

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 25 of 2008

BETWEEN : ESAVA CAKAUNITAVUKI of Garden of Joy, Navua, in the Republic of Fiji and Melbourne, Australia, District Sales Manager.

PLAINTIFF

AND : COLONIAL FIJI LIFE LIMITED and COLONIAL HEALTH CARE (FIJI) LIMITED companies duly incorporated in Fiji and having its registered office at Level 10, Suva Central Building, Corner of Renwick Road and Pratt Street, Suva being successor in title to the Colonial Mutual Life Assurance Society Limited pursuant to the Colonial Fiji Life Act 1999.

DEFENDANTS

BEFORE : Master Vishwa Datt Sharma

COUNSEL : Mr. Emmanuel Narayan for the Plaintiff
Mr. John Apted for the Defendant

Date of Ruling : 12th June, 2018

RULING

[Defendant's Summons seeking Dismissal of the Plaintiff's Action for failure to comply with Orders to make Discovery and give inspection pursuant to Order 24, Rule 16 (or alternatively Order 24, Rules 5,7 and 9) of the High Court Rules, 1988 and the inherent Jurisdiction of this Court.]

INTRODUCTION

1. This is the **Defendant's Summons** filed on 06th December, 2016 seeking an **Order for the Dismissal of the Plaintiff's Action for failure to comply with Orders to make Discovery and give inspection.**
2. This Court earlier on delivered a Ruling on 26th July, 2016 on the Defendants application seeking an order for **Further and Better Discovery** and made certain Orders as set out therein for the Plaintiff to comply.
3. According to the Defendants, the Plaintiff has to date failed to comply with the Orders made on the Ruling of 26th July, 2016 to make **Discovery and give inspection.**
4. This Application is made pursuant to inter-alia **Order 24, Rule 16** (or alternatively **Order 24, Rules 5,7 and 9**) of the **High Court Rules, 1988** and the **inherent Jurisdiction of this Court.**
5. The Plaintiff opposed this application and filed his answering Affidavit.
6. Both parties to this proceeding filed respective affidavit evidence together with written submissions accordingly.

THE LAW

7. **Order 24 Rule 16 of the High Court Rules, 1988** deals with **Failure to comply with requirement for discovery, etc. (O.24, r.16).**

16.-(1) If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose, fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1).-

(a) that party shall not be entitled subsequently to produce a document in respect of which default was made without the leave of the Court, and

(b) the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.

8. **Order 24 Rule 5** deals with **Form of list and affidavit (O.24, r.5)**; **Order 24 Rule 7** deals with **Order for discovery of particular documents (O.24, r.7)** and **Order 24 Rule 9** deals with **Inspection of documents referred to in list (O.24, r. 9)** respectively.

DEFENDANT'S CONTENTION

9. The Defendant stated that it is necessary for the Defendants to inspect the documents specified in the attached Schedule as they are relevant to their defence in this matter, and if they are not produced, there is a real, substantial and serious risk that a fair trial will not be possible;

10. The Plaintiff is endeavouring to avoid giving discovery. Despite the Court's orders dated 26 July 2016 and 5 requests from the Defendants dated 29 January 2015, 3 February 2015, 20 February 2015, 28 October 2016 and 23 November 2016, the Plaintiff has not disclosed the documents specified in the attached Schedule and/or produced them for the Defendants' inspection;
11. The Plaintiffs non-compliance (or the delay in complying) with the Court's orders and/or the requirements for discovery has been prolonged or inordinate, is inexcusable, and has caused serious or substantial prejudice to the Defendants; and
12. The Defendant relies on the Affidavit of Vandhna Devi Narayan filed in support of this application.

PLAINTIFF'S CONTENTION

13. That on 21st September, 2016 an Affidavit Verifying Plaintiff's Further Supplementary List of Documents was filed on the 26th September, 2016.
14. On or about 02nd December, 2016, the Plaintiff with the consent of the court filed Plaintiff's Bundle of Documents in order for the parties to discover and inspect documents as required under Order 24 Rules 2 and 3 of the High Court Rules, 1988.
15. On or about 06th December, 2016, the Plaintiff e-mailed a copy of the draft Pre Trial Conference minutes to the Defendant's Solicitors to get their comments which has not been responded to.
16. On or about 09th December, 2016, although the Plaintiff filed and served the Notice Requesting Pre Trial Conference, this request was declined by the Defendants.
17. On or about 04th March, 2017, the Plaintiff filed the Affidavit Verifying Plaintiff's fourth Supplementary List of Documents stating clearly that he did not have in his possession these documents-
 - Tax returns for the period of 2002-2014;
 - Notice of Assessment for the year 2005;
 - Salary Slip, evidence of income, contracts, and advertisements of employment as a part time Purchasing Officer during the 2010 period apart from the Letter of the employer dated 15th September, 2016.

ANALYSIS and DETERMINATION

18. On the Defendant's earlier further and Better Discovery application, filed on 09th March, 2015, this court delivered the Ruling on 26th July, 2016 and made the following orders-
 - (a) The Plaintiff to file and serve An Affidavit Verifying a List of Documents in respect of Tax Returns and Notices of Assessments for the period 2002- 2014 inclusive.
 - (b) The Plaintiff is directed to file and serve a Supplementary Affidavit annexing any salary slip, evidence of income, contracts or letters and advertisements of his employment as a part-time Purchasing Officer during the 2010 period only.

- (c) If the plaintiff is unable to discover any document, then he should set out clearly in the affidavit what attempts he has made to locate the documents and why he is not able to discover these documents including details of when he parted with any of them and what has become of them.
- (d) Costs to be in Cause.
19. Abovementioned orders were sealed by the **Defendants** on 04th August 2016.
20. The **Plaintiff** failed to comply with the orders made hereinabove. The Plaintiff filed an Affidavit Verifying Further Supplementary List of Documents [AVFSLD] on 26th September 2016.
21. On 28th October, 2016, the Defendant's Solicitors wrote to the Plaintiff to point out that the September 2016 AVFSLD did not comply with the Court's ruling at (a), (b) and (c) of the Ruling.
22. On 16th November, 2016, the Plaintiff provided copies of documents provided by the Plaintiff.
23. On 23rd November, 2016, the Defendant's Solicitors wrote to the Plaintiff again to request compliance with the orders and had failed to respond to their two (2) requests for compliance
24. The Plaintiff's Solicitor informed court that he had complied with the orders and sought leave to file a Bundle of Documents.
25. However, according to the Defendants, their contention was that the Plaintiff cannot proceed to Pre-Trial conference as it was premature as discovery had not then been completed.
26. The Defendants continuously complained to court that the Plaintiff has failed to comply with the orders made in the Ruling dated 26th July, 2016.
27. This failure prompted the **Defendants** to file the current Summons on 06th December, 2016 and seek an order for **dismissal of Action for failure on the part of the Plaintiff to comply with orders to make discovery and give inspection** accordingly.
28. The Summons was filed pursuant to *Order 24, Rule 16* (or alternatively *Order 24, Rules 5,7 and 9) of the High Court Rules, 1988* and the *inherent Jurisdiction of this Court*.
29. *Order 24 Rule 16 (1) (b)* gives this Court powers to **dismiss an action** if any party who is required to make **discovery of documents** or to produce any documents for the purpose of inspection fails to comply. The provision of this Law provides as follows-

Failure to comply with requirement for discovery, etc. (O.24, r.16)

16.-(1) If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose, fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1), -

(a)

(b) the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.

30. It cannot be denied by the **Plaintiff** and that he has admitted in his **Affidavit Verifying Plaintiff's fourth Supplementary List of Documents** filed on 04th March, 2017 stating clearly that he did not have in his **possession** the following documents-
- Tax returns for the period of 2002-2014;
 - Notice of Assessment for the year 2005;
 - Salary Slip, evidence of income, contracts, and advertisements of employment as a part time Purchasing Officer during the 2010 period apart from the Letter of the employer dated 15th September, 2016.
31. Firstly, the **Plaintiff** mentions that he has in his possession, custody or power the documents relating to the matters in question in this action enumerated in **Part One Schedule One** hereto.
32. I find that there are **no documents** mentioned or set out that the **Plaintiff** reckons is in his possession, custody or power. Under the heading **schedule one-Part one**, there is absolutely no mention of any documents whatsoever.
33. In terms of **schedule One-Part Two**, the **Plaintiff** mentions a bundle of papers containing copies of letters and instructions for the purpose of the **Plaintiff** seeking legal advice but refuses to produce the same on the ground of confidentiality.
34. **However**, the documents mentioned by the **Plaintiff** in the **Second Schedule** are the Documents for which in particular this court made the orders in its Ruling of 26th July, 2016 for the **Plaintiff** to furnish the documents. If he did not have those documents in his possession and custody, and/or able to discover, then he should explain to court what has happened or become of them.
35. The **Plaintiff** has gone ahead to explain that the documents he had, but does not have them now in its possession, custody or power are mentioned in the **Second Schedule**. He adds that the documents mentioned in **Second Schedule** were last in the above-named **Plaintiff's** possession, custody or power on or about the date thereof. Neither the **Plaintiff** nor its **Solicitors** nor any person on his behalf has now, or ever in its possession, custody or power any documents of any description whatsoever relating to any matters in question in this action, other than the documents set forth in **Schedules 1 and 2** hereof.
36. The **Defendants** appraised court that the **Plaintiff** had clearly failed to comply with the Orders. They pointed out as an example that-
- (a) Orders (a) and (c) in the Ruling required the **Plaintiff** to give discovery of his Tax Returns and to explain if he could not;
 - (b) **However**, the **Plaintiff** had not given discovery of any Tax Returns, and had not said in the September, 2016 **Affidavit Verifying Fourth Supplementary List of Documents (AVFSLD)** that he was unable to give discovery of them nor had he given any other necessary information about them, and
 - (c) He therefore breached the orders at (a) and (c).

37. According to the **Defendants**, the **Plaintiff** repeated the same general reasons he gave in the August 2015 Answering Affidavit as to why documents were not in his custody or possession. He says most of this were **lost** when moving houses over the years. He said that some relevant documentations provided to his former Solicitors was not retained by them. He also says that most of the **electronically stored documents** cannot be retrieved due to the "**volatile nature of storage in computers**" (paragraph 15 (ii)-(iv) refers. Further, he says that he **provided all documents he retrieved to the Defendants**, that he **listed the documents he claimed were not in his custody in the March 2017 Affidavit Verifying Fourth Supplementary List of Documents**, and that he had, at all times adhered to the orders (paragraph 15 (v)- (vii).
38. This was the reason why the **Plaintiff** has been reiterating and continuously informed court that he has complied with the orders in the **ruling** in terms of **Discovery**.
39. However, in modern civil litigation, **discovery** is central to the system of **fact finding** and decision making. All parties to the proceedings are encouraged to make available for inspection, **all relevant documents**, regardless of whether the document(s) support(s) their case or the other party's case.
40. In **Davies v Eli Lilly & Co [1987] 1 WLR 428**, Sir John Donaldson MR explains the "**justice**" behind this approach:
- In plain language, litigation in this country is conducted "cards face up on the table". Some people from other lands regard this as incomprehensible. "Why", they ask, "should I be expected to provide my opponent with the means of defeating me?". The answer of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have all the relevant information, it cannot achieve this object.*
41. C Cameron & J Liberman, '**Destruction of Documents before Proceedings Commence - What is a Court to Do?**' (2003) 27 Melbourne University Law Review 273, 274 explain the same policy thus:
- The primary aim of discovery is to ensure that litigants disclose to each other all relevant, non-privileged documents, whether that disclosure helps or hurts their respective cases, so that they will know the case they have to meet and judges will have the evidence they need to do their job effectively".*
42. E Bray, **The Principles and Practice of Discovery** (1885), explains the purpose of discovery as follows:
- "To ascertain facts material to the merits of his case, either because he could not prove them, or in aid of proof and to avoid expense; to deliver him from the necessity of procuring evidence; to supply evidence or to prevent expense and delay in procuring it; to save expense and trouble; to prevent a long enquiry and to determine the action as expeditiously as possible; whether he could prove them aliunde or not; to facilitate proof or save expense."*
43. The **Defendants** in their current application apart from seeking an order to strike out the Plaintiff's amended statement of claim and the Action to be dismissed, but also sought for an **Alternative order** that "**unless the Plaintiff does comply with the orders for discovery within 7 days**" as enumerated therein. Further in their written submissions at paragraph 84, the Defendants state that "**if the court does not dismiss this Action, then the circumstance of this Action justifies the making of unless orders requiring the Plaintiff to comply with the orders and the Rules of which time for compliance should be set at 7 days.**"

44. Since the **Alternative Order** sought is somewhat **conditional in its nature**, it would therefore be appropriate for this court to make relevant orders in the circumstances.
45. The Defendants have also appraised court of **delay** on the **Plaintiff's part** to comply with **Discovery** and the **failure** to do so tantamount to **contumacious** and **inordinate conduct**.
46. However, the **Defendants** have failed to establish whether the **failure** to complete the **Discovery** was **intentional** and/or the documents to be discovered were suppressed by the **Plaintiff**.
47. This matter was commenced by the Plaintiff on **22nd January 2008** over the termination of the Plaintiff's independent contract on **24th January, 2002**.
48. Therefore, to strike out the Plaintiff's Statement of Claim and Dismiss this Action for the Plaintiff's failure to make Discoveries as per the order of this court dated **26th July, 2016**, it would be rather harsh and a drastic stand to take. The power pursuant to **Order 24 Rule 16(1) (b) of the High Court Rules, 1988** to be exercised by court at this instance herein would rather have to be with great caution. Further, this court will also take into consideration **section 15(2) of the 2013 Constitution of Fiji** which states as follows-

"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."

49. If I may just add that the Plaintiff had explained in his **Affidavit Verifying Plaintiff's fourth Supplementary List of Documents** that "the documents he had, but does not have them now in its possession, custody or power are mentioned in the **Second Schedule**. He adds that the documents mentioned in **Second Schedule** were last in the above-named Plaintiff's possession, custody or power on or about the date thereof. Neither the Plaintiff nor its Solicitors nor any person on his behalf has now, or ever in its possession, custody or power any documents of any description whatsoever relating to any matters in question in this action, other than the documents set forth in Schedules 1 and 2 hereof.
50. Taking into consideration all above, the **Defendants** are still entitled to know what has happened to those documents for which this court made an order in its Ruling dated **26th July, 2016**. If these documents were to be found anywhere, then I am sure that it will mitigate the substantive claim pending before court.
51. **Halsbury's Laws of England** (Vol 13, 4th ed. Reissue) (Tab 1) (with the relevant footnotes) says at paragraph 33-

"(2) Sanctions for Non-Compliance with Requirements or Order for Discovery

33, Liability for failure to comply. The court has a general power to enforce compliance with the requirements of the rules or orders for the discovery, inspection and production of documents. If any party who is required by the Rules of the Supreme Court ' or by any order made under them, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose fails to comply with any provision of the rules or with that order, the court may make such order as it thinks just, including in particular an order that the action be dismissed, or an order that the defence be struck out and judgment entered accordingly. [RSC Ord 24, r. 16 (1): see Haridas v Khan [1971] 1 ALL ER 947,

[1971] 1 WLR 507, CA (order in county court that defendant be debarred from defending the action)..

..the court may make an immediate unconditional order for dismissal or striking out even on the first hearing of the application, as where, for example, the defaulting party fails to attend the hearing or is guilty of prolonged or inordinate and inexcusable delay which may cause substantial or serious prejudice to the opposite party. [Allen v Sir Alfred McAlpine & Sons Ltd [1968] 2 QB 229, [1968] 1 ALL ER 543. CA.

In actions begun by writ the failure to comply with the requirements to serve a list of documents without an order [RSC. Ord. 24, r. 2(1), is itself a ground for dismissal or striking out, as the case may be, without the need for first obtaining an order for discovery [RSC Ord. 24, r. 3 (2) and see Chipchase v Rosemond [1965] 1 ALL ER 145, [1965] 1 WLR 153.

52. **O.24, r. 16** gives Court power to immediately and unconditionally dismiss an Action for failure to comply with orders for discovery. However, *Halsbury* makes clear that the power even extends to where no discovery order (or any unless order) has been made.
53. The leading Fijian authority on dismissal or striking out for disobedience to discovery orders is *Native Land Trust Board v Rapchand Holdings Ltd [2006] FJCA 61; ABU0041j.2005 (10 November 2006)*.

The facts of *Rapchand* can be contrasted with the current case before Court. In *Rapchand*, the Court struck out the Defence for disobedience with a general discovery order whereas the Summons in this case relates to disobedience to specific discovery orders which were obtained after successive defaults by the Plaintiff in complying with the general discovery order. Further, NLTB was not given further time to comply with the general discovery order whereas, the Plaintiff had been given 5 chances to comply with the general order and then has been given many chances to comply with the orders. NLTB had also defaulted for only 12 days but this case concerns a failure to comply fully with the general discovery order made almost 5 years ago in August, 2012 and disobedience to specific discovery orders made 11 months ago in July 2016. Further, the Defendants have never waived the Plaintiff's defaults and have instead continuously sought compliance in correspondence and in Court without proper response by the Plaintiff.

54. Further, I am aware that the Plaintiff filed an Affidavit Verifying Plaintiff's fourth Supplementary List of Documents [AVFSLD] on 26th September 2016 but has failed to fully comply with the Court Ruling as was required of him to do so in the circumstances.
55. Taking into consideration the arguments raised by both parties to this proceeding coupled with the written submissions and the case authorities cited hereinabove, I am inclined to grant a **final opportunity** to the Plaintiff to comply with the ruling and orders of 26th July, 2016 accordingly within a timeframe of 14 days. This will enable parties to complete **Discovery** and move on with the cause of action and entering the action for trial.
56. If the **Plaintiff** fails in his bid to comply with the court's order in terms of the Ruling of 26th July, 2016 and abide by this final opportunity of grant of 14 days' timeframe to complete the **Discovery**, then this Court will have no alternative but to proceed to impose an "**Unless Order**" which will result in the final striking out of the Plaintiff's substantive claim pending before this Court.
57. Bearing in mind the conduct of this Action by the Plaintiff, it is appropriate that I make an order for **costs in the cause** accordingly.

58. Following are the final orders of this Court:

FINAL ORDERS

- A. The Plaintiff is hereby directed to comply in full with the Court's Ruling of 26th July, 2016 within 14 days timeframe.
- B. Further the Plaintiff is hereby ordered to make full Discovery as was sought for and accordingly give inspection.
- C. In the alternative, upon the failure of the Plaintiff to comply with the orders at A and B hereinabove, the Court will proceed to impose an 'Unless Order' accordingly.
- D. There will be an order for costs in the cause.

Dated at Suva this 12th Day of June 2018



Master
VISHWA DATT SHARMA