IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 105 of 2011

BETWEEN : AZAM ALI father's name Rahim Tullah trading as R AZZAM INVESTMENTS of Moto, Ba, Postal Address, P.O. Box 2987, Ba, Businessman

Plaintiff

AND : MERCHANT FINANCE & INVESTMENT COMPANY LIMITED a limited liability company having its registered address at Level 1, 91 Gordon Street, Suva.

Defendant

Before : Acting Master U.L. Mohamed Azhar

Counsel : Mr Mark Anthony for the Plaintiff
Mr K. Patel for the Defendant

Date of Hearing : 23rd May 2017
Date of Ruling : 24th May 2017

RULING
(On preliminary objection)

01. This ruling refers to the preliminary objection raised by the counsel for the defendant yesterday in respect of series of affidavits filed by the plaintiff during the hearing on an interlocutory application by the defendant. The facts of this matter, albeit brief, are that, the defendant filed the summons under O.25, r.9 of the High Courts Rules to strike out plaintiff's action for want of prosecution and abuse of court process. This summons was supported by the affidavit of manager of the defendant company sworn on 07.11.2016. The plaintiff filed his affidavit in opposition on 29th November 20016. The defendant in the affidavit in

reply claimed that, that the affidavit filed by the plaintiff is defective and should be struck out. The plaintiff then filed further affidavit dated 05th of April 2017, which was again opposed by the defendant, by filling a supplementary affidavit on the same ground as that affidavit, too, was defective. However, the defendant did not divulge the actual defects of those two affidavits.

02. The plaintiff being kept in dark, then filed the notice of motion on 5th May 20017 and sought following orders;

1. *That leave be granted to the Plaintiff's to use in evidence in this mater his Affidavits sworn on 5th April 2017 despite the irregularity in form.*

2. *Such further and/or other relief that may seem just and proper to this Honorable Court.*

3. *That costs be cost in the cause*

03. The said motion was supported by the affidavit sworn by the same deponent – the plaintiff and identified some defects of his previous affidavit filed on 5th April 2017. The counsel for the defendant then gave his limited consent to defects identified by the plaintiff and averred in the affidavit supporting the said motion. The order was made in terms of the said notice of motion only in relation to those defects that were identified by the plaintiff. However, the counsel for the defendant still informed the court that, there are some other defects as well which would be highlighted during the hearing of the summons for striking out.

04. The plaintiff then filed another notice of motion on 15th May 2017 and sought the following orders;

1. *That leave be granted to the Plaintiff's to use in evidence in this mater his Affidavits sworn on 29th November 2016 and 5th of April despite the irregularity in their form.*

2. *Such further and/or other relief that may seem just and proper to this Honorable Court.*

3. *That costs be cost in the cause*

05. This motion is again supported by an affidavit sworn by the plaintiff. It is evident in its draft itselt that, a blanket order is sought by the plaintiff to cover up all the defects which are, seemingly, unknown to himself. This is a very general attempt or rather an attempt by the plaintiff to shoot in the dark without having any idea about the exact defects of his own affidavits that were previously filed in court. This last attempt was made on 15th of May 2017 and whereas the hearing was fixed on 22nd May 2017- the day before yesterday. The returnable date of this last motion was last Friday (19.05.2017). Having confirmed the receipt of this notice of motion, the counsel for the defendant objected this motion and sought time to file affidavit in opposition to this motion. There again, the counsel for the defendant as he usually did, stated that, the last affidavit supporting the motion filed on 19.05.2017 too is defective, but he did not want to divulge the same defect. At the same time, the plaintiff's solicitor moved to file another affidavit ractifying all the defects. Since the hearing of original summons for striking out was fixed for hearing on 22.05.2017, this court ordered the defendant to take up any such objection at the hearing given the fact that any leave for the defendant to file the objection would make the hearing impossible on 22.05.2017. The court equally disallowed the plaintiff's application to file another affidavit.

06. On 22.05.2017 (Monday), the matter was taken up for hearing on the summons for striking out. The counsel for the denfendant took up an objection on the appearance of the particular solicitor, who appeared for the plaintiff on that day. Having considered the rationale and principles of the said objection, the court upheld it and disallowed the particular counsel. However, the court was reluctant to adjourn the matter considering its age and wanted to proceed with the hearing. The plaintiff then asked the court to give 24 hours time to retain another lawyer to represent him. Considering his right to retain a lawyer, this court gratned time till yesterday, subject, however, to the agreed cost.

07. The new solicitor was present yesterday for the plaintiff and the matter was taken up for hearing. The counsel for the denfendant then divulged his top secret on the defects of all four affidavits filed by the plaintiff. He argured that none of the affidavits was made on oath by the deponent and all of them are devoid of any oath. In other words, the plaintiff did not make oath in the first paragraph of all the affidavits as it is usually done by all deponents. Instead, he stated that, he is the plainitiff in the first paragraph of all the affidavits and then went on to his other averements. The counsel for the defendant then raised a preliminary objection that, all the affidavits are not in compliance with the rules and ought to be struck out. He further argued that, though there is no express provision in the High Court's Rule of Fiji which mandates that an affidavit must commence with the oath, the Supreme Court Practice, generally known as White Book will apply in Fiji, by virture of O.1, r.7 of the High Court's Rules of Fiji. He then highlighted the page 524 of the White Book 1967 Volume 1 where it states under the sub title 'Commencement of Affidavit' that, ***"An affidavit must commence by stating that, the deponent makes oath".***

08. Refering to the decision in ***Denarau Corporation Limited v. Vimal Deo [2015] FJHC 112; HBC32.2013***, the counsel for defendant argued that, this is an objection in law and can be raised at any time and any stage of proceedings. He further argued that, this defect can not be cured and all the affidavits should be struck out for their irregularity.

09. Conversely, the counsel for the plaintiff argued that, the only requirement of an affidavit under O. 41, r. 1 (8) of the High Court is that *'every affidavit must be signed by the deponent and the jurat must be completed and signed by the persons before whom it was sworn'*. All four affidavits filed by the plaintiif fulfilled this requirement and they are in accordance with the rules, he further argued. Citing the decision in ***Chandrika Prasad v. Republic of Fiji & Attorney General [2001] HBC 0217/00L 17 January 2001*** plaintiff's counsel argued that, in any event the defects can be cured and those affidavits may be allowed to be used in evidence notwithstanding their defects.

10. The first question to be decided by this court is whether those affidavits are in compliance with the rules or not. In ***Chandrika Prasad v. Republic of Fiji & Attorney General*** (supra) His Lordship the Chief Justice Gates (as His Lordship then was) allowed 3 defective affidavits to be used in evidence notwithstanding the non-compliance with the mandatory rule of O.41, r.9 of the High Court's Rules. In that case, the affidavits were devoid of the indorsement required under the said O.41, r.9. In the case before me, the crux of the argument of the defendant's solicitor is that, all those four affidavits filed by the plaintiff are devoid of any oath and not affidavits at all due to their irregularity. Thus the facts of that case are different in my view and that case has no application in the case before me as all four affidavits, as claimed by the defendant, lack the qualification of a valid affidavit due to their irregularity.

11. **Black's Law Dictionary** in 10th Edition at page 68 defines the affidavit as *'a voluntary declaration of facts written and sworn to by a declarant, usu. Before an officer authorised to administer oaths'*. In the meantime **Osborn's Concise Law Dictionary** in 11th Edition at page 22 gives definition as *'a written sworn statement of evidence'*. Thus an affidavit is a voluntary declaration by a declarant of the facts written and sworn by him. According to above definition, there must be a declaration by the deponent and it should be sworn by him or her, before a person who is authorized to administer oath or take affirmation.

12. The High Court's Rules in O. 41, r. 1 provides for the for the *Forms of an Affidavi.* It reads as;

> *<u>Form of Affidavits (O.41, r.1)</u>*
>
> ***1.****-(1) Subject to paragraphs (2) and (3), every affidavit sworn in a cause or matter must be entitled in that cause or matter.*
>
> *(2). Where a cause or matter is entitled in more than one matter, it shall be sufficient to state the first matter followed by the words "and other matters", and where a cause or matter is entitled in a matter or matters and between parties , that part of the title which consists of the matter or matters may be omitted.*

(3). Where there are more plaintiffs than one, it shall, be sufficient to state the full name of the first followed by the words "and others", and similarly with respect to defendants.

(4). Every affidavit must be expressed in the first person and, unless the Court otherwise directs, must state the place of residence of the deponent and his occupation or, if he has none, his description, and if he is, or is employed by, a party to the cause or matter in which the affidavit is sworn, the affidavit must state that fact.

In the case of a deponent who is giving evidence in a professional, business or other occupational capacity the affidavit may, instead of stating the deponent's place of residence, state the address at which he works, the position he holds and the name of his firm or employer, it any.

(5) Every affidavit must be in book form, following continuously from page to page

(6) Every affidavit must be divided into paragraphs numbered consecutively, each paragraph being as far as possible confined to a distinct portion of the subject.

(7) Dates, sums and other numbers must be expressed in an affidavit in figures and not in words.

(8) Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn.

13. On perusal of this rule it reveals that, there is no express requirement for an affidavit to contain an oath, but simply requires, as correctly pointed out by the counsel for the plaintiff that, *'every affidavit must be signed by the deponent and the jurat must be completed and signed by the persons before whom it was sworn'*. However, the absence of any express provision in High Court's Rules of Fiji for any circumstance that arises in any cause or matter is not the deadend of the jurisdiction of this court. This court is empowered to execise its jurisdiction in conformity with the practice and procedure being adopted in the like

circumstances in the High Court of Justice in England. This is clear from O. 1, r. 7 which provides that;

Practice where no express provision in the Rules (O.1, r.7)

> *7. Where no express provision is made by these Rules with respect to the practice or procedure in any circumstances arising in any cause of matter, then the jurisdiction of the High Court shall be exercised in conformity with the practice and procedure being adopted in the like circumstances in her Majesty's High Court of Justice in England.*

14. **The Supreme Court Practice (White Book) 1967 Volume 1** specifically provides under O. 41, r. 1 (3) at page 524 under the substitle '***Commencement of Affidavit***' as follows; ***an affidavit must commence by stating that the deponent "makes oath" (Phillips v Prentice, 2 Hare 542; Re Newton, 2 De G. F. & j. 3) Every affirmation in writing must commence "I of , do solemnly and sincerely affirm" (Oaths Act 1888 s4).*** The same provision is available in **White Book 1988** at page 650, however under O.41, r. 1 (4). It must be noted that High Court's Rules of Fiji is corresponding to the said White Book 1988 edition. Thus under and by virtue of the O. 1, r. 7 of the High Court's Rules, this court has jurisdiction to adopt the practice contained in the said White Book in this case. Applying that practice, it is my considered view that an affidavit sworn in Fiji must commence by stating that the deponent "makes oath". In the case of ***Phillips v Prentice, 2 Hare 542*** cited in the White Book above, it was held was held, on the authority of ***Oliver v Price*** **(3 Dowl. Rep K. B. Pract. 261)** that, ***"an affidavit which does not express that the deponent "made oath" is not admissible. An affidavit commencing in this form," A, B, of, c, saith, that," & c, not adding "maketh oath," or any words of like signification to be inadmissible, notwithstanding the jurat expressed that it was "sworn by the said A.B., at,"*** (underlining added).

15. Therefore, the failure of the deponent to make oath at the commencement of an affidavit is the breach of mandatory requirement of an affidavit which wil inevitably render it inadmissible, notwithstanding its jurat expressed that it was sworn by the said deponent and signed by the person before whom it was

sworn. An essential part of an affidavit is that it is a statement *made on oath or affirmation*. An affidavit must be signed in front of a person who is specifically authorised by the law to administer an oath or take an affirmation. The affidavit is signed by both the person making the affidavit *and* the authorised person at the time of making oath or affirmation. The rationale is that, the deponent is giving evidence on the facts averred therein and such evidence must follow the oath. If not, it will be a mere sworn statement which lacks the evidential value. For the above reasons, I uphold the preliminary objection of the counsel for the defendant and declare that, all four affidavits, filed by the plaintiff in opposition to summons for striking out the matter for want of prosecution, are inadmissible and can not be received in evidence in the present application as they are not in compliance with the rules.

16. The defendant's solicitor further argued that, all those affidavits filed by the plaintiff should be struck out for non-compliance and the materials contained in the affidavit filed by the defendant should be considered as unchalllanged and uncontested. He also drew the attention of the court to the O. 2, r. 1 and addressed on the consequence of non-compliance. The next question, therefore, is whether those affidavits should be struck out as argued by the defendant's solicitor for non-compliance or not.

17. The rules provide for the forms and procedure of filling and serving the affidavits. The failure to follow such procedure would be considered as non-compliance with the rules. However, the question is what would be the reaction of the court in such a situation. At this juncture, I draw my attention to the O. 2, r. 1 of the High Courts Rules which reads as;

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

1. –(1) Where, in the 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, 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, 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.

18. A careful reading of the above rule 1 (1) reveals that, any failure by reason of anything done or left undone at the beginning or at any stage of proceedings 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. In short, this sub rule identifies the irregularity, however does not make such document or order or judgment or proceeding null. The sub rule 1 (2) then gives the discretion to the court to handle such irregularity. Accordingly, the court may, on the ground that there has been such a failure, exercise its discretion in two ways;

a. It may 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 , judgment or order therein. (Emphasis is mine)
or
b. It may 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***. (Emphasis is mine)

19. These rules require the court to use two different yardsticks in exercising it discretion in either way when dealing the with any irregularity referred to in subsection (1) of the O. 2, r. 1. First one is ***just*** and other is ***fit***. The first one is broader than the second. If the court decides to set aside under first limb, it should think or form an opinion that, it is ***just*** to do so. It means it should be equitable to do so. Then the court's duty is to ensure that no unjust is caused to any party when it exercises its discretion under the that limb. If any unjust would be caused to any party, in the opinion of the court, then it should not act under the first limb, but the second limb would be ***fit,*** which means it would be proper for the court to act upon in such a situation. The court should use its judicial mind before choosing either of limbs and in particular, it should be mindful of the consequence of its action under this rule. If the end result would lead to the overall interest of justice only the court should exercise its discretion under first limb. If not, the court should not be reluntant to refrain from acting under first limb and prefer the second limb. I think this would have, possibly, been meant by the drafters of the rules in their wisdom in setting two different yardsticks under the above rule.

20. As mentioned above, it was the contention of the counsel for the defendant that, all the affidavits of the plaintiff should be struck out for their irregularity and end result would be the absence of any evidence by the plaintiff to show cause why his action should not be struck out and the meterials provided by the defendant would become unchallenged and uncontroverted. Then the court has no option than striking out the action of the plaintiff. It is with this intention, the counsel for the defendant cited the case of ***Jai Prakash Narayan v. Savita Chandra Civil Appeal No 37 of 1985***. His argurement, basically seeks the court to exercise the discretion under the first limb of the O. 2, r. 1, (2) and then to decide the his application based on the materials submitted by his client as those materials become uncontroverted.

21. I now turn to discuss which way the discretion should be exercised in this case for non-compliance. If the court upholds the argument of the defendant and exercise the discretion under first limb the O. 2, r. 1, (2), it would have a devastating repercussion on the plaintiff as his action would be struck out

without even giving an audience to him. Ultimately this would violate his constitutionally guaranteed right of access to justice and the right to have his matter determined by this court. The section 15 (2) of the constitution provides that *'every party to a civil dispute has the right to have the matter determined by a court of law or if appropriate, by an independent and impartial tribunal'*. At this point we should not lose sight of the section 6 (1) of the Constitution which provides that the Chapter on bills of rights binds judicial branch of the government as well, unlike some other jurisdictions where the judicial branch is excluded in terms of bills of rights.

22. The fundamental of natural justice is that every person against a claim or charge is made, must be given reasonable opportunity to present his case. This was laid down in many cases. In **Cameron v Cole** [(1994) 68 C.L.R. 571, p 589] Justice Rich stated as follows:

> *"It is fundamental principal of natural justice, applicable to all courts whether superior inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case"*

23. In **Grimshaw v Dunbar [(1953) 1 ALL E.R 350, p 355], Lord Justice Jenkins stated as follows:**

> *"Be that as it may, a party to an action is prima facie entitled to have it heard in his presence. He is entitled to dispute his opponent's case and cross examine his opponent's witness.....".*

24. As mentioned above, the original application is the summons filed by the defendant to strike out the claim of the plaintiff for want of prosecution and abuse of court process under O. 25, r. 9. The said rule provides that;

> *(1) If no step has been taken in any cause or matter for six months then any party on application or the court of its own motion may list the cause or matter for the parties to show cause why it should not be struck out for want of prosecution or as an abuse of the process of the court.*

(2) Upon hearing the application the court may either dismiss the cause or matter on such term as may be just or deal with the application as if it were a summons for directions."

25. This is the new rule that was introduced to the High Court Rules and is effective from 19 September 2005 for the case management purpose. The main characteristic of this rule is that, the court is conferred with power to act on its own motion in order to agitate the sluggish litigation (see; ***Trade Air Engineering (West) Ltd v Taga [2007] FJCA 9; ABU0062J.2006 (9 March 2007***). Though this rule was mainly introduced for the case management purpose and to prevent abuse of process, it does not confer an arbitrary power to admininstratively strike out all the causes or matters where no step has been taken for six months. But, this rule requires that process to be vetted by the judicial process by giving the parties an opportunity to show cause why it should not be struck out. If sufficient cause is shown by the relevant party as per the principles set out by the court , the court cannot strike it out. Thus giving an opportunity for such party to show cause is the mandatory requirement. Otherwise this process would become a mere administrative action of striking out all such causes or matters. The rationale behind this is that, every such person should be heard before he or she is put to face a devastating consequences or stiff punishments of getting his cause being struck out. In this intant case, if the court accepts the argument of the counsel for the defendant and strike out all the affidavits of the plaintiff, he will lose his opportunity to show cause why his cause should not be struck out. In that situation, this court itself will negate its duty imposed by this rule to give an opportunity to the plaintiff to show cause. Then he will be punished without being heard of his defence against this application to strike out.

26. Finally I would quote the observation of Fortescue J in ***R v Chancellor of the University of Cambridge (Dr Bentley's Case) (1723) 1 Str 557 at 567 [93ER 698 at 704]*** which states that, ***"The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it***

observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence"

27. If all the affidavits of the plaintiff are struck out as argued by the defendant's counsel, the consequences would be, firstly, he will be deprived of his constitutionally guaranteed right to access to justice; secondly, his right to be heard under the natural justice will be defeated; and thirdly, requirement of giving opportunity under O. 25, r 9 to show cause will be negated. For these reasons I decide that, it will not be ***just*** to strike out all the affidavits exercising the discretion under the first limb of the O. 2, r. 1, (2). But it would be ***fit and proper*** to allow the amendment acting under the second limb of the same rule, however, within a very short time. I am also of the opinion that, allowing any amendmet to make the affidavit proper will not, in any event, prejudice the denfendant as the summons will be argued on its merits and well established principles of stricking out of the cause for want of prosecution. The rule of law generally requires the court and the tribunal to have inclusive trial or hearing except in those limited circumstances where the law specifically allows the *ex-parte* hearing. As such, this court prefers to hear the summons for stricking out on its merits without shutting out the plaintiff on technical ground.

28. In result,

a. I decide that the affidavits filed by the plaintiff are irregular and not in compliance with the rules,
b. I allow the plaintiff to file the amended affidavits within 02 days from today and the hearing of summons is fixed for the following day, and
c. The cost will be in the cause.

At Lautoka

24.05.2017

U.L. Mohamed Azhar

Acting Master

HIGH COURT OF FIJI
LAUTOKA