

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA
[CIVIL JURISDICTION]

CIVIL ACTION NO. HBC 205 OF 2012

(In the matter of an Appeal from the Extempore Ruling of the Master delivered on 26th February 2015 at High Court Lautoka in Civil Action No. HBC 205 OF 2012)

BETWEEN : PRASAD'S NATIONWIDE TRANSPORT EXPRESS COURIER LIMITED a limited liability company having its registered office at 5 Mandarin Place, Drasa Vitogo, Lautoka.

Appellant
(Original Plaintiff)

AND : VIPUL MANOJ DUTT MISHRA AND RAMESHWAR PRAKASH both trading as MISHRA PRAKASH & ASSOCIATES of Ganga Singh Street, Suva, Barrister and Solicitor.

Respondents
(Original Defendants)

Counsel : Mr. W. Pillay for Appellant
Ms. J. Naidu for Respondents

Date of Hearing : 09th February 2016

Date of Ruling : 18th May 2016

Before : The Hon. Mr. Justice R. S. S. Sapuvida

RULING

[1] This is an application filed by the defendant/respondent [hereinafter referred to as the respondent] by way of summons filed on 14th May, 2015 seeking an order

for security for costs against the plaintiff/appellant [hereinafter referred to as the appellant] in order to secure defendant's costs of the appeal if the appellant does not succeed in the same.

1. The respondent is seeking an order that the appellant to deposit in court a security for costs in the sum of \$ 6000.00 on the following:
 - i. For this appeal
 - ii. Costs of \$ 1000.00 already awarded by the Master.
 - iii. For the costs of this application for security for costs.
2. The respondent's application is made pursuant to Order 23 Rule 1 of the High Court Rules 1988, and it reads:

**"ORDER 23
SECURITY FOR COSTS**

(O.23, r.1)

1.-(1) *where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court-*

- (a) that the plaintiff is ordinarily resident out of the jurisdiction, or*
- (b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or*
- (c) subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or*
- (d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation, then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.*

[2] The summons is supported by the affidavit in support dated 13th May, 2015 of Ms. Shazia Ali [Ms. SA] of Mulomulo, Nadi, and Law Clerk of the defendant law firm.

[3] The summons is opposed by the affidavit filed on behalf of the appellant company dated and filed on 20th October, 2015 of Mr. Shanon Shavneel Prasad

[Mr. SSP] a son of the majority shareholder and director of the appellant company Mr. Vimal Deo Prasad [Mr. VDP].

- [4] Hearing of the summons was held on 09th February, 2016 and both counsel made their oral submissions in addition to the written submissions tendered by the counsel for the respondent.
- [5] The counsel for appellant begged the court for 14 days' time from the date of hearing to file the written submissions and the respondent to reply to the same within 14 days thereafter.
- [6] The timeframe was so given for the both parties to file their respective written submissions, and yet the appellant has not filed the written submissions within 14 days or even thereafter. This has made no room for the respondent to file a reply to the written submissions of the appellant since there are no such written submissions filed as agreed and as per the directions given by the court on the same.
- [7] Therefore, I will now write the ruling with the available written submissions tendered by the respondent and the facts deposed by the affidavit of Mr. SSP and the affidavit of Ms. SA filed on behalf of the appellant and the respondent respectively.
- [8] The appeal pending before this court is filed by the appellant against the extempore ruling delivered by the Master of the High Court Mr. Jude Nanayakkara dated 26th February, 2015.
- [9] The Master by the said ruling struck out the plaintiff's [appellant's] case having given directions to the plaintiff to show cause as to why the action should not be struck out for want of prosecution or as an abuse of process of the court.
- [10] The following basic grounds among other things have been taken up by the respondent in the application for order for costs initially in the affidavit of Ms. SA and in the written submissions of the respondent thereafter:
- i. That the appellant company may already have been struck off or is no longer capable of litigating. The respondent refers to annexure "B" filed along with the affidavit of Ms. SA which reveals that the appellant company had not filed annual returns from the year 2006.

- ii. Annexure "B" further reveals that the file of the appellant company maintained at the Companies Office could not be located.
- iii. The director of the appellant company Mr. Vishnu Prasad is deceased, and the surviving director Mr. Vimal Prasad has migrated and reside in New Zealand,
- iv. Since the plaintiff no longer trades in Fiji and there is no such existing company by the name of appellant registered at the Companies Office, the respondent will not be able to recover any costs from the appellant unless the same is paid in court.
- v. The cost of \$ 1000.00 ordered by the Master has not yet been paid by the appellant even though the Master made orders to pay the costs within 14 days from [26 February, 2015] his order.

[11] Before I touch upon the issue of costs, it is necessary to look at the affidavit of Ms. SA and the affidavit of Mr. SSP and the validity and applicability of both the affidavits in the present matter at issue.

[12] The reason for the above dictum is because filing affidavits by law clerks in contentious matters in the High Court is not encouraged and are not usually considered in determining issues between parties.

[13] In the present application of the respondent, the summons is supported by the affidavit of Ms. SA, a law clerk employed by the respondent law firm.

[14] Then, the question arises whether the facts deposed by the deponent Ms. SA in her affidavit are matters in connection with the administrative functions of the law firm, and the matters to which she has reasonable control over by virtue of the office she holds at the respondent law firm.

[15] The reason for my comment above is because:

In REPENI SULIMUANA MONOIVALU vs TELECOM FIJI LIMITED [03 March 2006] (unrep) Suva High Court Civil Action No. 527 of 1997, His Lordship Justice Winter commented regarding the affidavits by law clerks at page 3 of the Judgment as follows:

“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 Boseiwaqa 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 1977 about the propriety of law clerks deposing affidavits”.

“The affidavit barely engages the applicant defendant in any meaningful way and is in any event quite illegitimate. Although the defendant has in part responded to this document by law clerk I intend to give it absolutely no weight whatsoever.”

- [16] Hence, the affidavits by law clerks are not entertained in the High Court in contentious matters.
- [17] The question now in the present matter is whether the depositions made by the law clerk Ms. SA are of contentious nature or the matters which deal with the other administrative matters at the defendant law firm or mixed type of all.
- [18] This issue is however not taken up by the appellant as an objection, and yet the court by its own motion has to take notice of these matters for completeness and in order to place a proper adjudication of the entire application before passing the ruling by the court.
- [19] Ms. SA in her affidavit in support of the summons for security for costs states certain facts with regard to the certain communication took place between the law office at which she works and the Office of the Registrar of Companies.

- [20] The letter "C" annexed to her affidavit is one of the documents which falls into the former category and it is sent by the Office of the Registrar of Companies to the respondent law firm which reads that the appellant company has not filed any annual returns from the year 2006. The date of the letter "C" is 12th August, 2014.
- [21] The other letter marked "A" annexed to her affidavit is a letter sent to the respondent law firm by their solicitors confirming and informing of the Master's ruling and the costs order made on 26th February, 2015 and indicating the solicitor's fees for the appearance in court billed at \$3500.00.
- [22] The third letter annexed to the affidavit marked "B" is a letter sent by the respondent's solicitors/city agents in Suva to the respondent informing the result that popped up upon a search carried out at Company's Office that the file of the appellant company has not been located.
- [23] All in all, it is convinced that the facts deposed by the law clerk Ms. SA in her affidavit apart from the other facts in it, are facts which are not contentious in the substantive matter in the appeal between the appellant and the respondent and it deals with the other administrative matters and communications took place between the respondent law firm and two other institutions.
- [24] Therefore, I cannot see any reason as to why the affidavit of law clerk Ms. SA in the instance should be disregarded in the present context as it was held in **REPENI case** [supra].
- [25] Hence, my view is that the facts deposed by the affidavit of Ms. SA are relevant to the costs application made by the respondent in this case.
- [26] Now I will move onto the affidavit of Mr. SSP filed in opposition to the respondent's summons for security for costs.
- [27] He, in his affidavit states that the majority shareholder and director of appellant company Mr. Vimal Deo Prasad is his father.
- [28] Mr. SSP is not a director of the appellant company but just a third party who files the said affidavit on behalf of the appellant company.

[29] He has submitted three documents along with his affidavit, namely the annexure marked "A" and two other documents attached to annexure "B".

[30] Annexure "A" is a letter given by Vimal Deo Prasad [Mr. VDP], as the letter explains, the majority shareholder and director of Prasad's National Express Courier Limited to his son Mr. SSP dated 30th June, 2014 authorizing Mr. SSP to depose evidence, swear affidavits and sign all documents necessary for all court proceedings on behalf of both the appellant company and Mr. VDP with respect to this case.

[31] The annexure "A" does not carry the company seal, namely the seal of the appellant.

[32] In the case of *Chul v Doo Won Industrial (Fiji) Ltd* [2004] FJHC 24; HBC0011R.2004S (4 October 2004) His Lordship Justice Jitoko (as he then was) held:

"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."

[33] In deed, the annexure "A" is not even a power of attorney. It does not bear the seal of the appellant company.

[34] Therefore, it does not convey any authority to Mr. SSP even though it speaks of several tasks.

[35] The other two documents I referred to in paragraph 29 above are annexed to the annexure "B" of Mr. SSP's affidavit.

[36] In order to place a better clarification on those documents and to confirm the same with proof; it is essential to reproduce the same. The two documents are:

"Company No.:

THE COMPANIES ACT 1983 SECTION 22 (1)

NOTICE OF THE RESOLUTION PASSED AT AN EXTRAORDINARY GENERAL MEETING OF THE COMPANY TO NOMINATE PERSON TO DEPOSE EVIDENCE

Name of the Company : PRASAD'S NATIONWIDE TRANSPORT EXPRESS COURIER LIMITED

Presented by : GORDON & CO.
Barristers and Solicitors
Suite 1 Level 1
157 Vitogo Parade
Lautoka, Fiji

At an Extraordinary General Meeting of the shareholders of PRASAD'S NATIONWIDE TRANSPORT EXPRESS COURIER LIMITED ("Company") Convened and held at the office of PRASAD'S NATIONWIDE TRANSPORT EXPRESS COURIER LIMITED on the 25th day of September, 2015, the resolution as set out below was duly passed:

1. That the company approved that its Shanon Shavneel Prasad is authorized and indemnified by the Company to depose evidence for and on behalf of the Company in all Civil and Criminal Court actions including High Court Action No. HBC 205 of 2012.

Dated this day of , 2015.

Signed
Chairman

MINUTES OF MEETING OF DIRECTORS OF PRASAD'S NATIONWIDE TRANSPORT EXPRESS COURIER LIMITED CONVENED AND HELD AT THE PREMISES OF PRASAD'S NATIONWIDE TRANSPORT EXPRESS COURIER LIMITED ON THE DAY OF, 2015 AT A.M/P.M

Issue: Nomination of Shanon Shavneel Prasad to depose evidence on behalf of the Company – PRASAD'S NATIONWIDE TRANSPORT EXPRESS COURIER LIMITED

RESOLVED:-

1. *That the company approved that its Shanon Shavneel Prasad is authorized and indemnified by the Company to depose evidence for and on behalf of the Company in all Civil and Criminal Court actions including High Court Action No. HBC 205 of 2012.*
2. *Such Resolutions are hereby ratified.*

Closure:

There being no further business the meeting then concluded.

Confirmed as a true record.

Dated this day of , 2015.

Signed
Chairman

- [37] It is conceivable on the face of those two documents that, one document explains of a resolution passed by the appellant company, and the other, the minutes of a meeting of directors of the appellant company.
- [38] One of the three equal important factors I notice with curiosity in regard to both these documents is that they are undated.
- [39] The other element I observe lacking in the same is that they do not carry the seal of the appellant company.
- [40] The next factor, though less notable, but very important is that those documents controvert with the annexure "A" submitted by Mr. SSP, because annexure "A" [letter of authority] should have been sprung as a result of, and after the two documents annexed to the annexure "B" [the resolution and the minutes], and yet the annexure "A" is dated 30th June, 2014 whereas the resolution to appoint Mr. SSP specially to attend to the instance case as it says was passed in 2015.
- [41] This very contradictory element I observed in the annexure "A" and "B" patently suggest that those are tailor-made and invented documents by the appellant just to litigate the matter against the respondent earlier in the original action and in the instance.

[42] Therefore, I cannot give them any weight whatsoever in deciding the present application for security for costs made by the respondent.

[43] Now I turn to the summons of the respondent for security for costs and the written submissions tendered by the respondent's counsel on the same.

[44] The Master has made the extempore ruling dated 26th February, 2015 having issued Notice by the court by its own motion pursuant to Order 25, rule 9 of the High Court Rules for the appellant to show cause as to why the action ought not be struck out for want of prosecution or on abuse of the process of court.

[45] Even the Master in his ruling at paragraph 12 & 13 had this to say:

“(12) The annexed copy of the Authority and Indemnity does not make reference to Board resolution authorizing “Shanon Shavneel Prasad” to depose to the facts stated therein. Since the Plaintiff is a Company, the authority can only be by Board resolution. Therefore, I hold that the Plaintiff's affidavit is defective and a Nullity because there is no Board resolution authorizing the deponent of the affidavit to swear it on behalf of the Plaintiff Company. Moreover, the deponent is employed with Fiji Airways Ltd.

(13) Therefore, the affidavit sworn by “Shanon Shavneel Prasad” cannot be used in evidence. It is disregarded. This may leave the court with no option but to dismiss the action, since there is no valid affidavit explaining the reasons for Plaintiff's inactivity for a period of 13 months to avoid the dismissal of the proceedings.”

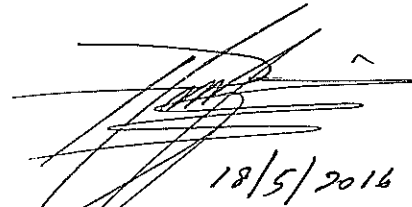
[46] It is very evident that in order to cover up the defects pointed out by the Master, the appellant now in the present issue [the costs application] hurried to make up the two documents annexed to the annexure “B” of Mr. SSP's affidavit which finally has boomeranged against the appellant.

[47] If one takes a closer observation of the signature of the author [Mr. VDP] of annexure “A” and the two documents attached to annexure “B” submitted with Mr. SSP's affidavit, it is obvious that there is a drastic difference among those three signatures to each other. For this, expert evidence of an Examiner of Questioned Documents (EQD) is not at all required, but anyone can clearly observe the visible difference on the face of those signatures.

- [48] This is another reason why I clearly stated earlier in this ruling that these documents are tailor made and fabricated ones just to cover up the vacuum pointed out by the Master in his ruling.
- [49] All in all, what is revealed here is that there is a serious question whether or not there really exists and operates a company by the name of the appellant.
- [50] I have also given the attention to the written submissions filed by the respondent's counsel and to the case law authorities he submitted which support the respondent's summons for order for costs against the appellant.
- [51] However, I do not wish to discuss here the each and every case law relevant to the present application, because I repeat it creates a reasonable doubt on the face of the affidavit of Mr. SSP and the documents he has submitted with same, that there really exists or operates a company by the name of appellant in Fiji.
- [52] For the reasons indicated above, I accept the application made by the respondent and that an order for security for costs should be made against the appellant in this appeal.
- [53] Now I wish to look at the amount of costs pleaded by the respondent against the appellant to be deposited into court in this appeal as a security for costs.
- [54] The respondent urges that the sum of \$6000.00 to be paid into court by the appellant.
- [55] The Master has made an order for costs in the sum of \$1000.00 in his extempore ruling made on 26th February, 2015 against the appellant payable to the respondent within 14 days from that order. The respondent points out that the appellant has so far been unable to honor the same.
- [56] The respondent urges that the costs ought to be deposited by the appellant is to cover the costs of the original case, the costs ordered by the Master and the costs of this application before me totaling at \$6000.00.
- [57] The amount of costs suggested by the respondent is not at all excessive having regard to the circumstances of this case.

[58] Therefore, I make the following orders:

- 1) The summons for security for costs filed by the respondent is allowed.
- 2) The appellant to furnish security for costs in the sum of \$6000.00 to be deposited into Court on account of this case within 14 days from this Ruling.
- 3) Unless the appellant furnishes the costs so ordered, the notice of appeal and the grounds of appeal filed by the appellant dated 18 March 2015 shall be struck out and dismissed with costs summarily assessed at \$1500.00.
- 4) The appellant shall pay costs of this application summarily assessed at \$1000.00 payable to the respondent within 14 days from this Ruling.



18/5/2016

R.S.S. Sapuvida
Judge
High Court of Fiji

On the 18th day of May 2016
At Lautoka