

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

Civil Action No. HBC 30 of 2012

BETWEEN : **PETER ALLAN LOWING**

PLAINTIFF

AND : **DAVID GRAHAM**

DEFENDANT

Counsel : Ms. Tabuadua Seru on instructions of Messrs. Lowing & Associates for the Plaintiff.

: Ms. Samantha Nilema on instructions of A. K. Lawyers for the Defendant.

Date of Hearing : 15th March 2018

**Written Submission
by the Plaintiff** : Not filed

**Written Submission
by the Defendant** : Not filed

Date of Ruling : 4th June 2018

Ruling by : Justice Mr. Mohamed Mackie

R U L I N G

[On the Application for Leading Evidence via Skype/Video]

A) INTRODUCTION

1. This ruling pertains to the hearing held before me on 15th March, 2018, in relation to the Summons filed and served on 30th May 2017 on behalf of the Plaintiff, namely, Mr. Peter Allen Lowing, moving for the following orders:

a. That Mr. Peter Allen Lowing, the Plaintiff in these proceedings, be granted leave to be examined, cross examined and re-examined Viva Voce on oath or affirmation by way of live Video Link/Skype conference from Port Moresby, in Papua New Guinea;

- b. *That an independent Barrister or Solicitor practicing law at Port Moresby, Papua New Guinea, be appointed as special Supervisor for the purpose of taking oath or affirmation of Mr. Peter Allen Lowing*;
- c. *That the Defendant is at liberty to instruct a Barrister or Solicitor in Papua New Guinea to attend at the time and place that Mr. Allen will be examined.*

2. The Summons (Application) is supported by the affidavit of the Plaintiff sworn on 29th May 2009 at Port Moresby in Papua New Guinea (PNG) and filed with an annexure marked “A”, which is an unsigned Standard Cost Agreement of M/s “**Leahy Lewin Lowing Sullivan**” (LLLS) a Law firm in PNG, in which the Plaintiff is said to be a partner. The Defendant Vehemently objects the Application by filing the affidavit in response.

B) BACKGROUND

- 3. The Plaintiff, Mr. **Peter Allan Lowing**, a Barrister and Solicitor, who, prior to the year 2013, was actively practicing in Fiji Islands, under the name and style of “Lowing and Associates”, while also engaged in practice as a partner in the aforesaid legal firm (LLLS) in PNG, had instituted this action on 22nd February 2012, against the Defendant by way of writ of Summons together with the Statement of Claim dated 21st February 2012, which now stands amended by the Amended Statement of Claim (A.S.C) dated 22nd April, 2013.
- 4. The Plaintiff in his A.S.C alleges that the Defendant made a false and malicious complaint regarding him to the Chief Registrar of the High Court in Fiji and thus he has been greatly injured in his credit, reputation and profession as a Barrister and Solicitor. He claims damages, under several headings, interest & indemnity costs. The main defence taken up by the Defendant in his statement of defence is the plea of justification.

C) HEARING OF SUMMONS:

- 5. At the hearing held before me on 15th March 2018, Counsel for both the parties made lengthy oral submissions, citing few case law authorities that touch the subject. At the end of the hearing, on the application of the Plaintiff’s Counsel, directives were given to file plaintiff’s written submissions first within 28 days, and the Defendant’s submissions within 28 days thereafter. No written submissions came to be filed by the Plaintiff, thus, the Defendant’s written submissions did not come forth.

D) DISCUSSION:

- 6. The reasons adduced by Plaintiff in his affidavit for this application are **that:**

- a. When he filed this action in the year 2012 he, as the sole owner of the Lowing Associates, was physically present in Fiji with the intention of attending for the trial and due to a major change of circumstance towards the end of the year 2013, occurred as the result of the resignation of one of the partners at his partnership Law firm (LLS) in PNG, he had to return to PNG permanently to head the litigation team at LLS and his last visit to Fiji was in mid-January 2015, after handing over the running of his firm here in Fiji (L.A) to his associates.
 - b. He has contractual obligations to his partners at LLS in PNG to oversee and manage the litigation team, he is heavily engaged in work, his charge out rate per hour at LLS is approximately AUD \$ 990.00, it will be cost effective and will reduce business losses to LLS, if he is allowed to give his evidence by way of live Video link/skype conference.
 - c. If he fails to attend or participate in any legal work that he is responsible and bound to perform at LLS, he would potentially be subjected to claim for breach of his contractual obligations to the LLS partnership.
7. Learned Counsel for the Plaintiff has drawn my attention to the decision in *Anderson v Salaitoga [1992] FJHC 24; Hbc0353d.89s (26 June 1992)*, wherein Hon. Justice Fitiaki, as he then was, after considering an application made pursuant to Order 39 rule 1 of the High Court Rules, to examine four witnesses , who were residing in Melbourne- Australia, on a commission (Letter of Request) to be issued, though dismissed the same, had accepted that the Court had wide discretion to grant Plaintiff's application , where if it appears necessary in the interest of justice.
 8. Unfortunately, we are yet to come across any latest civil case law authority, where the leading of evidence through skype or video technology from a foreign jurisdiction has been permitted by a court in Fiji, in the interest of justice as observed by Hon. Fitiaki –J in the above case or on any other valid and acceptable ground.
 9. Though, the above decision was on a criminal matter, I find that the following observations made therein [*Anderson v Salaitoga [1992] FJHC 24; Hbc0353d.89s (26 June 1992) supra*], are of great assistance which can throw some light in arriving at the most justifiable decision on the application in hand.

"I accept that this Court has a wide discretion to grant the plaintiff's application where it "... appears necessary for the purposes of justice". The "purposes of justice" however are not only served by advancing the interests of plaintiffs. These must be carefully weighed against the interests of defendants and all the circumstances of each case.

There are many cases where the Court has been reluctant to accede to applications by a plaintiff to take evidence abroad because the tribunal has been chosen by the plaintiff himself: so too with

regard to the case of the plaintiff asking for a commission to examine himself, the Court has full discretion, but it exercises that discretion strictly, and does not grant the application unless a very strong case is made out;

I do not consider in all the circumstances of this case having regard to the ground put forward; the paucity of information available and the competing interests of the defendant that this application ought to be granted and accordingly is dismissed”.

10. Another reason adduced by the Counsel for the Plaintiff, for the first time at the hearing, was that the Plaintiff has no intention of returning to Fiji and his legal firm in Fiji (LA) is currently undergoing the change of ownership, which is unsupported by any evidence and objected by the Defendant’s learned Counsel. Learned Counsel for the Plaintiff also argues that the Defendant has not adduced any evidence to show the cost to be incurred by the Defendant would be substantial, in the event the order in terms of the summons is granted.
11. In *State v Hurtado* [2016] FJCA 115; AAU00148.2015 (30 September 2016) Hon. Mr. Justice W. Calanchini, President, Court of Appeal made the following observation.

*“[39] It is clear that the interests of justice are not confined to the interests of an accused. The only matter that the learned trial judge considered when he authorized the use of Skype was the respondent's constitutional right to call witnesses. But the right to call witnesses was not an issue. The issue was **the mode of calling witnesses**. The interests of justice required the learned trial judge to ensure the trial was fair to both the defence and the prosecution and that there was accountability over the witnesses called by the parties. Witnesses who give evidence from overseas via Skype escape any form of accountability because the domestic courts lack jurisdiction to hold them responsible for perjury or contempt if they lie on oath. So there is a risk that an overseas witness may not give truthful evidence via Skype because of lack of any form of accountability. The learned trial judge did not consider any of these matters when he authorized the respondent to lead evidence from his overseas witnesses on a contested issue of language difficulty via Skype. For these reasons, I am satisfied that the learned trial judge erred in law in authorizing the use of Skype to receive evidence from overseas witnesses in the circumstances of this case. Ground 3 is upheld”.*

12. In *Lotawa v State* [2014] FJCA 186; AAU0091.2011 (5 December 2014) Justice Madigan JA with the concurrence of S.Gamalath –J and W. Calanchini –J (president C.A observed as follows.

*“Skype is a relatively new medium used extensively in social media and for personal contact between parties in place of telephones. It is noted that it has been used in Courts for the taking of evidence in Canada, Sri Lanka, and Australia and in Fiji and as such it has been a very useful medium for the admission of evidence in 2 obvious circumstances. First, for the protection of a "vulnerable" witness, provided for in sections 295 and 296 of the Criminal Procedure Decree 2009 and secondly for the good administration of justice, to hear a witness from abroad pursuant to section 131(2) of that Decree. Evidence by "skype" although convenient and immediate, suffers of course from the vagaries of any other electronic medium in that it can crash, perform erratically or be deceptive as to colour, sound and light. **The quality of its transmission will depend on the quality of the equipment being used at each station and in particular the cameras both at transmission and reception. It is impossible when receiving evidence by "skype" to properly observe the demeanour and reactions of a witness: in a case heavily dependent on credibility, the witness' words are often no match for***

his or her reaction to questions or for his or her display of sincerity or insincerity in giving evidence. It is therefore a much inferior method of receiving evidence, inferior to live viva voce evidence and for these reasons alone, although allowed by s.131(2) and section 295, it should be used only rarely for vulnerable witnesses and hardly ever for convenience reasons. In any event as Gamalath JA says care must be taken by the presiding Judge to comply with the procedure set out in s.295 and state judicially why he is allowing evidence to be adduced by that medium”(.emphasis mine)

13. The most recent authority on the subject is found in Chief *Registrar v Lal* [2018] FJILSC 2 (14 February 2018), a decision by the Fiji Independent Legal Services Commission, wherein Hon. Commissioner Dr. Thomas V. Hickie in paragraph 234 -237 states as follows.

[234] Again, whilst noting that a hearing before the Commission is not a criminal proceeding, I have noted the above from the Court of Appeal in Lotawa, in particular:

(1) The use of Skype is important in cases involving the need ‘for the protection of a “vulnerable” witness’; and

(2) ‘for the good administration of justice, to hear a witness from abroad’.(emphasis mine)

[235] Balanced against that I have also noted from the Court of Appeal in Lotawa:

(1) ‘It is ... a much inferior method of receiving evidence ... to live viva voce evidence and for these reasons alone ... it should be used only rarely for vulnerable witnesses and hardly ever for convenience reasons’;

(2)

[236] Having had the opportunity of reading the various affidavits in the present matter, I am of the view that because of the type of allegations involved, I require all witnesses to be present in Fiji giving evidence before the Commission in the Commission’s hearing room in Suva. Accordingly, my 9th Ruling is that the cross-motion of the Respondent legal practitioner seeking an order ‘THAT the taking of evidence of the Complainant Reema Gokal and witness Pratima Gokal by skype be refused’, is granted.

[237] Therefore, the two witnesses who are presently in India, being the Complainant, Reema Gokal and witness, Pratima Gokal, will have to come to Fiji and appear before this Commission to give evidence in person at the final hearing and not via “Skype” or some other form of video conferencing. Should the complainant, Reema Gokal and/or the witness, Pratima Gokal, not appear, at the next listed .hearing, the hearing will proceed in her/their absence?

14. Perusal of authorities related to the **criminal** proceedings shows that our Courts have exercised great caution when considering the applications for leading of evidence from other jurisdictions via Skype or Video technology. Undoubtedly, the main consideration therein, apart from various other factors, is the question of identification of the accused on trial. Even a slightest vagueness, imprecision or inaccuracy, which is sufficient to create a reasonable doubt, could bring about disastrous consequences.

15. The above position may not be correct in case of civil trials since the degree of proof differs as pointed out by the Plaintiff's learned Counsel. But this does not, necessarily, mean that the Civil Courts can adopt a lenient approach, when the applications for the usage of this technology in court proceedings are under consideration, since various other factors too should be considered in deciding whether the application should be allowed or not as highlighted in the above stated decisions.
16. The only reason adduced by the Plaintiff to justify the order in terms of his motion, in allowing the recording of his evidence via Skype/ Video from PNG, was that his absence at his partnership law firm in PNG on account of his physical appearance for trial in this Court would cause hourly loss of around AUD \$990.00 and he could become liable to his partnership for breach of contract. Apart from his mere averments in his affidavit in support, there is no acceptable evidence in support of it. The only document annexed to the supporting affidavit is the unsigned document marked as "A" which cannot be accepted and acted upon as evidence.
17. I am of the view, that the ground adduced by the Plaintiff is not an acceptable and reasonable one to convince this court for a favourable consideration of the application. It appears that the Plaintiff through an order in his favour on this application only wants to ensure his convenience and to avoid the assumed loss of earnings, he claims to be making through his partnership in PNG. I would say, it cannot be at the expenses and inconvenience caused to the Defendant, who claims that he is being vexed from the year 2012 on account of a complaint made to the Chief Registrar.
18. This action was filed in the year 2012. The, purported, change of circumstance occurred in the year 2013, which according to the Plaintiff caused him to stay in PNG for good. This application was made in mid part of 2017. In the meantime the Plaintiff has taken two adjournments of trial with the consent of the Defendant. If the Plaintiff really wanted, he could have made this application long before. There is no evidence before this Court that the circumstance, allegedly, arose in the year 2013 still persists.
19. When the nature of the claim is considered, it is always prudent for the Plaintiff to be physically present in Court and substantiate his claim by directly relaying his evidence before the judge, which will help the judge, the opposing counsel and the supporting staff in the Court room in performance of their respective duties in the way expected of them.
20. The Plaintiff, being a citizen and onetime senior practitioner of Fiji, still having his own legal firm in Fiji and currently stationed in a neighbouring jurisdiction, not being a vulnerable witness and in the absence of any other compelling reason on the grounds such as ill-health, disability or old age, which may hamper his physical presence in court to give evidence, cannot be considered for an order in terms of his motion to relay his evidence

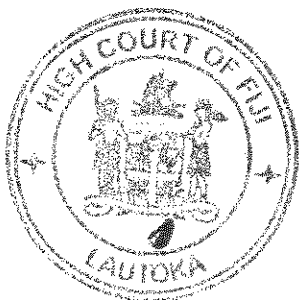
via Skype/ Video technology. He has not put forward good grounds that warrant the order in his favour.

E) CONCLUSION

21. According to the Plaintiff's own averments, his partnership (LLLS) in PNG has 5 partners and 14 associates, where he claims to be the head of the litigation team. I don't find evidence to the effect that there are hard and fast rules in his partnership, curtailing the Plaintiff's liberty to take leave for the prosecution of his own action by being physically present in Fiji. The reason adduced by the Plaintiff to relay his evidence via Skype / Video technology from PNG, by not being physically present in this court, is not convincing.
22. The Plaintiff's claim, that his physical attendance in this court will affect his practice in partnership at LLLS, by causing loss of income leading to breach of his contractual obligations, is unfounded.

F) FINAL ORDERS:

- A. The summons filed by the Plaintiff on 30th May 2017 is hereby dismissed.
- B. The application to lead plaintiff's evidence via Skype/ Video technology from Port Moresby in Papua New Guinea is hereby dismissed.
- C. The Plaintiff shall pay the Defendant within 14 days from today \$ 2,000.00 being the summarily assessed costs in respect of this application.
- D. Matter will be mentioned after 21 days to fix the Substantial action for trial.



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A.M.Mohammed Mackie

Judge

**At Lautoka
4th June, 2018**