

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 188 of 2012

BETWEEN : **BEACHCOMBER ISLAND RESORT LIMITED** a limited liability company having its registered office at Lautoka.

Plaintiff

AND : **INTERNATIONAL FREIGHT AND CLEARANCE SERVICES LIMITED** a limited liability company having its registered office at c/- Shyam Narayan & Co. 1st Floor, Crown Investments Building, Nadi.

Defendant

AND : **BRENDAN LUKE HANNON** shareholder/director of Beachcomber Island Resort Ltd , Fineline Holdings Ltd and Anchorage Beach Resort, of Vuda, Lautoka.

1st Third Party

AND : **TUBREN AIRFREIGHT CONSULTANTS** of Nayau Street, Samabula North, Suva.

2nd Third Party

AND : **FINELINE HOLDINGS LIMITED** a limited liability company having its registered office at 52 Narara Parade, Lautoka.

3rd Third Party

(Ms) Virisila Lidise for the Plaintiff and 1st and 3rd Third Party
Mr. Roneel Kumar for the Defendant

Date of Hearing : - 21st November 2016
Date of Ruling : - 17th February 2017

RULING

- (1) The matter before me stems from the Defendant's Summons dated 04th August 2016, made pursuant to Order 20, rule 5 of the High Court Rules 1988 and the inherent jurisdiction of the Court seeking the grant of the following Orders;
 - ❖ The Defendant be given leave to amend paragraph 08 of its Statement of Defence and Counter Claim as proposed.
 - ❖ The costs of this application be paid by the Plaintiff, the 1st and 3rd Third Parties on a Solicitor Client indemnity basis.
- (2) The Defendant's application is supported by an Affidavit sworn on 04th August, 2016 by Ifran Zoheb Ali Janab', the Financial Controller of 'International Freight Clearance Services Ltd', the Defendant Company.
- (3) At the oral hearing before the court, the Plaintiff raised a preliminary objection to the 'admissibility' of the Defendant's supporting Affidavit. The Plaintiff says that the deponent 'Ifran Zoheb Ali' is not a Director of the Defendant Company and there is no proper authority to show that the deponent is authorised to give such Affidavit evidence.
- (4) On my perusal of the Defendant's supporting Affidavit, it seems to me perfectly plain that;
 - ❖ 'Ifran Zoheb Ali' is not a director of the Defendant Company.
 - ❖ No authority or resolution of the Defendant Company was annexed to the supporting affidavit to establish that the deponent has been authorised by the Defendant Company to swear the supporting Affidavit on behalf of the Defendant Company.
 - ❖ To address this defect, the deponent in his "Affidavit in Reply" has annexed a correspondence dated 11th October 2016, (annexure and marked 1ZA-1) addressed to the Faiz Khan Lawyers, Solicitors for the Defendant, by Shailendra Prasad, Managing Director of the Defendant Company. For the sake of completeness, the correspondence is reproduced below in full.

11th October 2016

*Faiz Khan Lawyers
Lautoka
Fiji Islands*

Attn: Roneel Kumar

Dear Sir

I Shailendra Prasad, Managing Director hereby authorise our Financial Controller, Mr Ifran Zoheb Ali JANab of 7 Kara Punja Road, Waiyavi Stage 2, Lautoka to act on behalf of the company in all legal matters of International 1 Freight & Clearance Services Limited, specifically Action No. HBC 188 of 2012.

Please do not hesitate to contact us for any queries or clarifications.

Yours faithfully

(Signed)

*Shailendra Prasad
Managing Director*

(Emphasis added)

I note that the correspondence does not affirm that the deponent was authorised to depose a supporting Affidavit. One word more, the correspondence is dated 11th October 2016. But the supporting affidavit was sworn on 04th August 2016. Therefore, the deponent cannot derive any assistance from the correspondence to regularise his supporting affidavit.

- (5) I cannot brush aside the preliminary objection raised by counsel for the Plaintiff at the oral hearing before the court. I remind myself that, this Court is duty bound, as a matter of law, to take into account in exercising the Court's discretion, the argument advanced by Counsel for the Plaintiff.

See;

❖ **Australian Wire Industries (Pty) Ltd v Nicholson**
(1985) 1 NSWCCR 50

❖ **Sullivan v Department of Transport**
(1978) 20 ALR 323

❖ **Baldwin & Francis v Patents Appeal Tribunal**
(1959) AC 663.

(6) Thus, the question is, what is the ‘**admissibility**’ of the supporting Affidavit of ‘Ifran Zoheb Ali Janab, the Financial Controller of the Defendant Company?’

(7) In response to the preliminary objection advanced by the Plaintiff, the Defendant says; (I focus on paragraph (10) and (13) of the Defendant’s final submissions filed on 23rd November 2016)

Para 10. Similarly in the present case the Plaintiff has failed to file any application to set aside the Defendant’s Affidavit. The Plaintiff cannot raise this issue at the hearing after choosing not to follow the High Court Rules. By filing an affidavit in opposition the Plaintiff has taken another step, without filing an application by Summons or Motion to set aside the affidavit for purported irregularity.

13. The Defendant submits that it has complied with the requirements of filing an affidavit in support under Order 41 rule 1 (4). However if this Honourable Court disagrees then the Defendant submits that the Plaintiff has failed to file a Summons or Motion to set aside its Affidavit under Order 2 rule 2 as per Safari Lodge (supra). Further and in the alternative the Defendants seeks leave of this Honorable Court under Order 2 rule 1 and Order 41 rule 4 of the High Court Rules 1988 as per Inspired Destinations (supra).

(8) So I come to the First.

Counsel for the Defendant relies substantially on the ruling in this Court on ‘**Safari Lodge (Fiji) Ltd v Tiki (Fiji) Ltd**, (2015), FJHC 876.

The Defendants in ‘Safari Lodge’ case annexed ‘ostensible’ authority (annexure AT-1) to prove that the deponent “(Ms) Ana Tuiwawa’ was duly authorised to swear on behalf of the Defendant Company. However, the Defendant in the instant case did not annex ‘ostensible’ authority to the supporting affidavit to prove that the deponent was duly authorised by the Defendant Company to swear a supporting Affidavit on behalf of a limited liability company.

The issue here is quite different from that which was before 'Safari Lodge Ltd'. Thus, that does not, in my Judgment, help in the present case.

- (9) I am abundantly clear in my mind that the **supporting affidavit** of Ifran Zoheb Ali Janab', the Financial Controller of 'International Freight Clearance Services Ltd', the Defendant Company, is an '**irregular document**' because there is no 'ostensible' authority annexed to the supporting affidavit to prove that the deponent was duly authorised to swear a supporting affidavit on behalf of the Defendant company. The deponent is not the Director of the Defendant Company. Any action on behalf of a limited liability company should be done by a Director under the company seal. A director is a creature of the Articles of the Association of a company. **Order 41, rule 1(4) of the High Court Rules, 1988 requires affidavits to be expressed in "first person"**.

Counsel for the Defendant argues that when Order 2, rule 1 is read with Order 2, rule 2, where there has been an irregular document in the court record then if the opposite party wishes to apply to this Court to set the irregular document and the proceedings (in which the failure occurred) aside, the only way in which it can be done is for that opposite party to issue a Summons or Motion stating his grounds of objection on a Summons or Notice of Motion; and, if he takes that course, on ordinary principles the onus is on that party to satisfy the Court that his application to set aside be granted. Unless he discharges that onus, the Court should not set the irregular document and the proceedings (in which the failure occurred) aside.

If that construction of the rule is right, it is said to lead to next submission, namely that unless and until an application under Order 2, rule 2 has been made to the Court and the Court has properly granted that application, the irregular document and the proceedings in which the failure occurred remains valid inter parties.

Dealing with the question this far, I would hold that in spite of the force with which Counsel for the Defendant puts his submission, it is wrong.

With due respect to the forceful and tenacious argument of Counsel for the Defendant, in my opinion it involves a misconstruction of Order 2, rule 1. It is wrong to construe Order 2, rule 1 as saying that where there is an irregular document and irregular proceedings, the document and the proceedings is not to be treated as irregular until the opposite party successfully applies to the Court to set the irregular document and the proceedings (in which the failure occurred) aside.

So, I should come to **Order 2, rule 1** which I quote;

EFFECT OF NON-COMPLIANCE

Non-Compliance with rules (O.2, r.1)

1. -(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with

any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such term as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other than the one employed.

As a matter of construction of that rule, it is clear that, where there had been irregularity by non-compliance with the rules, the consequence would be that by reason of the irregularity, unless the Court so directed, the power of the Court, when an irregularity was noted, was either to set the proceedings aside or to amend them or otherwise deal with them as the Court thought fit. The content of Order 2, rule 1 is designed to enable the Court, whenever faced with anything done or left undone in proceedings which constitutes a failure to comply with the requirements of the rules, to exercise the powers conferred by the rules without having first to decide whether the jurisdiction conferred by the rules applies at all.

Order 2, rule 2 describe the procedure when a Defendant wishes to apply to set aside any irregular proceedings or any irregular document. Such an application shall not be allowed unless made within reasonable time and before the party applying takes any further steps.

So I should come to **Order 2, rule 2 which I quote;**

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 motions.

As I understand the wording of Order 2, r 1, from the moment a step in proceedings is tainted by irregularity through failure to comply with the rules, the irregular step or document remains irregular inter partes until the matter has been brought before the Court and the Court has decided in which way to exercise the jurisdiction conferred by Order 2, r 1(2). It should be born in mind that, Order 2, r 2 does not restrict the power of the Court in the sense of restricting its jurisdiction, and it does not have the effect of suspending the irregularity until the application under Order 2, r 2 is made. The purpose and effect of Order 2, r 2 is to prescribe the procedure if and when an opposite party decides to apply so that the Court on recognising the irregularity may exercise its powers under r 1(2) by taking the action of killing or curing the irregular proceeding.

Where, in the course of proceedings, the court finds that a failure of the nature referred to in Order 2, r 1(1) has occurred, which has not been waived by the other party either expressly or by implication, the court is given by Order 2, r 1(2) a choice of courses to pursue at its own discretion, whether or not an application under Order 2, r 2 is before it. In such a situation, in the exercise of its discretion under r 1(2), it may either adopt the more draconian course of setting aside wholly or in part the proceedings in which the failure occurred, or the relevant step taken in those proceedings or the relevant document or order. Alternatively, it may make such order ... dealing with the proceedings generally as it thinks fit'. The last mentioned words are, in my opinion, manifestly wide enough to empower it to make a dispensing order waiving the relevant irregularity. See ; **Leal v Dunlop Bio-Processors Ltd [1984] 2 All ER 2007 at 211 – 212 [1984] (1) WLR 874 at 880 per Stephenson LJ.**

- (10) That brings me to the next submission. The second submission on behalf of the Defendant is that, the Court should grant leave to the Defendant to use the Affidavit in evidence under Order 41, rule 4 of the High Court Rules 1988.

With all due respect to the argument, I am not at all persuaded by the submission of Counsel for the Defendant.

In my opinion, however contrary to the submission of Counsel for the Defendant, the supporting Affidavit of "Ifraan Zoheb Ali Janab" is defective and a nullity because there is no 'ostensible' authority annexed to the supporting affidavit to prove that the deponent was duly authorised to swear a supporting Affidavit on behalf of the Defendant Company. The correspondence (annexure and marked 1ZA-1) dated **11th October 2016** does not assist the Defendant because the supporting Affidavit was sworn on **04th August 2016**.

In the Court's view, the defect in the supporting Affidavit is fundamental, which cannot be cured by the use of the Court's discretion, under Order 41, rule 4 of the High Court Rules.

I now turn to the authority.

In coming to the conclusion to which I have come and in support of this conclusion of mine, I adopt the following words of Hon. Justice Jitoko 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.”

I can see no reason why the rule of law enunciated by Hon. Justice Jitoko should not be applied in the case before me. I have no hesitation whatsoever in relying on the above judicial decision 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 holding that the supporting Affidavit of ‘Ifraan Zoheb Ali Janab’ filed in support of the Defendant’s Summons seeking leave to amend the Statement of Defence and Counter Claim is defective and a nullity. Therefore, I give it no weight whatsoever. It is not the function of the court to point out to the deponent how he should swear an affidavit on behalf of a limited liability company.

It would be an abuse of practice of the court to permit an irregular document to remain upon the record. This court has a duty to discharge towards the public and the suitors, in taking care that its records are kept free from irregular documents.

I am of course, not hesitant, in the exercise of my discretion to direct this affidavit to be struck off the record of the court under Order 2, rule 1(2).

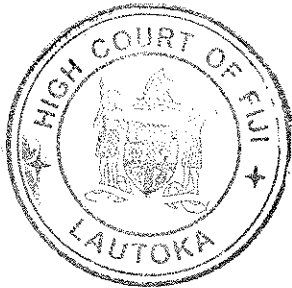
This may leave the Court with no option but to dismiss the Defendants Summons since there is no evidence on which the Court can exercise its discretion under Order 20, rule 5 of the High Court Rules, 1988.


- (11) To sum up, in view of the approach I have adopted in relation to the ‘admissibility’ of the supporting Affidavit of ‘Ifraan Zohed Ali Janab’, the Financial Controller of the Defendant Company, I have no alternate but to dismiss the Defendants 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 Defendant's application to amend the Statement of Defence and Counter-Claim.

ORDERS

- (1) The Defendant's Summons dated 04th August 2016 is dismissed.
- (2) The Defendant is to pay costs of \$500.00 (summarily assessed) to the Plaintiff within 14 days hereof.




17/2/2017
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Jude Nanayakkara
Master

At Lautoka
17th February 2017