

causing damages to the Plaintiffs property without proper approval from the City Council and entered the Plaintiffs property as a trespasser.

3. The Plaintiff claimed for General Damages, Special Damages to be assessed, interests and costs.
4. The Plaintiff served their Writ of Summons and Statement of Claim and a Statement of Defence was filed by the Defendants denying the allegations and claims.
5. The Plaintiff thereafter filed an application for striking out before the learned Master of the High Court, who had dismissed the Plaintiffs application on 30th July 2018 and ordered the Plaintiff to pay \$650 costs within 14 days.
6. The Plaintiff thereafter was directed to file/serve a Reply to the Defence and a summons for direction on 28 August 2018. Application for extension of time to file/serve was granted on 18 October 2018. The Plaintiff filed their Reply to Statement of Defence but no Summons for Direction or costs was paid. On 3rd December 2018 the Court struck out the Writ of Summons.
7. This is an application seeking Leave to Appeal the decision of the learned Master of the High Court for refusing to grant reinstatement of the Writ of Summons that was struck out.
8. The Orders sort are as follows:
 - 1) Leave be granted to the Applicant to appeal the Interlocutory Ruling of the Honorable Acting Master of the High Court Ms Vandana Lal dated the 29th of July 2022; and
 - 2) Any other order that the Court deems just.

PART B: Affidavit evidences

9. The Plaintiff/Applicant relied upon his Affidavit in Support of his Application which states as follows –

“4That I seek leave to appeal the Interlocutory Ruling on the grounds stated in the proposed Notice and Grounds of Appeal annexed hereto and marked AA 2.

5. That I am advised by my solicitors and verily believe that WML’s grounds of appeal have every chance of succeeding.

6. That in above circumstances, I verily believe that it would be substantially unjust, unfair and prejudicial to me if the Interlocutory Ruling is allowed to stand.”

10. In reply, the Defendant's Affidavit is as follows –

“8. On 8 August 2018, the Plaintiff failed to appear at the mention date before Master Lal. On this date, Mr V. Filipe appeared for the Defendant and informed the Court that costs of \$650 as ordered by the Court had not been paid. The matter was then adjourned to 28 August 2018.

9. On 29 August 2018, the Plaintiff and the Defendant appeared before Master Lal. Again Mr V Filipe for the Defendant informed the Court that the court ordered costs had not been paid. Mr Gosai appeared for the Plaintiff but did not offer any explanation whatsoever as to why costs of \$650 had not been paid. The matter was then adjourned to 18 October 2018.

10. On 18 October 2018 the Plaintiff and Defendant appeared before Master Lal. Yet again Mr V Filipe for the Defendant informed the Court that costs had not been paid. Mr Gosai appeared for the Plaintiff and did not explain why the Plaintiff had failed to comply with the orders made in the interlocutory ruling. Mr Gosai sought a further 14 days for the costs to be paid. The matter was then adjourned to 13 November 2018.

11. On 13 November 2018, the Plaintiff failed to appear at the mention date before Master Lal. Mr C. Yee for the Defendant appeared and advised the Court that the Plaintiff had failed to comply with Interlocutory ruling by Master Sharma and failed to comply with orders made by Master Lal on 18 October 2018. Thereafter, Mr Yee made an oral application, seeking, that an unless order to strike out be granted if the Plaintiff had failed to pay costs of \$650 within 14 days. Master Lal granted Mr Yees oral application. This matter was adjourned to 3 December 2018.

12. On 3 December 2018 the Plaintiff and Defendant appeared at the mention date before Master Lal. Mr Yee for the Defendant informed the Court that the costs of \$650 had not been paid. Master Lal, asked Mr Gosai why the costs of \$650 were not paid pursuant to the orders made by Master Sharma on 30 July 2018 and the subsequent orders of Master Lal made on 18 October and 13 November 2018. Mr Gosai could not offer any explanation and/or reason as to the delay as to why costs of \$650 were not paid. Master Lal exercised judicial discretion to strike out the High Court action.”

PART C: LAW ON LEAVE TO APPEAL

11. Order 59 Rule 8 (2) of the High Court Rules provides as follows –

“(2) No appeal shall lie from an interlocutory order or judgment of the Master to a single judge of the High Court without the leave of a single judge of the High Court which may be granted or refused upon the papers filed.”

12. Order 59 Rule (11) of the High Court Rules prescribes the procedure as follows:

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

13. In Nagiya -v- Autur [2017] FJHC 928; HBC 69.2012 (7 December 2017) Mackie J cited the following case:

“Kelton Investment Limited and Tappoo Limited and 1. Civil Aviation Authority of Fiji Motibhai & Company Limited, Civil Appeal No. ABU 0034.1995, court held:

"The courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence **leave to appeal** are not readily given. Having read the affidavits filed and considered the submissions made I am not persuaded that this application should be treated as an exception. In my view the intended appeal would have minimal or no prospect of success if leave were granted."

14. Reference is also made to the case of Toyota Tsusho (South Sea) Ltd -v- Goundar Shipping Ltd HBC 51 of 2018 where Amratunga J held that:

“It is rare to interfere with interlocutory decision and this will be more so when it relates to a decision regarding case management. Defendant should primarily establish on appeal that the orders by the Master were erroneously and they are prejudiced by the order.

There is no qualms that orders by Master had prevented Defendant pleadings being considered at hearing. This had prejudiced them from presenting their defence. So if the grounds of appeal show merit if leave is granted.”

15. Again in Toyota Tsusho (Supra) explained about unless orders as follows:

[12] In the case of **Westmall Limited v Cul (Fiji) Limited** HBC 175 of 2001L, Inoke J set out the law relating to unless orders in detail. I fully agree with his Lordship's reasons relating to the law and would therefore do not wish to be repetitive by repeating them again, except to state the following matters.

[13] Fundamentally, courts are required to determine cases on merit rather than dismissing them summarily on procedural grounds. However, for better case management, the courts at times are required to exercise its inherent jurisdiction and make unless orders against parties who persistently default adhering to court orders. The court therefore makes unless orders requiring the defaulting party to comply with the order by a certain date and specify the consequence of the default.

[14] Clearly, unless orders can only be made by courts in exercising its inherent

jurisdictions. Further, an unless order should only be made when the court determines that the defaulting party is breaching the court order made 'relating to procedural compliance' either intentionally or contumaciously or acting lethargically and dragging his feet - so to say, thereby causing delays in the conclusion of the case. When making an unless order, a court must act fairly and reasonably. Moreover, the consequence of the order should be proportionate to the non-compliance once the default has occurred [3]. In *Trade Air Engineering (West) Ltd v Taga* [2007] FJCA 9; ABU0062J.2006 (9 March 2007) their Lordships in fact favoured an unless order rather than striking out the cause when it was said:

".....While, as pointed out in Grovit v Doctor [1997] UKHL 13; [1997] 2 ALL ER 417, it is an abuse of the court's process to commence proceedings without the intention of prosecuting them with reasonable diligence, so far as we have been able to establish, from the somewhat sparse materials before us, such an absence of intention was not made out and accordingly striking out the proceedings on such grounds was not justified. The fact that the limitation period for the Appellants' cause of action had not expired at the time of the dismissal is a second consideration favouring the giving of directions, possibly taking the form of "unless orders", rather than terminating the proceedings. (emphasis added)

[15] In the case of *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463; [2007 ALL E.R. 365 Moore-Bick L.J. said, "...a conditional order (unless orders) striking out a statement of case or dismissing the claim or counterclaim is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified".

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

PART C: Analysis

16. The application before the Court pertains to claims made against the Defendant for negligence and trespass. The Plaintiff seeks for leave to appeal against the orders of the learned Master to have refused reinstatement of the claims made by the Plaintiff.

17. The Plaintiff's Counsel has made oral submissions that the learned Master had failed to exercise her discretion fairly when she imposed unless orders for the failure of the Plaintiff to pay costs.
18. The learned Master had made unless orders giving another mention date to review compliance. The Plaintiff continued to fail to comply with Court orders for payment of fine. The master was within her powers to vary or setaside her orders. She refused the application as there was consistent non-compliance.
19. Furthermore, for case management purposes it was crucial to comply with orders of the Court.
20. It was in the Courts interest to have the matter struck out.
21. Furthermore there is no grounds of appeal for which leave is sort provided for the in the affidavit of the applicant. The Court finds no reasonable grounds for granting the application.

Costs

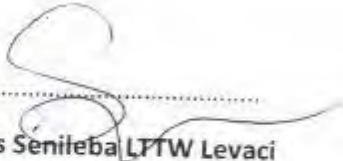
22. The Court grants costs of \$500 to the Defendants.

Orders of the Court:

23. **The Court orders as follows:**

- (a) That the Court will refuse Leave to Appeal;*
- (b) That costs be awarded to the Defendants for \$500.*




Mrs Senileba LTTW Levaci
Acting Puisne Judge