

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 217 of 2012

BETWEEN : **NARSEYS PLASTIC INDUSTRIES LIMITED** a limited liability company having its registered office at 5th Floor, Development Bank Centre, 360 Victoria Parade, Suva in the Republic of Fiji.

PLAINTIFF

AND : **SHARMA MUSIC CENTRE LIMITED** a limited liability company having its registered office at 73 Sagayam Road, Nadi in the Republic of Fiji.

DEFENDANT

Mr. Amani Vodowaqa Bale for the Plaintiff
Mr. Janendra Kaushik Sharma for the Defendant

Date of Hearing : - 10th May 2016
Date of Ruling : - 12th August 2016

RULING

(A) INTRODUCTION

- (1) The matter before me stems from the "Notice of Motion" filed by the Plaintiff, dated 31st July 2015, pursuant to Order 34, rule 2 of the High Court Rules, 1988 for an Order that the action be re-instated and/or restored which was taken off the cause list on 04th of May 2015.
- (2) The Plaintiff is a limited liability Company. The application for re-instatement is supported by an Affidavit sworn by one 'Sainimere Kato', Legal Executive, in the chambers of 'Lal Patel Bale' Lawyers, Solicitors for the Plaintiff.

- (3) The application for re-instatement is strongly contested by the Defendant.
- (4) The Defendant Company filed an 'Affidavit in Opposition', sworn by one 'Amitaash Chandra Sharma', a Director of the Defendant Company, opposing the application for re-instatement followed by an 'Affidavit in Reply' thereto.
- (5) The Plaintiff and the Defendant were heard on the Notice of Motion for re-instatement. They made oral submissions to Court.

(B) CHRONOLOGY OF EVENTS

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|--------------------------------|---|--|
| 08 th October 2012 | - | The action was instituted by the Plaintiff by way of Writ of Summons and Statement of Claim, claiming damages for misrepresentations made by the Defendant. |
| 16 th October 2012 | - | The Plaintiff filed an Affidavit of Service of the Writ of Summons and the Statement of Claim. |
| 01 st November 2012 | - | The Plaintiff having searched and finding that the Defendant had failed to file and serve "Notice of intention to Defend and Acknowledgment of Service" within the prescribed time, entered judgment by default against the Defendant. |
| 28 th November 2012 | - | The Defendant filed an ex parte 'Notice of Motion' for a Stay of execution of the Default judgment. The Court upon reading the Defendant's ex parte 'Notice of Motion' ordered a 'Stay of execution' of the Default Judgment. |
| 30 th January 2013 | - | The Plaintiff filed Summons opposing the setting aside and seeking Summary Judgment. |
| 22 nd March 2013 | - | The Defendant filed an Affidavit in Opposition opposing the Plaintiff's Summons. |
| 15 th April 2013 | - | The Plaintiff filed an Affidavit in Reply. |
| 06 th June 2014 | - | The Default Judgment was set aside by consent and the Defendant was given leave to file the Statement of Defence. |
| 10 th June 2014 | - | The Defendant filed its Statement of Defence and Counter-Claim. |
| 15 th July 2014 | - | The Plaintiff filed its Reply to Defence and Defence to Counter-Claim. |

- 29th July 2014 - The Plaintiff filed Summons to enter Summary Judgment.
- 14th October 2014 - The Defendant filed an 'Affidavit in Opposition' Opposing the Plaintiff's Summons for Summary Judgment. The Plaintiff's Summons for Summary Judgment was set down for hearing on 17th April 2015 at 11.30 am.
- 08th April 2015 - The High Court Registry sent a notice of Adjournment of hearing and the matter to be called on 23rd April 2015 due to Judicial Conference.
- 23rd April 2015 - There was no appearance for or on behalf of the Plaintiff. "NOAM" re- issued on the Plaintiff. The case is adjourned for mention on 04th May 2015.
- 04th May 2015 - There was no appearance for or on behalf of the Plaintiff. The case is taken off the cause list due to the second consecutive non-appearance by the Plaintiff.
- 31st July 2015 - The Plaintiff filed the 'Notice of Motion' herein to re-instate the action.

(C) THE PLAINTIFF'S NOTICE OF MOTION FOR RE-INSTATEMENT

As I have already said, the Plaintiff is a limited liability Company. The Plaintiff's Notice of Motion for re-instatement is supported by an Affidavit sworn by one 'Sainimere Kato', Legal Executive, in the chambers of 'Lal Patel Bale' Lawyers, Solicitors for the Plaintiff, which is substantially as follows;

- Para 1. I am employed by the Plaintiff's solicitors as a Legal Executive*
- 2. I make this affidavit from information personal to me unless so stated, where so I believe the said to be true and correct.*

CHRONOLOGY OF FACTS

- 3. The Writ of Summons and Acknowledgement of Service were filed by Messers Lal Patel Bale Lawyers on 8th October, 2012.*
- 4. That the Affidavit of Service was filed by Messrs Lal Patel Bale Lawyers on 16th October, 2012.*

5. *A Praecipe to Search for Acknowledgement of Service and Statement of Defence Judgment by Default was filed by Messrs Lal Patel Bale Lawyers on 30th October, 2012.*
6. *An Ex-parte Notice of Motion and Affidavit of Amitaash Chandra Sharma was filed by Messrs Janend Sharma Lawyers on 28th November, 2012 seeking a stay of execution and a setting aside of the Judgment obtained by Default.*
7. *An Order for stay was of execution was granted on 28th November, 2012.*
8. *A Summons and Affidavit of Ajit Kumar Narsey was filed by Messrs Lal Patel Bale Lawyers on 30th January, 2013 opposing the setting aside and seeking summary Judgment as an alternate relief.*
9. *An Affidavit of Mani Kantan Dass in Reply to the Affidavit of Ajit Kumar Narsey was filed by Messrs Janend Sharma Lawyers on 22nd March, 2013 opposing the application by the Plaintiff.*
10. *A further Affidavit of Ajit Kumar Narsey in Reply to the Affidavits of Sandhya Devi and Mani Kantan Dass was filed by Messrs Lal Patel Bale Lawyers on 15th April, 2013 responding as necessary.*
11. *On 6th June 2014 the Default Judgment was set aside and the Defendant was given leave to file its defence which it did on 10th June, 2014.*
12. *A Reply to Defence & Counterclaim was filed by Messrs Lal Patel Bale Lawyers on 15th July, 2014.*
13. *The Plaintiff then filed a Summons and Affidavit of Ajit Kumar Narsey in support seeking Summary Judgment on 6th August, 2014.*
14. *The Defendant opposed the application and filed the Affidavit of Amitaash Chandra Sharma on 14th October, 2014.*
15. *Submissions of the Plaintiff in support of Summary Judgment were filed on 19th January, 2015.*
16. *The said matter was scheduled for hearing before Mr. Anare Tuilevuka on 17th April, 2015 at 11.30 am. The hearing did not take place as a judicial conference was taking place and the hearing date was vacated and listed for mention on 23rd April 2015. The matter was further adjourned by a notice of adjourned hearing to 4th May 2015.*
17. *When the matter was called on 4th May 2015, our office failed to appear as I had failed to enter the date in our master diary. As a result I failed to instruct our city agents to appear in this matter. Accordingly the matter was taken off the list.*
18. *On 15th May, 2015 my Principal, requested the status of the matter and I then realised that I had forgotten to give instructions as required.*

19. *I then found out from the Lautoka High Court Registry that the matter was called on 4th May 2015 and taken off the list due to non-appearance by our Counsel.*
20. *I therefore seek that the Plaintiffs Summons dated 29th July 2014 and filed on 6th August 2014 be re-instated to the list and a hearing date be assigned on the Summons.*

(D) AFFIDAVIT IN OPPOSITION

The Defendant Company filed an Affidavit in Opposition sworn by one ‘Amitaash Chandra Sharma’, a director of the Defendant Company which is substantially as follows;

- Para 1. That I am a director of the Defendant Company and am duly authorised by the Company to swear this Affidavit on its behalf.*
2. *I have been read and explained the Affidavit of Sainimere Kato in Support filed on 31st July, 2015 (herein after called the “said Affidavit”).*
 3. *That in so far of the contents of this Affidavit is within my personal knowledge it is true, in so far it is not within my personal knowledge, it is true to the best of my knowledge and information and belief.*
 4. *I deny the allegations in paragraphs 16 to 17 inclusive of the said Affidavit and state that the Plaintiff Solicitors had failed to appear in Court on 2 consecutive occasions (23rd April, 2015 and 04th May, 2015) due to which the Court had taken matter off the Cause-list.*
 5. *The Plaintiff has been lax in prosecuting their claim and have caused delays.*
 6. *That I seek that the Plaintiffs Application be dismissed with costs to the Defendant.*

(E) ANALYSIS

- (1) At the commencement of the hearing before the Court, Counsel for the Defendant raised objections to the Plaintiff’s ‘Notice of Motion’ for re-instatement. The Defendant’s objection seems to be two fold;
 - (i) The Plaintiff’s notice of Motion is irregular because Order 34, rule 2 of the High Court Rules, 1988 cannot be applied for an application for re-instatement.

- (ii) The Plaintiff is not entitled to be heard in support of its application for re-instatement of the Summons seeking Summary Judgment, unless and until it takes the first and essential step towards re-instating the action.

(2) Let me now move to consider the first objection, viz, “Notice of Motion” is irregular.

The Plaintiff’s “Notice of Motion” for re-instatement is made pursuant to Order 34, rule 2 of the High Court Rules, 1988.

It was contended by the Defendant that the Notice of Motion is irregular because Order 34, rule 2 cannot be applied for an application for re-instatement.

Let me have a closer look at Order 34, rule 2.

Pre-trial conference (O.34, r.2)

(2)-(1) The provisions of this rule apply only in proceedings in which all the parties are represented by solicitors.

(2) Before an action may be set down for trial the solicitor acting for any of the parties shall make a written request to all the other solicitors acting for other parties to the action to attend a conference at a mutually convenient time and place, with the object of reaching agreement as to possible ways of curtailing the duration of the trial, and, in particular, as to all or any of the following matters –

- (a) the possibility of obtaining the admission of facts or Documents;*
- (b) the holding of inspections and examinations;*
- (c) the discovery of documents;*
- (d) the exchange between parties of reports of experts;*
- (e) the plans, diagrams, photographs, models and similar articles to be used at the trial;*
- (f) the quantum of damages; and*
- (g) the consolidation of trials.*

(3) If any solicitor refuses to attend such a conference, the solicitor requesting the same may apply to the Court for an order that such conference be held, and the Court may order that such Conference be held at such time and place and for such purpose as shall be specified in the order, or may order that such conference need not be held.

(4) [At the conclusion of any such conference the Solicitors attending it shall draw up and sign a minute containing a succinct statement of:

- (a) the matters, if any, upon which they are agreed, and*
- (b) the issues whether of fact, law or procedure remaining for determination by the Court.]*

(5) [When a Solicitor sets an action down for trial or makes a written request for the date of the hearing thereof he must state in writing whether a pre-trial conference under this rule has been held and if not must state the reasons therefor.]

(6) Before the trial proceeds the judge may call to his chambers the solicitors representing the parties in the action with a view to bringing about an agreement on any matter likely to curtail the duration of the trial or save the costs.

(7) When giving judgment on the action the Court may award portions of the costs against any parties who should have agreed to certain matters at a pre-trial conference but had refused to do so, if such an agreement would have curtailed the duration of the trial or saved the costs.

The wording of Order 34, rule 2 is perfectly clear to me. Order 34, rule 2 contain provisions relating to 'Pre-trial Conference' and it makes no provision for 're-instatement'.

This is not disputed by Counsel for the Plaintiff. There is a world of difference between general provisions relating to 'Pre-trial Conference' from an application to reinstate an action or Summons.

In any event, the Defendant's objection must fail because of the delay involved.

Order 2, r.2 provides that an application to set aside any proceedings for 'irregularity' shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the 'irregularity'. The requirements are cumulative. Since the application is not made within a reasonable time, the application will not be allowed. If the Defendant had considered that the 'Notice of Motion' was in an irregularity, it could have moved under Order 2, r.2 before it filed an Affidavit in Opposition. Instead, it did not do so. It has waived its right by filing an Affidavit in Opposition. It is now too late to raise such an argument even if it had any validity.

For the sake of completeness, Order 2, r.2 is reproduced below in full.

Application to set aside for irregularity (O.2, r.2)

2.-(1) An Application to set aside for irregularity any proceedings, any step taken in any proceedings or any documents, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

(2) *An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion.*

It should be remembered, as I significantly believe, the rules are an indispensable framework for the orderly administration of justice.

The need for and the importance of complying with the Rules were emphasised as far back as 1983 by the Court in "Kenneth John Hart v Air Pacific Ltd", *Civil Appeal No. 23 of 1983*.

In 1995, the Supreme Court, the highest Court in the land warned; "We now stress, however, that the Rules are there to be obeyed. In future practitioners must understand that they are on notice that noncompliance may well be fatal to an appeal" See; Venkatamma v Ferrier –Watson, *Civil Appeal No. CBV 0002 of 1992 at p.3 of the judgment*.

In August, 1997, the Court of Appeal in Hon Major General Sitiveni Rabuka & Others v Ratu Viliame Dreunimisimisi & Others (*Civil Appeal No. ABU0011 of 1997*) held as follows-

"In all the circumstances, having regard to the history of the proceedings in the High Court and bearing in mind what the Supreme Court said in *Venkatamma*, we have decided that the proper course for us to follow now is to reject the application for further time to comply with rule 17 and to dismiss the appeal."

In the decision of the Privy Council in Ratnam v Cumarasamy and Another [1964] *3 All E.R. at page 935*;

Lord Guest in giving the opinion of the Board to the Head of Malaysia said, *inter alia*:

"The rules of court must, Prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation. The only

material before the Court of Appeal was the Affidavit of the appellant. The grounds there stated were that he did not instruct his solicitor until a day before the record of appeal was due to be lodged, and that his reason for this delay was that he hoped for a compromise. Their lordships are satisfied that the Court of Appeal was entitled to take the view that this did not constitute material on which they could exercise their discretion in favour of the appellant. In these circumstances, their lordships find it impossible to say that the discretion of the Court of appeal was exercised on any wrong principle.”

(Emphasis Added)

On the strength of the authority in the above judicial decisions, I wish to emphasise that the rules are there to be followed and non-compliance with those rules is fatal.

If the Defendant was serious in its intention on the issue of irregularity, it should have availed itself of the relief granted to it under Order 2, rule 2 of the High Court Rules, and apply to set aside on the ground of irregularity. However, this required of the Defendant not to have taken any fresh step after becoming aware of the irregularity, which cannot possibly satisfy, having proceeded with this hearing regardless.

The Defendant’s Counsel cannot at this stage of the proceedings, base part of its objection on what appears to be an irregularity as to form and contents, without being subjected to the test under the second limb of Order 2, rule 2(1).

Therefore, I reject the first objection raised by the Defendant.

(3) Now let me move to consider the second objection raised by the Defendant.

It was contended by the Defendant that the Plaintiff is not entitled to be heard in support of its application for re-instatement of the Summons seeking Summary Judgment unless until it takes the first and the essential step towards re-instating the action, which was taken off the cause list on 04th May 2015 due to the second consecutive non-appearance by the Plaintiff.

Let me have a closer look at the “Notice of Motion” filed by the Plaintiff. The Plaintiff has sought the following Order;

NOTICE OF MOTION

*TAKE NOTICE that this Honourable Court will be moved before the Master in Chambers at High Court Lautoka on Friday the 28th day of August 2015 at the hour of 8.30 am o'clock in the forenoon or so noon hereafter as Counsel can be heard by Counsel for the above-named Plaintiff for an **ORDER** that this matter be reinstated and/or restored which was removed from the cause list on the 4th day of May 2015.*

(Emphasis Added)

The Order sought by the Plaintiff in its 'Notice of Motion' is unmistakably clear; "**ORDER that this matter be reinstated and/or restored which was removed from the cause list on the 4th day of May 2015**".

Thus, this Court does not find any merit in the Defendant's submissions on the second ground of objection.

(4) Leave all that aside for a moment!!

The Affidavit in Support of the Plaintiff's Notice of Motion for reinstatement is sworn by a law clerk in the chambers of Plaintiff's Solicitors. The reason why the Plaintiff is unable to depose has not been explained.

The Plaintiff's application for reinstatement of the Plaintiff's claim is a **contentious matter** and it is not appropriate for a law clerk to depose in support of it. Moreover, the law clerks of Solicitors are neither litigants nor competent legal persons to swear in **contentious matters**.

In this, I am comforted by the rule of law expounded in the following judicial decisions:-

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."

(Emphasis Added)

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”.

(Emphasis added)

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 Gerard 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 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 1077 about the propriety of law clerks deposing affidavits”.

(Emphasis added)

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 Plaintiff's Notice of Motion for reinstatement is unacceptable. Therefore, the whole of the affidavit is removed from the court record. This may leave the court with no option but to dismiss the Notice of Motion, since there is no valid affidavit explaining the reasons for plaintiff's non appearance in court on 23rd April 2015 and 04th May 2015.

The Defendant did not raise objections to the Affidavit of the law clerk. But the Court is bound to look into the propriety and the legality of the affidavit, filed in support of the application for re-instatement before considering the principles on re-instatement.

This should be made clear; I am not prepared to hallow an irregular practice. It is not the function of this Court. At this moment, I cannot resist in saying that Counsel for the Plaintiff should cloth the practice in the garment of legal acceptability!!!

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 eight (8) of the 'Affidavit in Reply' deposed by 'Sanimere Kato', the law clerk, filed on 28th October 2015, on behalf of the Plaintiff Company.

Para 8. I accepted that I had failed to enter the date of 4th May 2015 in our firm's master diary and therefore I failed to instruct our agents to appear on 4th May 2015 which resulted in the matter being taken off the list. For this reason and my error we humbly pray to this Honourable Court for the matter to be restored to the list given that our client has:

- (i) a bona fide claim against the Defendants;*
- (ii) has been diligent in prosecuting this matter;*
- (iii) the delays in bringing the Plaintiff's summary judgment application to hearing have been as a result of the NOAH's received from the High Court and of no fault of the Plaintiff;*
- (iv) that to fail to restore the Plaintiff's claim to the list would undoubtedly cause severe prejudice to its bona fide claim in light of an administrative error on my part.*

(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.

As noted earlier, the Plaintiff is a duly incorporated limited liability company having its registered office at Nadi. The affidavit in support of the Plaintiff's Notice of Motion is sworn by a law clerk in the chambers of Plaintiff's Solicitors. The law clerk needs the sanction of the Plaintiff Company to swear on behalf of the Plaintiff Company. But the law clerk does not annex 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 Plaintiff 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."

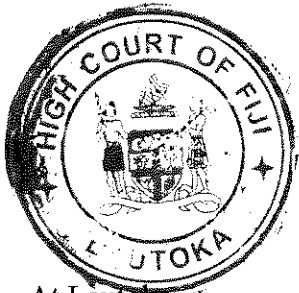
In view of the foregoing analysis there is no alternate but to dismiss the Plaintiff's Notice of motion for re-instatement. I cannot see any other just way to finish the matter than to follow the law.

In view of the approach, I have adopted, I do not think that there is any need for me to express my views on the merits of the Plaintiff's arguments relating to re-instatement of the action. 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 Plaintiff's application for reinstatement.

Essentially, that is all I have to say!!!

(F) **FINAL ORDERS**

- (1) The Plaintiff's "Notice of Motion" dated 31st July 2015 is dismissed.
- (2) The Plaintiff is to pay costs of \$500.00 (summarily assessed) to the Defendant which is to be paid within 14 days hereof.



At Lautoka
12th August 2016.

Jude Nanayakkara
Master.