

[C] The Affidavit in Support of the application for re-instatement

The affidavit sworn by (Ms.) Prasad is substantially as follows;

1. *THAT I am a legal Executive in the employment of Mishra Prakash & Associates, Solicitors for the Plaintiff and I have been duly authorized by the plaintiff to make this affidavit on his behalf.*

2. *THAT I depose to the facts as within my own knowledge and that acquired by me in the course of my duties and where applicable from the documents in the plaintiff's file save as expect where stated to be on information and belief and where so stated, I believe that same to be true.*

3. *THAT I make this affidavit in support of the appellant's application for reinstatement of this appeal.*

4. *THAT the Notice of Intention to Appeal and the Grounds of Appeal was filed by our office on 24th May, 2019 at the Tavua Magistrates Court.*

5. *THAT this Appeal is from the Ruling of the Magistrates Court of Fiji at Tavua, Civil Action No. 2 of 2015 dated 21st May, 2019.*

6. *THAT I called Tavua Court Registry on 19th August, 2019 to request on the progress of this appeal and to check if the Record was ready. I was then advised by the Court Clerk at the Tavua Court Registry that this filed had been transferred to Lautoka High Court.*

7. *THAT I called Lautoka High Court Civil Registry on 19th August, 2019 and was advised by the Court Officer namely Ms. Madhvi Gounder that this Appeal had been struck out on 26th July, 2019 due to non-appearance of the Appellant's Counsel.*

8. *THAT I was further advised by the same Court Officer that this Appeal was first call before the High Court on 19th July, 2019 and due to non-appearance of the Appellant and the 1st Defendant, it was adjourned to 26th July, 2019.*

9. *THAT, the registry further informed me that as per the Court file notes, a NOAH was put in the Mishra Prakash & Associates folder at the Lautoka Court Civil Registry on 5th July, 2019 and a phone call was also made to the Appellant's solicitors informing them of the next Court date on the same day.*

10. *THAT I have conducted diligent searches of our office records and confirm that we did not uplift and/or receive any NOAH or any phone calls from the Lautoka High Court Registry regarding the above appeal.*

11. *THAT I have also made enquires with our Lautoka City authorized agents namely Ravneet Charan Lawyers and Gordon & Co Lawyers and have been confirmed that they have not received NOAH or phone calls on our behalf.*

12. *THAT I believe the Appellant has a case on merits and should be given a chance to have this Appeal heard before this Honourable Court.*

13. *THAT the 1st and 2nd Respondents will not be prejudiced if this appeal is reinstated.*

[D]. The Affidavit in Response

The affidavit in response of Mr. Rai is substantially as follows;

1. *I am employed as a litigation clerk with Messrs Faiz Khan Lawyers Barristers and Solicitors of Lautoka, the Solicitors acting for the Second Respondent and I am duly authorized to swear this Affidavit on its behalf.*

2. *I make this Affidavit from my own personal knowledge of the Court proceedings to date and from information obtained from perusing the relevant file in our office. In any event, the matters so sworn in this Affidavit are within my knowledge and are of an administrative nature except where stated to be information and belief and whereso stated, I verily believe this to be true.*

3. *I have read and understood the Affidavit of Priyanka Nirmita Roy Prasad sworn on 28th August, 2019 and filed herein on the 10th September, 2019 (herein referred to as "the said Affidavit").*

4. *As to paragraphs 4 and 5 of the said Affidavit, I agree that the Appellant's action against the Respondents was struck out by the Honourable Magistrate on 21st May, 2019. This was when the matter was set for hearing at Tavua Magistrate Court in Civil Action Number 2 of 2015. Copy of the Record of the Magistrate's Court at Tavua is attached herewith and marked as "MKR1".*

5. *The Plaintiff/Appellant on 7th July, 2015 had filed a personal injury claim arising out of a motor vehicle accident against the Defendants/Respondents alleging that the 2nd Defendant/Respondent as the owner of the rental car registration number LR1063 was liable for damages for the fault on the part of the 1st Defendant/ Respondent.*

6. *The Plaintiff/Appellant was prosecuted and convicted by Tavua Magistrate Court vide Traffic Case number 61 of 2013 for driving a tractor without being holder of a valid driving licence on a public road arising out of the same incident as above.*

7. *When the matter was set for Hearing at Tavua Magistrate Court on 21st May, 2019, the Plaintiffs/Appellants solicitors failed to appear before the Magistrate and made an oral application for adjournment of hearing through their agent.*

8. *Our Ms Devi on instructions of the Second Respondent objected to the said application of the Appellant/Plaintiff on the basis that they had prepared for the hearing and had travelled to Tavua Magistrate Court along with an expert witness from Suva and a representative of 2nd Defendant from Nadi.*

9. *That the 2nd Defendant/Respondent had incurred significant litigation costs since 2015 when the matter was instituted at Tavua Magistrate Court.*

10. *That our Ms Devi had further informed the Magistrate Mr. Fotofili that the matter was set for hearing on 5th December, 2017 but was unfortunately vacated. The matter was then set for Hearing on 21st May, 2019 after almost two further prolong years. If the hearing was to be vacated it would have been unlikely to be re-fixed until year 2020.*

11. *The matter was then struck out and the Appellant proceeded to file his Notice and Grounds of Appeal at the Lautoka High Court.*

12. *The Grounds of Appeal of the Appellant dated 14th June, 2019 was struck out by Your Lordship Justice Nanayakkara of Lautoka High Court on 26th July, 2019 due to non-appearance of the Appellant on two call over dates i.e. 19th July and 26th July, 2019.*

13. *That Messrs Faiaz Khan Lawyers as solicitors acting for the 2nd Respondent were informed of the call over date of 19th July, 2019 by a Notice issued by the Registry on 5th July, 2019.*

14. *That as to paragraphs 6, 7, 8, 9, 10 and 11 of the said Affidavit, I am unaware of the contents and therefore cannot comment on these.*

15. *However for the purposes of completeness I will respond to the said paragraphs from my understanding and through advise on procedures from Messrs Faiaz Khan Lawyers within the scope of my employment which I verily believe to be true that:*

    i. *The deponent has failed to state the exact dates the Appellant's Solicitors had made its searches and in what forms were these searches conducted with their city agents.*

    ii. *Considering that the Appeal was struck out we note that there is no evidence of any formal letters written by the Appellant to the court registry or its agents.*

iii. *In the Grounds of Appeal filed on 14th June, 2019 the Appellant or his Solicitors have failed to state the address and name of their city agents in Lautoka.*

iv. *The Appellant has made lame excuses without providing any supporting evidence.*

v. *It is also incumbent on the Appellant's solicitor's office to regularly check their folders kept at the High Court Registry for any documents or Notices issued by the Registry.*

16. *I verily believe for the same to be true that due to the Appellant's delays in proceeding with his Appeal, the 2nd Respondent had to again bear further unnecessary litigation cost. This is after almost 5 years of litigation costs in Tavua Magistrates' Court that has caused significant prejudice and burden to the Respondents.*

17. *That as to paragraph 12 of the said Affidavit, I verily believe to be true that the Appellant's Grounds of Appeal are without merits and do not have any likelihood of success.*

18. *As instructed and the court record will reveal that Messrs Faiz Khan Lawyers had been promptly appearing in the Tavua Magistrate Court mater (Civil Action No 2 of 2015) and for appeal matter at Lautoka High Court.*

19. *On the other hand the Appellant has been habitually negligent in appearing and prosecuting its claim or appeal. The Appellant has failed to take any steps to prosecute his claim either at Tavua Magistrates' Court or his appeal at Lautoka High Court in a timely manner.*

20. *Further as to paragraph 13 of the said Affidavit the 2nd Respondent will be highly prejudiced if the Appellant's application for reinstatement is allowed for aforementioned reasons.*

21. *For aforementioned reasons I humbly pray that the Appellant's Notice of Motion dated 28th August, 2019 be dismissed with cost on a solicitor client indemnity basis.*

[E] The Affidavit in Reply

The Affidavit in reply of (Ms.) Prasad is substantially as follows;

1. *THAT I am a legal Executive in the employment of Mishra Prakash & Associates, Solicitors for the Appellant and I have been duly authorized by the Appellant to make this affidavit on his behalf.*

2. *THAT I depose to the facts as within my own knowledge and that acquired by me in the course of my duties and where applicable from the documents in the Appellant's file save as expect where stated to be on information and belief and where so stated, I believe that same to be true.*

3. *THAT I have read and understood the contents of the Affidavit of Manoj Kumar Rai in response sworn on 8th November, 2019 and filed on 18th November, 2019 ("Second Respondent's Affidavit") and respond to it as follows.*

4. *THAT as to paragraph 7 & 8 of the Second Respondents Affidavit, the Appellant says as follows:*

    a) *The Plaintiff's Counsel had written a letter to the Tavua Magistrates Court on 17th May, 2019 advising the Court of their engagement in two hearings at the Fiji Court of Appeal and made an application for adjournment of the Hearing which was listed on 21st May, 2019. A copy of the letter dated 17th May, 2019 is attached herewith and marked with letter "PNRP1".*

    b) *The Plaintiff's solicitors had instructed their agent, Howell & Associates to appear on their behalf on the Hearing date at Tavua Magistrates Court.*

    c) *The Second Defendant's Counsel objected to the Application for adjournment on the day of Hearing and the matter was then struck out.*

5. *THAT as to paragraph 9 of the Second Respondents Affidavit, the Appellant is not aware of the content.*

6. *THAT as to paragraphs 13 of the Second Respondent's Affidavit, the Plaintiff is not aware of the content.*

7. *THAT as to paragraph 15 of the Second Respondent's Affidavit, I repeat the paragraphs 8 – 13 of my previous Affidavit filed on 10th September, 2019 and state that diligent searches and enquiries were conducted by our office with our city agents, Gordon & Co Lawyers and Ravneet Charan Lawyers in Lautoka on 20th August, 2019 and were advised that they had not received any NOAH or phone calls on our behalf.*

8. *THAT as to paragraph 16 of the Second Respondent's Affidavit, the Appellant states that there was no delays with proceeding with the Appeal on the Appellants behalf as the Notice of Call over was not received by our office and we were not aware of the Call over date.*

9. *THAT the Appellant denies paragraph 17 of the Second Respondent's Affidavit and states that the Appellant's Grounds of Appeal has merits and high chance of success on the grounds contained therein.*

10. *THAT the Appellant denies paragraph 19, 20 and 21 of the Second Respondent's Affidavit and states as follows:*

a) *The Appellant has not neglected on the proceeding of its claim and/or Appeal and has always complied to the directions of Court.*

b) *I believe the Appellant has a case on merits and should be given a chance to have this Appeal heard before this Honourable Court. The Appellant ought to be allowed a chance to proceed with this Appeal due to the nature of the claim at the Tavua Magistrates Court.*

c) *That the 2nd Respondent will not be prejudiced if the Appellants application for reinstatement is allowed.*

[F] CONSIDERATION OF THE APPLICATION FOR RE-INSTATEMENT

(01) The Court's power to re-instate an action is discretionary. The principles to be applied to the exercise of the judicial discretion to re-instate an action are;

(A) Adequate reason must be given for non-appearance.

(B) The application to re-instate must be made promptly.

(C) Prejudice.

(02) This appeal was first called before the High Court on 19-07-2019 and due to the non-appearance of the appellant and the first respondent, it was adjourned for 26-07-2019.

(03) As per the High Court file notes, a NOAH was issued by the High Court on 05-07-2019 informing the appellant that the appeal will be called on 19-07-2019 in the High Court of Lautoka.

(04) The High Court file notes also reveal that on 05-07-2019, NOAH was put in the Mishra Prakash & Associates folder at the Lautoka High Court Civil Registry and a phone call was also made to the appellant's solicitors informing them of the Court date regarding the appeal.

(05) The Court struck out the appeal on 26-07-2019 due to the second consecutive non-appearance of the appellant on two call over dates, i.e., 19th July and 26th July, 2019.

THE LENGTH OF THE DELAY

(06) The court struck out the appeal on 26.07.2019. The appellant's notice of motion for re-installment of the appeal was filed on 10th September 2019. Turning to the period of

delay, it is, at least one month (01) and fifteen (15) days, which is on any view of it is substantial.

(07) In the affidavit in support of the notice of motion for re-instatement, (Ms) Prasad states at paragraph seven (07) that on the 19th August 2019 she was informed by the High Court of Lautoka Civil Registry that the appeal was struck out on the 26th July 2019.

(08) The important point which concerns me is, if she was so informed, then why did the appellant wait till 10th September 2019 to file an application for re-instatement? The appellant has not adverted to this question in the supporting affidavit.

THE REASON FOR NON-APPEARANCE

(09) Turning to the second issue, that is the reason for non-appearance in the High Court on the 19th July 2019 and 26th July 2019, the reasons for it are put forward in the affidavit of (Ms) Prasad sworn in support of this application on 28th August, 2019. She says;

(4) THAT the Notice of Intention to Appeal and the Grounds of Appeal was filed by our office on 24th May, 2019 at the Tavua Magistrates Court.

(5) THAT this Appeal is from the Ruling of the Magistrates Court of Fiji at Tavua, Civil Action No. 2 of 2015 dated 21st May, 2019.

(6) THAT I called Tavua Court Registry on 19th August, 2019 to request on the progress of this appeal and to check if the Record was ready. I was then advised by the Court Clerk at the Tavua Court Registry that this filed had been transferred to Lautoka High Court.

(7) THAT I called Lautoka High Court Civil Registry on 19th August, 2019 and was advised by the Court Officer namely Ms. Madhvi Gounder that this Appeal had been struck out on 26th July, 2019 due to non-appearance of the Appellant's Counsel.

(8) THAT I was further advised by the same Court Officer that this Appeal was first call before the High Court on 19th July, 2019 and due to non-appearance of the Appellant and the 1st Defendant, it was adjourned to 26th July, 2019.

(9) THAT, the registry further informed me that as per the Court file notes, a NOAH was put in the Mishra Prakash & Associates folder at the Lautoka Court Civil Registry on 5th July, 2019 and a phone call was also made to the Appellant's solicitors informing them of the next Court date on the same day.

(10) THAT I have conducted diligent searches of our office records and confirm that we did not uplift and/or receive any NOAH or any phone calls from the Lautoka High Court Registry regarding the above appeal.

(11) *THAT I have also made enquires with our Lautoka City authorized agents namely Ravneet Charan Lawyers and Gordon & Co Lawyers and have been confirmed that they have not received NOAH or phone calls on our behalf.*

(10) I confess to a feeling of some bewilderment and some indignation at (Ms) Prasad's explanation as to the reasons for non-appearance in the High Court.

(11) As per the High Court file notes, a NOAH was put in the Mishra Prakash & Associate folder at the Lautoka High Court Civil Registry on 05.07.2019. A phone call was also made by the Lautoka High Court Civil Registry on 05.07.2019 to the appellant's solicitors informing them of the next court date and that the NOAH was put in their folder.

(12) It is a complete misstatement of the position to say that, "*We did not uplift and / or receive any NOAH or any phone calls from the Lautoka High Court Registry regarding the appeal.*"

It is incumbent on the appellant's solicitor's office to regularly check their folders kept at the High Court Registry for any documents or notices issued by the registry. This is a clear case of negligence of the appellant's solicitors. This cannot be condoned.

(13) In the grounds of appeal filed on 14.06.2019, and also in the notice of motion filed on 10.09.2019, the name and address of the city agent has not been mentioned by Mishra Prakash & Associates. Therefore, it is also a complete misstatement of the position to say that "*I have also made enquiries with our Lautoka city authorized agents namely Ravneet Charan Lawyers and Gordon & Co. Lawyers and have been confirmed that they have not received any NOAH or phone calls on our behalf.*"

(14) I am bound to say that the reason for non-appearance is most unsatisfactory. It would be unreasonable to give the appellant an indulgence. The appellant's solicitors did not admit they were at fault. They adopted a **blame storming** approach towards the High Court. No latitude or indulgence should be extended to the appellant. It is a matter of contractual obligation between the solicitors and their own clients and should be disregarded for the purpose of the exercise of the court's discretion to re-instate the appeal. There will be cases in which justice will be better served by allowing the consequences of negligence of the solicitors to fall on their own heads rather than by re-instating the action. This is one such an occasion.

PREJUDICE

(15) In the affidavit in support of the notice of motion for re-instatement, (Ms) Prasad states that, "*the 1st and 2nd respondents will not be prejudiced if the appeal is re-instated.*"

(16) The second respondent takes issue on this point and says; (reference is made to paragraphs (05) to (11) and (16), (19) and (20) of the affidavit of Mr. Rai sworn on 08.11.2019)

5. *The Plaintiff/Appellant on 7th July, 2015 had filed a personal injury claim arising out of a motor vehicle accident against the Defendants/Respondents alleging that the 2nd Defendant/Respondent as the owner of the rental car registration number LR1063 was liable for damages for the fault on the part of the 1st Defendant/ Respondent.*

6. *The Plaintiff/Appellant was prosecuted and convicted by Tavua Magistrate Court vide Traffic Case number 61 of 2013 for driving a tractor without being holder of a valid driving licence on a public road arising out of the same incident as above.*

7. *When the matter was set for Hearing at Tavua Magistrate Court on 21st May, 2019, the Plaintiffs/Appellants solicitors failed to appear before the Magistrate and made an oral application for adjournment of hearing through their agent.*

8. *Our Ms Devi on instructions of the Second Respondent objected to the said application of the Appellant/Plaintiff on the basis that they had prepared for the hearing and had travelled to Tavua Magistrate Court along with an expert witness from Suva and a representative of 2nd Defendant from Nadi.*

9. *That the 2nd Defendant/Respondent had incurred significant litigation costs since 2015 when the matter was instituted at Tavua Magistrate Court.*

10. *That our Ms Devi had further informed the Magistrate Mr. Fotofili that the matter was set for hearing on 5th December, 2017 but was unfortunately vacated. The matter was then set for Hearing on 21st May, 2019 after almost two further prolong years. If the hearing was to be vacated it would have been unlikely to be re-fixed until year 2020.*

11. *The matter was then struck out and the Appellant proceeded to file his Notice and Grounds of Appeal at the Lautoka High Court.*

16. *I verily believe for the same to be true that due to the Appellant's delays in proceeding with his Appeal, the 2nd Respondent had to again bear further unnecessary litigation cost. This is after almost 5 years of litigation costs in Tavua Magistrates' Court that has caused significant prejudice and burden to the Respondents.*

19. *On the other hand the Appellant has been habitually negligent in appearing and prosecuting its claim or appeal. The Appellant has failed to take any steps to prosecute his claim either at Tavua Magistrates' Court or his appeal at Lautoka High Court in a timely manner.*

20. *Further as to paragraph 13 of the said Affidavit the 2nd Respondent will be highly prejudiced if the Appellant's application for reinstatement is allowed for aforementioned reasons.*

(17) The appellant's cause of action, if he has one, arose on 12.07.2012. The writ was not issued until 07th July 2015. The appellant waited until the last 05 days of the three years. The appellant has no legal right to delay for that period. The writ was issued five (05) days before the limitation period of three (3) years ran out.

(18) After the writ was issued, the matter was delayed for another four (04) years. The case was initially fixed for trial before the Resident Magistrate on 05-12-2017, but was vacated. Again the action was set for trial on 21-05-2019 (after two years). **On 21-05-2019, the plaintiff's – appellant's agent sought a vacation of the trial.** The Resident Magistrate said "***It is very likely that if the trial is vacated today the case will be heard for trial next year***" **. Counsel for the second defendant-respondent was ready for trial with three witnesses from Suva and Nandi. (See, paragraph B(iii) above).**

There is a delay of seven and half years from the accident,

If the action is allowed to continue, at the trial (most probably in 2020), the disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened seven and half years ago, memories grow dim, witnesses may die or disappear. The claim depends on an investigation of facts which took place nearly seven and half years ago. How in the world could the Court find out what really happened seven and half years ago?

It is often during the first three or four years that witnesses die or disappear or forget what happened and that records and notes are lost or destroyed. Thus, every year that passes prejudices the fair trial. It would be impossible to have a fair trial after seven and half years. The plaintiff-appellant has lasted so long as to turn justice sour.

Therefore the chances of the Court being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard.

Just consider the position of the plaintiff –appellant.

If the claim is allowed to proceed for trial on another date (most probably in 2020) this is more likely to operate to the prejudice of the plaintiff/appellant on whom the onus of satisfying the Court as to what happened generally lies. At the trial itself, the lapse of time will tell more heavily against the plaintiff-appellant than against the defendant-respondent. I reiterate that at the trial disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened seven and half years ago, memories grow dim, witnesses may die or disappear. The claim depends on an investigation of facts which took place nearly seven and half years ago. It has long been recognized that the longer the delay the more difficult it can be for witnesses accurately to remember events that may have occurred years before. Such events may be forgotten, and there may be an increased possibility that a witness may, by virtue of the passage of time, come to believe an event or a happening that in fact did not occur, or did not occur in the manner he or she now believes. It is reasonable to assume that the plaintiff -appellant did not take the steps a police investigator would normally

take under the circumstances. Thus, there will be no detailed statements of the witnesses. Witnesses who would otherwise be unable to recall relevant events can frequently do so when they are able to refresh their memory by reading detailed statements that they made shortly after the incident. There is no reason to believe that this would occur in the present case. Then, how in the world could the court do justice to the parties? One word more. The plaintiff-appellant will be further embarrassed, if this case goes to trial, as to the presentation of medical evidence. The medical reports (if any) dated back to 2012. The Doctors will probably have no recollection at all of the case; they will have to rely on the reports that they made seven and half years ago and oral evidence or cross examination as to the plaintiff's/appellant's condition will be extremely difficult. The Doctors, despite their records, would be faced with considerable difficulty in recalling effectively the situation which must form the basis of the assessment of damages. Would that mean the justice of the case?? How in the world could the Court assess the damages? Thus, there is no real possibility of prejudice to the plaintiff/appellant by dismissing the action. The plaintiff/appellant may be better off than if the action is allowed to continue. There can be no injustice in his bearing the consequences of his own fault.

When the trial of the action is prolonged, there is a substantial risk that a fair trial of the issues will be no longer possible. When this stage has been reached, the public interest in the administration of justice demands that the action should not be allowed to proceed.

The delay in the present case had an effect on the administration of justice by taking up Court time (four and half years after issuing the writ) and putting other cases further back in the queue. That damaged the reputation of Civil Justice. The message to the profession, which should be read and understood, is that the standard of diligence in this case was totally unacceptable. In balancing the prejudice to the plaintiff/appellant against the prejudice to the defendant/respondent account had to be taken of prejudice to other litigants and the administration of justice generally.

In the present case, the accident took place nearly seven and half years ago. Clearly the inexcusable lapse of time for which the plaintiff -appellant is partly responsible has given rise to a substantial risk that the issue whether the accident occurred in the way alleged by the plaintiff-appellant cannot now be fairly tried. It is impossible to have a fair trial after so long a time.

It is a serious prejudice to the defendant/respondent to have the action hanging over its head even for that time.

Moreover, the prejudice to a defendant - respondent by delay is not to be found solely in the death or disappearance of witnesses or their fading memories or in the loss or destruction of records. There is much prejudice to a defendant/respondent in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial.

It would be an intolerable injustice to the second defendant/respondent and to the directors and staff, to have to fight this case seven and half years after the accident. They

are no doubt suffering at least some apprehension as to what may happen at the trial. It is reasonable to assume that the second defendant/respondent may well suffer continuing financial stringency and loss each week that goes by through having to set aside funds against its contingent liabilities. Should they continue to have to suffer? The second defendant -respondent is entitled to have some peace of mind and to regard the incident as closed. It is the duty of the Court to prevent its process being used to create injustice.

This kind of prejudice is a very real prejudice to a defendant-respondent and when this prejudice is added to the great and prejudicial delay before the writ then I find it hard to believe that this court should be powerless to intervene to prevent such a manifest injustice.

In the context of the present case, I am comforted by the rule of law enunciated in the following judicial decision;

"Prejudice can be of two kinds. It can either specific, that it 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"; per Hon. Sir Maurice Casey, **New India Assurance Company Ltd v Singh**[1],.

The prejudice will generally be regarded as inherent in substantial delay: **Green v CGU Insurance Ltd**[2] and **Christou v Stanton Partners Australasia Pty Ltd**[3].

In an era when the need to ensure the efficient use of judicial resources has become increasingly important, delay may also be significant in that regard. **Town & Fencott & Associates Pty Ltd v Eretta Pty Ltd** [1987] FCA 102; (1987) 16 FCR 497, 514, and **Christou v Stanton Partners Australasia Pty Ltd** [2011] WASCA 176 (10 August 2011).

> *"We now turn to consider whether prejudice should be inferred from the extent of the delay. It has long been recognized that the longer the delay the more difficult it can be for witnesses accurately to remember events that may have occurred years before. Such events may be forgotten, and there may be an increased possibility that a witness may, by virtue of the passage of time, come to believe an event or a happening that in fact did not occur, or did not occur in the manner he or she now believes."* per Hon. Sir Maurice Casey, **New India Assurance Company Ltd v Singh**, (1999) FJCA 69.

Lord Denning summed up prejudice in **Biss v. Lambeth, Southwark & Lewisham Health Authority**[4], as follows:

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[1] (1999) FJCA 69
[2] [2008] NSWCA 148; (2008) 67 ACSR 105
[3] [2011] WASCA 176 (10 August 2011).
[4] [1978] 2 All E.R. 125

> *"The prejudice that might be suffered by a defendant as a result of the Plaintiff's delay was not to be found solely in the death or disappearance of witnesses, or their fading memories, or in the destruction of records,* ***but might also be found in the difficulty experienced in conducting his affairs with the prospects of an action hanging indefinitely over his head in the circumstances, by having the action suspended indefinitely over their heads****, the defendants have been more than minimally prejudiced by the Plaintiff's inordinate and inexcusable delay and contravention of rules of court as to time since the issue of the Writ, and that, added to the Plaintiff's great and prejudicial delay before the issue of the Writ, justified the court in dismissing the action for want of prosecution."*
>
> (Emphasis added)

[G] ORDERS

(i) The application for re-instatement is dismissed.

(ii) There will be no order as to costs.

.....
03/03/2020.

Jude Nanayakkara
[Judge]

HIGH COURT OF FIJI
LAUTOKA

At Lautoka
Tuesday, 03rd March, 2020