

IN THE EMPLOYMENT RELATIONS COURT**AT SUVA****ORIGINAL JURISDICTION****CASE NUMBER:** ERCC 02 of 2012**BETWEEN:** **CAPTAIN RUFUS D'CRUZ****PLAINTIFF****AND:** **CARPENTERS FIJI LIMITED****DEFENDANT***Appearances:* Mr. S. Nandan for Plaintiff.

Mr. E. Narayan for the Defendant.

Date/Place of Judgment: Thursday 27 April 2023 at Suva.*Coram:* Hon. Madam Justice Anjala Wati.**RULING***(Order 25 Rule 9 - HCR)***A. Catchwords:**

Employment Law –defendant asked to show cause why its counter – claim should not be struck out for want of prosecution when it failed to list the action down for trial after the plaintiff failed to move the matter –previously the plaintiff was also asked to show cause why its claim should not be struck out and when he failed to appear and show cause his claim was struck – since the defendant was not granted an opportunity to show cause, time was granted to the defendant to state its reasons for the delay in proceedings with the matter -under the High Court Rules 1988, the onus to list the action for the trial is not only on the plaintiff but the defendant as well and since there was a counter – claim, the defendant should have listed the action down for trial – defendant’s counter-claim struck out with costs to the plaintiff.

B. Legislation:

1. *The High Court Rules 1988 (“HCR”): Order 25 Rule 9 and Order 34.*

1. I have required the defendant to show cause why its counter – claim should not be struck out for want of prosecution. The plaintiff’s claim was struck out on 23 July 2019 on his failure to appear in Court and show cause why his claim should not be struck out for want of prosecution. I had overlooked to ask the defendant to show cause too.
2. At the time of writing the judgment striking out the plaintiff’s claim for want of prosecution, I realized that there was a counter-claim by the defendant. I then indicated in the judgment that the defendant would be given an opportunity to show cause why its counter-claim should not be struck out too. The parties have had the opportunity to address me.
3. In the judgment striking out the plaintiff’s claim, I made certain which were applicable to the plaintiff’s claim and some which were applicable to the defendant’s counter claim. I will outline the ones which were applicable to the defendant’s counter-claim:

“The defendant must now show cause why its counter-claim for a sum of \$11,017.00 should not be struck out under Order 25 Rule 9 as the defendant too could have filed an application to strike out the claim and entered its claim down for trial.

I will be consulting the parties about what should happen to the monies paid by the plaintiff in the High Court. There are two sums that were ordered to be paid. One amount of \$11,017.00 represents the amount on the counter-claim which was paid in High Court as a condition for setting aside the default judgment and the second amount of \$5,000 represents security for costs which the plaintiff was ordered to pay in the proceedings”.

4. Order 25 Rule 9 gives me the powers to act on my own motion to ask a party to the proceedings to show cause why the action should not be struck out for want of prosecution. It states:

“(1) If no steps have been taken in any cause or matter for six months then any party on application or the Court on its own motion may list the cause or matter for the parties to show cause why it should not be struck out for want of prosecution or as an abuse of the process of the Court.

(2) Upon hearing the application the Court may either dismiss the cause [or] matter on such terms as may be just or deal with the application as if it were a summons for directions”.

5. Before I determine the fate of the defendant’s counter-claim, I wish to briefly outline the basis on which the plaintiff’s claim was struck out as it has a bearing in determining whether the defendant is to be also blamed for not moving the cause. To that end some of the information from my earlier judgment determining the plaintiff’s claim under Order 25 Rule 9 is relevant.
6. This is an action that was filed on 24 April, 2012. A reply to defence and defence to counter-claim was filed on 3 May 2013. One may wonder why this was done after a year. For sake of completeness I must say that there was default judgment entered in this matter for the balance unpaid sum on the counter-claim.
7. The default judgment was set aside by consent on 15 April 2013 on the condition that the plaintiff deposits a sum of \$11,017.00 in the High Court within 14 days.
8. Upon the filing of the reply to defence and defence to counter-claim, the plaintiff filed a summons for directions on 15 January 2014. Since the Summons for Directions did not seek any orders for Pre-Trial Conference, Mr. Nandan withdrew his summons to file another one. I then ordered on 21 February 2014 for Mr. Nandan to file a fresh summons seeking directions for all the orders including compliance of order 34.
9. Following my orders, a fresh summons for directions was filed and the Summons still did not require any orders for Pre-Trial Conference. When the Summons was called in Court on 3 July 2014, both counsel for the parties agreed for order in terms of the same, the effect of which was that both parties did not see a need for any Pre-Trial Conference.
10. If there was a need for Pre-Trial Conference then the Summons for Directions would have sought that order. Be that as it may, when there was no indication that a Pre-Trial Conference was preferred, I gave order in terms of the summons for directions.
11. The effect of my order of 3 July 2014 was that:

- a. *The plaintiff and defendant were to file and serve their affidavit verifying list of documents within 14 days.*
 - b. *Thereafter the parties had to inspect the documents.*
 - c. *The trial was to be fixed within 60 days.*
12. I must say that as per my orders of 3 July, discovery and inspection of documents should have been completed by mid-August 2014. The defendant filed its affidavit verifying list of documents on 18 July 2014. That was done on time. The plaintiff did not comply with the order until 08 April 2015.
 13. The plaintiff should have filed his affidavit verifying list of documents by 18 July 2014 but he was well out of time. There was delay of almost 9 months to file a simple affidavit verifying list of documents. The defendant should have moved the court to dismiss the action when the plaintiff delayed filing its affidavit verifying list of documents knowing very well that the matter had to be fixed for trial within 60 days from 3 July 2014.
 14. None of the parties took any positive progressive action in the matter for over 4 years from the time limited to set the action down for trial when suddenly the plaintiff moved the court with an application filed on 14 March 2019 to dispense with the Pre-Trial Conference in the matter. This application was frivolous as there was no order sought or granted for the Pre-Trial Conference despite my initial directions to file a Summons for Directions and require one. Therefore the plaintiff’s application asking for dispensation of the Pre-Trial Conference was struck out on 24 April 2019.
 15. If the plaintiff wanted to have a Pre-Trial Conference then the application should have been made to compel the defendant to attend a Pre-Trial Conference. The application for dispensation was meaningless when it was clear that Pre-Trial Conference was not intended. Even if it was intended and an order not sought, the application should have been made before expiration of 60 days from the order on summons for directions as the parties were ordered to enter the action down for trial within 60 days.

16. After striking out the plaintiff's application to dispense with the Pre-Trial Conference on 24 April 2019, I ordered the plaintiff to show cause why the matter should not be struck out for want of prosecution. The matter was assigned another date for the plaintiff to show cause. The plaintiff did not appear and show any cause when the matter was struck out.

17. I must say that it is now 11 years since the filing of the action and the matter is still lying in the system. I do not think that it should have taken this long to prosecute this matter.

18. If the plaintiff did not file a summons to enter the action down for trial, the defendant should have moved the court instead of waiting from 2014. The defendant did not take any expeditious action to have its counter-claim tried. It just continued to enjoy the delay thinking that its counter-claim hinges on the plaintiff's claim without realizing that the defendant's counter claim is an independent action and should have been proceeded with by the defendant. The defendant could have also applied for the plaintiff's claim to be struck out for want of prosecution but it did not.

19. The law bestows the responsibility on both parties to move the action. In respect of setting the action down for trial, Order 34 of the High Court Rules 1988 states:

"1 (1). Every order made in an action which provides for trial before a judge shall, wherever the trial is to take place, fix a period within which the plaintiff is to set down the action for trial.

(2). Where the plaintiff does not, within the period fixed under paragraph (1), set the action down for trial, the defendant may set the action down for trial or may apply to the Court to dismiss the action for want of prosecution and, on the hearing of any such application, the Court may order the action to be dismissed accordingly or may make such order as it thinks just."

20. I find that the defendant is equally at fault for not progressing the cause which has been in the system for about 11 years. I find that it should not take 11 years for a matter in the employment

court to finalise unless there are satisfactory reasons why the matter could not be finalized on time. I do not find any satisfactory reason why the parties have delayed their claims. I see no reason why the defendant's claim too must not be struck out for want of prosecution.

21. In the final analysis, I make the following orders:

- a. *The defendant's counter-claim is struck out for want of prosecution.*
- b. *There shall be costs against the defendant to be paid to the plaintiff in the sum of \$550 which is the same amount I had ordered against the plaintiff in striking out its claim.*
- c. *Any monies paid by the plaintiff as the condition for setting aside the judgment and as security for costs shall now be refunded to the plaintiff by the High Court Registry.*



Anjala Wati

 Hon. Madam Justice Anjala Wati
 Judge
 27. 04. 2023

To:

1. Reddy and Nandan Lawyers for the Plaintiff.
2. Patel Sharma Lawyers for the Defendant.
3. File: ERCC 02 of 2012.