

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 13 of 2013

BETWEEN : **GURBACHAN SINGH AND COMPANY LIMITED**, a
limited liability company having its registered office
at Naseakula Road, Nasea, Labasa.

PLAINTIFF

AND : **SANDEEP OLAK** and **SANJEEV OLAK** both of 44
Dobsons Lane, Palmerston North, New Zealand,
Company Directors.

DEFENDANT

Counsel : Mr. Singh, R. for the Plaintiff
Ms. Lagilevu, E. and Mr. Pal, K. for the Defendant

Before : Acting Master S. F. Bull

Judgment : 31 March 2016

INTERLOCUTORY JUDGMENT

Background

1. On 22 January 2013, the Plaintiff filed a writ of summons claiming that the Defendants, (the son in law and daughter of a previous director of the Plaintiff), had, without any colour of right, sold assets belonging to the Plaintiff and kept for themselves the proceeds therefrom. It prays for:
 - (i) Judgment in the sum of \$68,000.00;

- (ii) Interest at the rate of 10% on the said sum of \$68,000.00 from 1st August 2012;
- (iii) Damages
- (iv) Such further and other relief as the Court deems just.
- (v) Costs of this action on an indemnity basis

The Defence

2. In a statement of defence filed on 15 April 2013, the Defendants:

- (i) Deny that the Plaintiff owned the tractors and motorcycles referred to in the Claim;
- (ii) Stated that the items owned by the Plaintiff and sold by them were sold at market value and with the authorisation and on instructions of the Plaintiff's Director, Daya Singh, to whom the proceeds of the sale were given;
- (iii) Deny owing the Plaintiff the amount claimed by it;
- (iv) Say that the Plaintiff is "not duly authorised by its duly appointed Directors to make the demand of FJD \$68,000.00";
- (v) Deny that the Plaintiff has suffered substantial financial loss owing to the alleged illegal sale by them of the Plaintiff's assets;
- (vi) State that the directorship of the Plaintiff is subject to litigation in separate proceedings.
- (vii) Pray for the Plaintiff's claim to be struck out;
- (viii) Seek an order for costs on a solicitor – client indemnity basis, and;
- (ix) Any other orders that the Court deems just and necessary.

The summons

3. By this summons, the Defendant seeks leave to amend its Statement of Defence so as to include a counterclaim.

The affidavits

4. In support of the application, SanjeevOlak has sworn an affidavit on behalf of herself and the first defendant, her husband. She says that in their Statement of Defence, they had denied keeping the proceeds of sale of assets and also denied that the sale value was \$FJD 68,000.00. The Plaintiff filed a reply to their Statement of Defence, as well as the Summons for Directions on 30 April 2013. An order in terms of the Summons for Directions was granted on 10 June 2013, with the Plaintiff thereafter filing its affidavit verifying their lists of documents on 13 February 2014.

5. Ms.Olak states that when the Statement of Defence was filed by her solicitors, she had not notified them about the existence of a counterclaim against the Plaintiff. She was not aware that the counter claim could be dealt with in this action and had been under the impression that the counter claim was to be the subject of separate proceedings.

6. Subsequent to the close of proceedings and an order on the Summons for Directions, she had discussions with her solicitors about the money owed to her by the Plaintiff. It was then that she was informed about filing a counterclaim. Once she was aware of this, she instructed her solicitors to include the counterclaim as part of this action, and provided them with the relevant documents for assessment and preparation of the counterclaim.

7. Ms.Olak says that they had provided assistance to Mr. Daya Singh in managing and operating the Plaintiff company at a time when the Plaintiff was in severe financial difficulty. The Defendant provided financial advances to the Plaintiff Company which included the payment of FJD \$6612.59 for staff salaries; payment of bills and utilities; and loan repayments totalling FJD \$11,000.00 on behalf of the Plaintiff Company. The amount spent by the Defendant in favour of the Plaintiff is FJD \$17612.59.

8. The deponent says she does not believe the Plaintiff will be prejudiced as a result of this application as there will not be any undue delay on the part of the Defendant should the application be granted, and also, since the proposed amendments do not alter their defence.
9. The Defendants are willing to pay to the Plaintiff reasonable costs of FJD \$300.00 for amendment of pleadings if leave to amend is granted by the Court, and if the Court is of the view that costs ought to be paid to the Plaintiff.
10. In opposing the application, Charan Jeath Singh deposes:
 - (i) that he is a Director of the Plaintiff company and is duly authorised to swear the affidavit on behalf of the Plaintiff;
 - (ii) The Defendants had always had legal representation and "it is unbelievable and untrue that they did not disclose this to their Solicitors if they had any genuine claim against the Plaintiff;
 - (iii) The Defendants says they thought the counterclaim was to be in separate proceedings, but even then, did not file separate proceedings;
 - (iv) The Defence was filed on 15 April 2013, with this application for amendment filed, almost a year later. It is unbelievable that the Defendants did not speak to their solicitors about their counterclaim for almost a year;
 - (v) The Plaintiff does not acknowledge that it owes any money to the Defendants who have not produced any evidence of the advances they allege were made to the Plaintiff;

- (vi) The allegations in paragraphs 16 – 20 of the affidavit in support of the application is denied, as the Defendants had never been in a financial position to advance any moneys to anyone.
- (vii) The Plaintiff will be “severely prejudiced” by the Defendants’ recently “concocted” counterclaim which they have not supported with any evidence;
- (viii) That the application to amend be refused with costs.

11. In reply, the second named Defendant says:

- (i) She is not precluded from filing separate proceedings against the Plaintiff but is seeking the inclusion of her counterclaim in these proceedings for the Court to deal with both matters, saving time and resources which would otherwise be spent on additional proceedings.
- (ii) She has evidence of the alleged advances to the Plaintiff, which evidence will be fully disclosed at the discovery stage. She annexes a printout from her account with the Bank of New Zealand, showing payments allegedly advanced to the Plaintiff. This she avers, is part of the evidence that she will rely on at trial.

The law

12. The application is made pursuant to Order 20 rule 5 of the High Court Rules 1998 (the HCR) and the inherent jurisdiction of the Court.

13. Order 20 rule 5 (1) provides:

- (1) Subject to Order 15 rules 6, 8 and 9 and the following provisions of this rule, the Court may at

any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

14. In *Reddy Construction Company Ltd v Pacific Gas Company Ltd* [1980] FijiLawRp 3; [1980] 26 FLR 121 (27 June 1980), the Court of Appeal stated:

The primary rule is that leave may be granted at any time to amend on terms if it can be done without injustice to the other side. The general practice to be gleaned from reported cases is to allow an amendment so that the real issue may be tried, no matter that the initial steps may have failed to delineate matters. Litigation should not only be conclusive once commenced, but it should deal with the whole contest between the parties, even if it takes some time and some amendment for the crux of the matter to be distilled. The proviso, however, that amendments will not be allowed which will work an injustice is also always looked at with care. So in many reported cases we see refusal to amend at a late stage particularly where a defence has been developed and it would be unfair to allow a ground to be changed.

Reported Appeal cases must be read with care, noting that sometimes the refusal has been based on the lateness of the application when a position cannot be retrieved because the trial has completed. See for example *Shoe Machinery Co. v. Cultan* 1896 1 Ch. D. 108 at p. 112 and the discussion of the ratio decidendi of the well-known case of *Cropper v. Smith* 26 Ch. D. 700. See too *Bradford Third Equitable Building Society v. Borders* 1941 2 All E R 205 particularly at pages 217H to 218A.

15. In *Tildesly v Harper* (1876) 10 Ch.D. 393 at 396 and 397, Bramwell L.J. stated:

My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.

Analysis

Defects in affidavits

16. The Defendant takes objection to the Plaintiff's affidavit in opposition on the following grounds:
- (i) That it was sworn by the Company's director without evidence of a Company resolution or authorisation to do so;
 - (ii) That it is not properly indorsed and therefore is in breach of Order 41 rule 9 (2) of the High Court Rules (the HCR).
17. In reply, counsel for the Plaintiff submits that the Director is an agent of the Company and therefore has authority to depose the affidavit in the Company's behalf.
18. The Plaintiff relies on the decisions of Gates J (as His Lordship then was) in *Prasad v State* (No.6) [2001] FJHC 329; [2001] 2 FLR 39 (17 January 2001) and also *Koroi v Commissioner of Inland Revenue* (No. 1) [2001] FijiLawRp 76; [2001] 2 FLR 314 (24 August 2001) where, notwithstanding the absence of the mandatory indorsement required by Order 41 rule 9 (2), the Court granted leave for the defective affidavits to be used in evidence in those proceedings.

19. As to the form of affidavits, I reiterate here the sentiments of Gates J (as His Lordship then was) in Prasad (supra), that:

It is counsel's duty to ensure that affidavits filed on behalf of their clients comply with the Rules. Fortunately, Order 41 r. 9(2) is not an onerous rule and should present no difficulty for counsel. It is to be emphasized that it is a mandatory rule, and in matters of form it is to be complied with. (Underlining for emphasis)

20. Indeed, in Koroi (supra), His Lordship stated:

Much has been said on this particular type of defect over the last year - see *In the Matter of Kim Industries Ltd.* (unreported) Lautoka High Court Winding Up No. HBF0036.99L 7 July 2000 pp 1-4; *The State v H.E. The President and 4 Others* (unreported) Lautoka High Court, Judicial Review No. HBJ007/2000L 12 October 2000 at pp 9-10; *Chandrika Prasad v Republic of Fiji* (supra) [Ruling on Respondent's summons for stay pending Appeal (No. 2)] 20 December 2000, and again in [Ruling on Proposed Interested Party's Joinder Application] 17 January 2001 pp 2-3. Other judges both in Fiji and overseas have referred similarly to this type of defect - see *Gleeson v J. Wippell & Co. Ltd.* [1977] 1 WLR 510 at 519C. These mistakes are of little consequence to the actual conduct of the litigation. But since the setting of the format of an affidavit, a vehicle for the presentation of succinct evidence to the court, is a relatively simple exercise, these errors should no longer persist.

21. More recently in Prasad v Prasad [2015] FJHC 940; HBC48.2014 (2 December 2015), none of the affidavits filed for the defendant in a section 169 Lands Transfer Act application for vacant possession complied with indorsement in Order 41 rule 9 (2), nor was the leave of the Court sought for their use in those proceedings. Kumar J had this to say:

In view of the nature of the proceedings, leave is granted for Defendant to rely on the Affidavits filed. **However the litigants and their counsel should take note of the fact that failure to comply with Order 41 Rule 9(2) and failure to obtain Court's leave to utilise these Affidavits could result in the Affidavits being removed from the court file which of course will be fatal to their client's case.**

22. Having considered the law and counsel's submissions on the lack of indorsement of the Plaintiff's affidavit, I am persuaded to grant leave for the Plaintiff's affidavit in opposition to be used as evidence in this application. However, I too would sound a reminder as to the need for counsel to comply with the Rules, so as to avoid the potentially fatal consequences of non-compliance.
23. As to whether the deponent of the Plaintiff's affidavit in opposition requires evidence of authorisation from the Company, section 40 of the Companies Act provides:

A document or proceeding requiring authentication by a company may be signed by a director, secretary or other authorized officer of the company, and need not be under its common seal.

24. In this case, the deponent of the Plaintiff's affidavit in opposition is Charan Jeath Singh who swears that he is a director of the Plaintiff Company. The Defendant does not dispute in any of its affidavits that Mr. Singh is a director of the Plaintiff Company. Pursuant to section 40 of the CA, a company director or secretary or other authorised officer of the company may sign a document or proceeding requiring authentication without the need for it to be under the company's common seal.

25. In *Denarau Corporation Ltd v Deo* [2015] FJHC 112; HBC32.2013 (24 February 2015), the Court dealt with, inter alia, an objection that affidavits sworn by a chief executive officer were irregular for want of evidence showing he had authority to swear the affidavits on behalf of the company. In dealing with the issue, and referring to section 40 of the Companies Act, Ajmeer J said:

A company being an artificial person cannot act by itself. It should act through agent. That agent must have proper authority to act on behalf of the company. Merely stating that the deponent is Chief Executive Officer of the plaintiff and has authority to swear affidavit on behalf of the plaintiff company is not sufficient. He must state the person who gave that authority, whether it is a director or secretary or other authorised officer of the company. In the absence of this the deponent will lack authority to swear affidavit on behalf of the company.

26. In this case, it is not disputed in the affidavit material that Mr. Singh is a director for the Plaintiff Company. Section 40 of the CA requires authorisation only where the person signing a document or proceeding for the company is neither director nor secretary of the company.

27. Pursuant to section 40 of the CA therefore, I do not see anything improper in Mr. Singh swearing the affidavit for the Plaintiff Company.
28. I turn now to the application before the Court.
29. The Plaintiff alleges inter alia that the Defendants had sold assets belonging to it without any colour of right. It accuses the Defendants of fraud by taking illegal possession of the Plaintiff's assets and selling the same at a gross under-value, conversion of the proceeds for their own use, and that the Plaintiff has suffered substantial financial loss as a result.
30. In their defence, the Defendants say that they are the daughter and son in law of one Mr. Daya Singh who maintains "a directorship claim" in the Company. They say that there is a dispute as to the directorship of the Company. They deny the allegations against them saying that the items belonging to the Plaintiff and sold by them were sold at market value "with the authorisation and on the instructions of the Director of the Plaintiff Company, Mr. Daya Singh to whom the proceeds of the sale were given."
31. The amendment that the Defendants seek is the inclusion of a counterclaim against the Plaintiff in the sum of FJD\$17612.59, comprised of \$11,000 allegedly paid to the Plaintiff for repayment of its loans, and FJD\$6612.59 which is said to have been paid to the Plaintiff for the payment of salaries and utility bills at a time when the Plaintiff was in severe financial difficulty. Apart from the proposed Counterclaim, the Defendants do not intend to make any amendments to its defence.
32. Having considered the affidavits, counsel's submissions, the provisions of Order 20 rule 5 and case authorities above, as well as the stage which the substantive matter is at, I am persuaded to grant the application. I believe that the amendment sought will not only enable the real issues to be tried, but also permit the Court to deal

with the whole of the dispute between the parties and thereby avoid a “multiplicity of suits.”

33. In *Reddy Construction Company Ltd v Pacific Gas Company Ltd* [1980] FijiLawRp3; [1980] 26 FLR 121 (27 June 1980), the Court of Appeal stated:

The primary rule is that leave may be granted at any time to amend on terms if it can be done without injustice to the other side. The general practice to be gleaned from reported cases is to allow an amendment so that the real issue may be tried, no matter that the initial steps may have failed to delineate matters. Litigation should not only be conclusive once commenced, but it should deal with the whole contest between the parties, even if it takes some time and some amendment for the crux of the matter to be distilled. (Emphasis mine)

34. I have considered the likelihood of the Defendant filing a fresh action if the application to amend is refused. In *NBF Asset Management Bank v Taveuni Estates Ltd, Registrar of Titles & Attorney General* [2007] HBC 543/04S Decision 27 March 2007, the then Master stated:

Moreover, the proposed amendment is as to the counterclaim. If it is refused now, there is always the potential for commencement of a fresh action. Refusal will be a catalyst for the sprouting of new suits. Any appropriate amendment to stifle, impede or inhibit multiplicity of suits, with a cause of action, which can conveniently be considered within this action, it ought to be allowed.

35. It is not disputed that the application to amend has come belatedly. Following orders made on the summons for directions, the Plaintiff

filed its affidavit verifying list of documents, though the Defendant has yet to file theirs. In Clarapede v Commercial Union Association (1883) 32 W.R. 262 at 263, Brett M. R. said:5

However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. **There is no injustice if the other side can be compensated by costs.** (See also Weldon v Neal (1887) 19 Q.B.D. 394 at 396; Australian Steam Navigation Co. v Smith (1889) 14 App.Cas. 318 at 320; Hunt v Rice & Son (1937) 53 T.L.R. 931, CA)

36. In Reddy (supra), the Court said:

Reported appeal cases must be read with care, noting that sometimes the refusal has been based on the lateness of the application when a position cannot be retrieved because the trial has completed. See for example Shoe Machinery Co. v Cultan 1896 1 Ch. D. 108 at p. 112 and the discussion of the ratio decidendi of the well-known case of Cropper v. Smith 26 Ch. D. 700. See too Bradford Third Equitable Building Society v. Borders 1941 2 All E R 205 particularly at pages 217H to 218A.

37. In NBF Management Bank v Taveuni Estates Ltd (supra), discoveries were yet to be completed when the defendant filed a summons seeking amendment of its counterclaim. The main objection to the summons was the lateness of the application and the consequent delay to proceedings. In dealing with this issue, the Court stated:

Presently, the parties are at the discovery stage. No meaningful, if at all any pre-trial conference has yet been

convened. Discoveries are still incomplete. Thus, the proceeding has not reached an irretrievable point. If anything this application will obviate a late application for amendment, which seems imperative.

38. In this matter, discoveries are yet to be completed. Though belatedly brought, I do not consider that either party is at the point where their positions “cannot be retrieved”. (See *NBF*, and also *Reddy*, supra) The Plaintiff cites *Kelton Investments Limited v Lami Investments Limited*[2011] FJHC 812; HBC248.2006 (30 December 2011) where the Defendant’s late application to amend was refused by the Court. In that case, the Defendant had maintained throughout not only in its defence but also in earlier, related proceedings in the High Court and Court of Appeal, that it had constructed mezzanine floors in the plaintiff’s premises. The amendment it sought comprised of a complete denial that it had ever built the mezzanine floors. No reason was given for this complete change of stance.
39. In this case, the only change to its pleadings that the Defendant seeks is the inclusion of a counterclaim. Its defence remains unchanged. It has provided an explanation for the failure to include the proposed counterclaim in its initial defence.
40. Having considered all the submissions and affidavits, I am not satisfied that the Defendant has acted in bad faith in bringing this application. Its failure to institute a prior action against the Plaintiff in respect of the matters raised in its proposed counterclaim does not, in my opinion, lead inescapably to a conclusion that it has acted in bad faith.
41. The Plaintiff is claiming against the Defendant the sum of \$68,000. The Rules allow the Defendant to file a defence and also to counterclaim. I consider it necessary to allow the Defendant to amend its defence, to include a counterclaim, to enable the Court to “deal

with the whole contest between the parties, even if it takes some time..." (*Reddy*, supra)

42. I find that whatever prejudice caused to the Plaintiff as a result of the granting of this application, may be compensated for by costs.

Final Orders:

1. The Defendants' application for leave to amend its statement of defence so as to include a counterclaim, is granted.
2. The Defendants are to file and serve an amended defence within 14 days.
3. The Plaintiff is to file and serve a reply to the amended defence and defence to the counterclaim within 14 days thereafter.
4. A reply to the defence to the counterclaim, is to be filed and served within 14 days thereafter.
5. The Defendants to pay costs of \$1,000 to the Plaintiff, within 14 days.
6. Case adjourned to 13 May 2016, for further directions.

