

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 70 of 2013**

**BETWEEN** : **RAWLINSON JENKINS LIMITED**, a limited liability company having its registered office at Na Hina Tower, 4 McGregor Road, G.P.O. Box 990, Suva.

**PLAINTIFF**

**AND** : **HANSONS (FIJI) LIMITED**, a limited liability company having its registered office at Level 2, Office 1, Victoria Corner Building, Victoria Parade, G.P.O Box 17051, Suva.

**DEFENDANT**

**Counsel** : Mr. Jamnadas K. for the Plaintiff  
Mr. Singh, S., and Mr. Tuikilakila for the Defendant

**Before** : Acting Master S. F. Bull

**Ruling** : 17 October 2016

## **RULING**

### **Background**

1. The Defendant seeks leave to amend its defence and counterclaim pursuant to Order 20 rule 5 of the High Court Rules. In support of the application is an affidavit sworn by Monitesh Kant, accountant for the Defendant Company, who deposes that:
  - (i) he is informed and verily believes that the new matters pleaded in the proposed Amended Statement of Defence

and Amended Counterclaim arise out of the same facts as are relied upon in the present claim;

- (ii) the proposed amendments are not substantial, and;
- (iii) the Plaintiff will not be prejudiced by the amendments proposed.

2. The Plaintiff vigorously opposes the amendments proposed on the grounds that:

- (i) they substantially alter the defence and counterclaim;
- (ii) the change in the Defendant's position is a complete contradiction of its original position in the present defence and counterclaim where it admits the existence of a contractual relationship with the Plaintiff;
- (iii) the proposed amendments will deviate from the issues in controversy between the parties, and;
- (iv) the prejudice resulting from such an amendment cannot be offset by a costs order.

### **Preliminary objection**

3. The Plaintiff says the affidavit in support is defective in that it was sworn by an accountant for the Defendant company who has not adduced any proof of authorisation to swear such an affidavit for the company. Reliance is placed on section 40 of the Companies Act [Cap 247] (which was in force at the time the affidavit was taken), and on Denarau Corporation Ltd v Deo Civil Action No. HBC 32 of 2013.

4. 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 authorised officer of the company, and need not be under its common seal.

5. In Denarau (supra), Ajmeer J stated:

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.

6. In reply to the Plaintiff's objection, Mr. Singh points out that the affidavit in Denarau (supra) was not accepted for many reasons. The absence of authority, he says, does not mean that the affidavit ought to be dismissed. Mr. Singh also submits that it is not clear whether in paragraph 13 of Denarau the Judge was expressing his opinion, or merely citing Mr. Narayan's submissions there.
7. Whilst Mr. Kant deposes that the Company has duly authorised him to make the affidavit in its behalf, no evidence of such authorisation has been shown to the Court.
8. The effect of the lack of authorisation for affidavits sworn on behalf of a company or party has been addressed in a number of decisions in this jurisdiction.
9. In Total (Fiji) Ltd. v Khan, Civil Action No. HBC 23 of 2008, the Court dealt with a section 169 application for vacant possession. The company's application was supported by the affidavit of the Retail Area Manager who had authority to do so, as well as by the affidavits of two other officers of the company, for whom no evidence of authority to so swear was given. The Defendant objected to these

affidavits on account of lack of authority and therefore breach of section 40 of the Companies Act.

10. Master Tuilevuka (as His Lordship then was) was of the view that the very senior positions of the officers as well as the fact that the company had for quite some time been trying to obtain possession of its property led to the conclusion that the officers were duly authorised to swear the affidavits for the company. The affidavits were accepted into evidence and the company's application for vacant possession granted.
11. More recently in Denarau Corporation Ltd v Deo Civil Action No. HBC 32 of 2013, Ajmeer J found defective and insufficient an affidavit in support which not only lacked proper authorisation from the Company for whom it was filed, but was also sworn before the city agents of the Plaintiff's solicitors in breach of Order 41 rule 8 of the High Court Rules. Consequently, the application for summary judgment was dismissed.
12. In Raingold Investment Ltd v Courts (Fiji) Ltd Civil Action No. HBC 41 of 2013, the Court disregarded an affidavit sworn by the plaintiff's solicitor for the plaintiff company, in the absence of evidence of authority to do so.
13. Similarly, in Ali v Merchant Finance & Investment Company Civil Action No. HBC 105 of 2011, the Master upheld the Plaintiff's preliminary objection to the Defendant's affidavit in support of an application to strike out for want of prosecution and abuse of process, on the ground that there was no evidence that the deponent had authority from the company to swear an affidavit in its behalf. The Court disregarded the affidavit and, finding in consequence there to be no evidence in support of the summons, dismissed it accordingly.

14. In Bulileka Hire Services Ltd v Housing Authority Civil Action No. HBC 57 of 2011, Seneviratne J refused to accept into evidence a solicitor's affidavit in support of the summons for leave to appeal and to stay proceedings pending appeal. The affidavit in support of the summons failed to show that the deponent had authority to depose it on behalf of the Housing Authority. The Court found there to be no proper affidavit before it in support of the summons and consequently struck it out.
15. The authorities above are binding on this Court. The Defendant is a company and therefore "an artificial legal entity<sup>1</sup>." It cannot act or give evidence on its own and therefore relies on its officers or agents to give evidence in its behalf. Under section 40 of the Companies Act, a director or secretary or an authorised officer may do that. Under Denarau, Raingold and Bulileka (supra), an agent needs to show authority. Thus in Denarau, Ajmeer J stated:

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.

16. In the absence of authority for Mr. Kant to swear the affidavit for the Defendant company, I disregard the affidavit in support of the Defendant's application. The result is that the summons is left without any evidence in support of it, and therefore must fail.
17. Even if I had dismissed the preliminary objection, the outcome would be the same. I say this in light of what I see as the wholly inadequate

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<sup>1</sup> Total (Fiji) Ltd v Khan, Civil Action No. HBC 23 of 2008.

and sparse contents of the affidavit in support. The Defendant had the onus of proving that the proposed amendment was warranted, and failed to do so.

18. Order 20 rule 5 of the High Court Rules deals with amendment of writ or pleading with leave. Rule 5 (1) allows the plaintiff or any party to amend its pleadings at any stage of proceedings.
19. 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.

20. 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.

21. The *Supreme Court Practice* 1999 at 20/8/6 added:

On the other hand, it should be remembered that there is a clear difference between allowing amendments to clarify the issues in dispute and those that provide a distinct defence or claim to be raised for the first time (see, per Lord Griffiths in *Ketteman v. Hansel Properties Ltd* [1987] A.C. 189 at 220).

22. In this case, the proposed amendment to the defence includes a denial of there being any contract between the parties. This is in direct conflict with the present defence which admits at paragraph 5 that there was a contract between the parties for a fixed lump sum fee of \$50,000.00 VEP.
23. The affidavit in support has not provided any reason at all for the change in the Defendant's position, let alone the basis for any of the amendments sought, save for the bare statement that the new matters pleaded in the proposed amended defence and counter claim "arise out of the same facts as are relied upon the present claim..., are underlined in red ink... [and that] the Plaintiff would not be prejudiced" by them.
24. It is baffling how the defence admitting the existence of a contractual relationship between the parties could be allowed to exist for more than two years, and then, without any explanation at all, deny the existence of any such contractual relationship (paragraph 16 of the proposed defence).
25. This distinct proposed defence being raised for the first time at this late stage in proceedings and the failure to give any reasons not only for the change but also as to why amendment ought to be granted, must lead inevitably to a dismissal of the application.

### **Conclusion**

26. Whilst my finding on the preliminary objection is enough to dispose of this application, a consideration of the merits of the application would

have yielded the same result, in that the application has not been made out and must therefore be dismissed.

**Orders:**

1. The application for leave to amend the statement of defence and counterclaim is dismissed.
2. The Defendant to pay to the Plaintiff within 14 days, costs summarily assessed in the sum of \$1000.00.
3. Case adjourned to 7 November 2016 at 9am for further directions.



*S.F. Bull*

S.F. Bull  
**Acting Master**