

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

Winding Up Cause No. 33 of 2015

IN THE MATTER of **MEDIA METRO LIMITED** a limited liability company having its registered office at HLB Crosbie & Associates, Chartered Accountants, 1st Floor, Harilal Mulji Building 161 Main Street, Nadi.

A N D

IN THE MATTER OF THE COMPANIES ACT 1983

(Ms). Arthi Bandhanna Swamy for the Petitioning Creditor
Mr. Mosese Qorici Raratabu for the Respondent Debtor

Date of Hearing :- 18th October 2016
Date of Ruling :- 25th November 2016

RULING

(1) The matter before me stems from the “**Inter-Parte**” **Summons** filed by the Respondent Debtor, dated 25th January 2016, pursuant to Section 201 of the Companies Act and under the inherent jurisdiction of the Court seeking the grant of the following Orders;

1. *THAT the Respondent be granted leave to file Affidavit in Opposition to the Winding Up Petition.*
2. *THAT any other orders as this Honourable Court may deem fit*
3. *THAT the costs of this Application be costs in the cause.*

- (2) The application is supported by an Affidavit sworn by “Manisha Manishka Nadan”, **Legal Executive**, in the Chambers of “Siddiq Koya Lawyers”, Solicitors for the Respondent Debtor.
- (3) The application seeking an extension of time to file an “Affidavit in Opposition” is vigorously contested by the Petitioning Creditor.
- (4) The Petitioning Creditor filed an “Affidavit in Opposition” sworn by ‘Ming Lai Chan’, **one of the Directors of the Petitioning Creditor**, opposing the application seeking an extension of time to file an “Affidavit in Opposition”. Regrettably, the Respondent Debtor did not file an “Affidavit in Reply”.
- (5) The Petitioning Creditor and the Respondent Debtor were heard on the Summons. They made oral submissions to Court. In addition to oral submissions, Counsel for the Petitioning Creditor and the Respondent Debtor filed a careful written submission for which I am most grateful.
- (6) At the commencement of the hearing before the Court, Counsel for the Petitioning Creditor raised objections to the Affidavit in Support of the Summons seeking an extension of time to file an Affidavit in Opposition, on the following grounds;
 - ❖ The application seeking an extension of time to file an affidavit in opposition is a **contested hearing**, thus, it is not appropriate for a law clerk to depose in support of it.
 - ❖ The supporting Affidavit contains material which is pure **hearsay**.
- (7) Let me now move to consider the **first ground of objection** raised by Counsel for the Petitioning Creditor, that is to say that the application seeking an extension of time to file an affidavit in opposition is a contested hearing, thus, it is not appropriate for a law clerk to depose in support of it.

I acknowledge the force of the submission by Counsel for the Petitioning Creditor. **The swearing of affidavits by solicitor’s clerks in contested proceedings should be a rare exception and the reason why the party is unable to depose ought to be explained.**

It is not disputed that the Respondent Debtor’s application seeking an extension of time to file an affidavit in opposition is a contested proceeding. Rule 31(1) of the Companies (Winding Up) Rules provides that a response should be filed within 07 days from the date of filing the affidavit verifying Petition. If a Respondent fails to file the opposition within the time stipulated in the Rules, then he is required to file Summons seeking an extension of time pursuant to Rule 7(1) and Rule 201 of the Companies (Winding Up) Rules. The Respondent Debtor’s Summons seeking an extension of time to file opposition is vigorously contested by the Petitioning

Creditor. Rule 201 of Companies Winding Up Rules states that the Court may, in any case in which it sees fit, extend or abridge the time appointed by these Rules or fixed by any order of the Court for doing any act or taking any proceeding. In my view the discretion is granted to the Court to extend the time period, but it has to be exercised judiciously without prejudice to all the parties to a matter before the Court.

Returning back to the application before me, I note that there is not a word in the law clerk's affidavit explaining as to why the Respondent Debtor is unable to depose.

In the case of Dr. Ramon Fermin Angco v Dr. Sachida Mudaliar & Others, Lautoka High Court Civil Action No. 26 of 1997, the Court on page 3 stated;

"The Court will disregard the affidavit sworn by Yogesh Narayan. As a practice it is quite improper that law clerks swear affidavits on behalf of clients. Proceedings such as the present are matters in which the latter ought more appropriately to be involved. Too often solicitors allow their law clerks to swear affidavits because it is all too convenient. Such conduct must be discouraged. It trespasses the demarcation between client and solicitor roles."

I reiterate here the comments of Hon. Mr. Justice Jiten Singh in Deo v Singh [2005] FJHC 23; HBC0423.2004 (10 February 2005):

"The swearing of affidavits by solicitor's clerks in contested proceedings with alarming regularity before the courts. Arun Kumar says he was duly authorised by defendants to dispose the contents. There is no authority annexed to the affidavit. Order 41 Rule 1 sub-rule 4 requires affidavit to be expressed in "first person". The affidavit put before the court is more like a statement defence in its wording rather than being expressed in first person. Swearing of affidavit by solicitor's clerk on contested matters should be a rare exception and the reason why the party is unable to depose ought to be explained".

Master Robinson in Chand v Hussein [2009] FJHC 286; Civil Action 17. 2007 {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".

In the case of 'Rupeni Silimuana Momoivlau v Telecom Fiji Ltd', Civil Action No. HBC 527 of 1992, Hon. Justice Gerad Winter held;

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 where not disputed. The most appropriate person to have sworn the affidavit in these proceedings was Mr. Joji Boseiwaga who appeared on instructions from the plaintiff at the relevant time. The court respectfully endorses the general thrust of dicta by Lyons J in Michael Harvey v Michael Kelly & Ray McGill, Civil Action No. HBC 323 of 1077 about the propriety of law clerks deposing affidavits".

I have no hesitation whatsoever in relying on the above Judicial decisions in the instant matter before me.

Applying those principles to the present case and carrying those principles to their logical conclusion, I have no hesitation in concluding that the affidavit of the law clerk filed in support of the Respondent Debtor's Summons seeking extension of time to file an affidavit in opposition is unacceptable. **Thus, I uphold the first ground of objection.** Therefore, the whole of the affidavit is removed from the court record. The affidavit is worthless and ought not to be received in evidence in any shape whatever. This may leave the court with no option but to dismiss the Summons since there is no material on which the court can exercise its discretion.

Leave that aside for a moment!

As noted earlier, the Respondent Debtor is a duly incorporated limited liability company having its registered office at Nadi. The law clerk needs the sanction of the Respondent Debtor Company to swear on behalf of it. But the law Clerk does not exhibit any authority given to her by the Company. As a result, I am left with the conclusion that the law clerk's Affidavit is defective and a nullity because there is no 'ostensible' authority to prove that the law Clerk was duly authorised to swear on

behalf of the Respondent Debtor Company. Therefore, I give it no weight whatsoever. I find considerable support for my view from the Supreme Court Practice.

In the Supreme Court Practice (1967) (The White Book) the following note appears at page 117:

*'The affidavit may be made by the Plaintiff or by any person duly authorised to make it. If not made by the Plaintiff, the affidavit itself must state that the person making it is duly authorised to do so-
Chingwin -v- Russell (1910) 27 T.L.R. 21'.*

Moreover, I am comforted by the rule of law expounded in "Chul v Doo Won Industrial (Fiji) Ltd (2004) FJHC 24. Hon Justice Jitoko held;

"The applicant himself is not a director. Any action taken on behalf of the Company, including this present application can only be done by a director under the seal of the Company. A director is a creature of the articles of association of the Company, as well as the Act. His duties and responsibilities are specifically set out in the Act and in the articles. In my view, a director cannot, by the instrument of a Power of Attorney, cede his legal authority, duties and responsibilities imposed by law to another except than in accordance with the provision of the Act. But even if were possible to cede the powers vested in the directorship of a Company, to a third party, through a Power of Attorney, it can only be personal, the exercise of which if purportedly on behalf of the Company, will need the sanction of the Company."

(Emphasis added)

- (8) Let me now move to consider the **second ground of objection** raised by Counsel for the Petitioning Creditor.

Counsel for the Petitioning Creditor relies on two passages in the law clerk's Affidavit. It is in paragraph (1) and (2).

The paragraph (1) is this;

Para 1. THAT the Respondent Company was unaware that they were

served with a Petition at their registered address. Because they were a shelved company and had not changed the address of their registered office.

The paragraph (2) is this;

Para 2. THAT they only became aware when the Petition was advertised in the local newspaper.

Counsel for the Petitioning Creditor asserted that no reliance could be placed on paragraph (1) and (2) of the Affidavit of the law clerk since it contains material which is **pure hearsay**. Counsel seeks to strike-out paragraph (1) and (2) of the Affidavit of the law clerk which is intended to be used by the Respondent Debtor.

In '*adverso*', Counsel for the Respondent Debtor submits that RHC Order 41, r.5 (2) provides for an exception in interlocutory proceedings, permitting the inclusion of hearsay and secondary evidence in Affidavits filed in such proceedings.

I acknowledge the force of the submission of Counsel for the Respondent Debtor. The Respondent Debtor's Summons seeking an extension of time to file affidavit in opposition is a true interlocutory proceeding.

Let me have a close look at RHC Order 41, r.5.

Order 41, r.5 provides;

Contents of affidavit (O.41, r.5)

5.-(1) Subject to Order 14, rules 2 (2) and 4 (2), to Order 86, rule 2 (1), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an Affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

The wording of Order 41, r.5 (2) is perfectly clear to me;

“An Affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the source and ground thereof.”

It is obvious from r.5 (2) itself that it operates as an exception from the primary rule of evidence stated expressly in Order 41, r.5 (1) that a person may only give evidence as the “facts” which he ‘is able of his own knowledge to prove’. r.5 (2), by including Statements of information or belief plainly allows the adduction of hearsay. But such Statements will have no ‘probative value’ unless the sources and grounds of the information and belief are revealed. The purpose of r.5 (2) is to enable a deponent to put before the Court in interlocutory proceedings, frequently in circumstances of great urgency, facts which he is not able of his own knowledge to provide but which, the deponent is informed and believes, can be provided by means which the deponent identifies by specifying the original sources and grounds of his information and belief. By having to reveal original source (not the immediate source), the deponent affords a proper opportunity to another party to challenge and counter such evidence, as well as enabling the Court to assess the weight to be attributed to such evidence.

The importance of these dual disclosures is obvious as was stated by Lord Alverstone C.J. over a century ago in J.L Young Manufacturing Co. Ltd. V J.L. Young Manufacturing Co. Ltd. (1900) 2 Ch. 753 at 754:

‘In my opinion some of the affidavits in this case are wholly worthless and not to be relied upon. I notice that in several instances the deponents make statements on their ‘Information and belief’ without saying what their source of information and belief is, and in many respects what they so state is not confirmed in any way. In my opinion so-called evidence on ‘information and belief’ ought not to be looked at all, not only unless the Court can ascertain the source of the information and belief but also unless the deponent’s statement is corroborated by someone who speaks from his own knowledge. If such affidavits are made in future, it is as well that it should be understood that they are worthless and ought not to be received in evidence in any shape whatever.’

As noted above, r. 5 (2) provides for an exception in interlocutory proceedings, permitting the inclusion of hearsay and secondary evidence in Affidavits filed in such

proceedings. The relaxation is allowed only if the deponent discloses 'the original source' of his information and 'the grounds' of his belief.

I keep well in my mind the paragraphs in question. The paragraph (01) and (02) of the law Clerk's Affidavit in Support are in this form;

Para 1. THAT the Respondent Company was unaware that they were served with a Petition at their registered address. Because they were a shelved company and had not changed the address of their registered office.

Para 2. THAT they only became aware when the Petition was advertised in the local news paper.

The deponent, viz, law Clerk has not identified the original or immediate source to her of her information. Therefore, I have reached the clear conclusion that paragraph 01 and 02 of the law clerk's Affidavit is irrelevant, because it contains material inadmissible by virtue of Order 41, r.5 (2) in interlocutory proceedings.

One word more, upon perusal of the Affidavit of the law clerk, it is observed that the deponent swears on contentious issue of fact and law.

Reference is made to paragraph seven (07) of the law clerk's affidavit.

*Para (7) That this matter was called on 18th of January, 2016 and this Honourable Court had directed for us to file a formal application for our affidavit in opposition for our **meritorious defence** we believe have merits.*

(Emphasis added)

In my view, law clerks of Solicitors are neither litigants nor competent legal persons to swear on such contentious issue of fact and law. The deponent is neither competent nor familiar to the pleadings of this case.

To sum up, in view of the approach I have adopted in relation to the supporting affidavit of the law clerk, I have no alternate but to dismiss the Respondent Debtor's Summons. Thus, it will be at best a matter of academic interest only or at worst an exercise in futility to express my conclusion on the merits of the Respondent Debtor's application for extension of time to file an opposition.

FINAL ORDERS

- (1) The Respondent Debtor's Summons, dated 25th January 2016 seeking an extension of time to file an affidavit in opposition is dismissed.
- (2) The Respondent Debtor to pay costs of \$500.00 (summarily assessed) to the Petitioning Creditor within 14 days hereof.



At Lautoka

25th November 2016

A handwritten signature in black ink, followed by the date "25/11/2016" written below it. A horizontal dotted line is drawn across the signature and date.

Jude Nanayakkara
Master