

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

CIVIL ACTION NO. HBC 227 OF 2015

BETWEEN : **CREDIT CORPORATION (FIJI) LIMITED** a limited liability company having its registered office at 10 Gorrie Street, Suva.

PLAINTIFF

AND : **WINDSOR INVESTMENT (FIJI) LIMITED** a limited liability company having its registered office at 164 Ratu Mara Road, Samabula, Suva.

FIRST DEFENDANT

AND : **RUSTAM ALI AND SHAMSHAHD BEGUM** both of Leonidas Street, Lautoka (Both Guarantors/Company Directors).

SECOND DEFENDANTS

Appearances : Mr J. Sharma for the plaintiff
Mr I. Khan with Ms S. Khan for the defendants

Date of Trial : 18 March 2019

Date of Ruling : 18 March 2019

R U L I N G

[on adjournment of trial]

[01] This is a last minute application to adjourn the trial listed for today and tomorrow (18 and 19 March 2019). The application has been filed this morning at 8.20 am, about an hour prior to the commencement of the trial. It is supported with an affidavit of Mr Iqbal Khan, the solicitor for second the second defendants, Rustam Ali and Shamshad Begum.

[02] The application is made pursuant to Order 35, Rule 3 of the High Court Rules 1988, as amended ('HCR'). Rule 3 states:

Adjournment of trial (O 35, R 3)

"3. The Judge may, if he or she thinks it expedient in the interest of justice, adjourn a trial for such time and to such place, and upon such terms, if any, as he or she thinks fit." (Emphasis supplied).

[03] The supporting affidavit filed by Mr Khan on behalf of the first named second defendant states the reasons for seeking an adjournment of the trial. Mr Khan in that affidavit deposes [at para 3-13]:

"...

3. *That the hearing date in this matter is set down for 18th and 19th March 2019.*
4. *That the 2nd defendants have just instructed the firm of Messrs Iqbal Khan & Associates to act on their behalf.*
5. *That I have been trying to contact the 2nd defendants from the last one week to discuss the above matter for the hearing, however, there had been no response from them.*
6. *That after several unsuccessful attempts to contact the 2nd defendants, I visited the 1st named 2nd defendant, Mr Rustam Ali, at his home at Vomo Street, Lautoka, on 16th day of March, 2019 and it came to my knowledge that he had been sick since one week and was unable to move around.*
7. *That thereafter, I request the 1st named 2nd defendant to consult his doctor and obtain a medical report so that I could advise the Court that the difficulty we have due to the illness of the first named second defendant.*
8. *That after speaking to the 1st named 2nd defendant I then called the solicitors for the plaintiff, Mr Sharma and advised him that the 1st named 2nd defendant is sick due to viral infection and as such will not be able to attend Court on Monday, 18th March, 2019 and further if he could consent to our application for adjournment of trial. Mr Sharma advised me that he will take instructions from his client (the plaintiff) and advise me accordingly.*

9. *That the 1st named 2nd defendant was seen by the Doctor on the 16th March, 2019 and he was advised to have a rest for three days.*
10. *That annexed hereto marked as letter "IIK-1" is a copy of the 1st named 2nd defendant's medical report and prescription dated 16th March, 2019 and the Medical certificate under the Criminal Procedure Code which confirms his inability to attend Court.*
11. *That my office also cannot continue with the Hearing as we do not hold a complete instructions from our clients and as such I wish to bring this application that the trial date be vacated due to my client's medical reasons and lack of instructions.*
12. *That without having full instructions, I cannot proceed with the trial.*
...." (Emphasis supplied)

- [04] Mr Sharma appearing for the plaintiff submits that he is objecting to the application on the ground that the solicitors should have obtained instructions before they file notice of appointment in February 2019 and that The Ba Medical Centre is in Ba and the first named second defendant resides in Lautoka. Alternatively, he submits that if the court minded to adjourn the trial, he would seek incurred costs of \$2,000.00.
- [05] Ms Khan counsel appearing for the defendants on the other hand submits that the Medical Centre has a branch in Lautoka and the first named second defendant is at home and recovering.
- [06] I have carefully considered the application, the supporting affidavit, the medical report appended to the affidavit and submissions put forward by both counsel.
- [07] The adjournment is sought on two grounds:
1. Not received full instructions from the first named second defendants.
 2. First named second defendant is unwell.

- [08] With regards to the first ground, Mr Iqbal Khan, the solicitor for the second defendants, in his supporting affidavit states that: *'my office also cannot continue with the Hearing as we do not hold a complete instructions from our clients and as such I wish to bring this application that the trial date be vacated due to my clients medical reasons and lack of instructions.'*
- [09] The ground that the solicitor was unable to get full instructions to conduct the trial must necessarily fail, for the solicitor ought to have obtained full instructions from his client before filing the notice of appointment on behalf of the clients, the second named defendants on 6 February 2019.
- [10] Previously, the second defendants were represented by another law firm. Last occasion, the second defendant through their previous solicitors got the trial dates of 8 and 9 October 2018 adjourned. The ground for that adjournment was on the submissions that: *'we have no instructions from our client. He is in New Zealand and has involved in a family dispute. He can't come to Fiji. We have contacted Mr Sharma. He has no objection subject to costs of \$750.00.'*
- [11] I now turn to the Medical Report submitted on behalf of the first named second defendants. Unusually, Mr Khan has visited the first named second defendant at his home at Vomo Street at Lautoka on 16 March 2019 as he was unable to contact him for about a week to receive instructions for the trial. Then he found the first named second defendants to be sick and was unable to move around. Therefore, Mr Khan, the solicitor for the second defendants had caused Mr Rustam Ali to obtain a medical report apparently with the view to seek an adjournment. The medical report says the patient (Rustam Ali) suffers from viral infection. The medical report does not specify what viral infection he is suffering from and it only recommends 3 days' rest. Rustam Ali has been hospitalised as a result of his illness. Last week, I rejected a medical report issued by the same Medical Centre (Ba Medical Centre) on the ground that it only indicated that the patient suffered from acute viral infection without specifying the illness (see HBC 257/18). I am not satisfied myself with the medical report appended to the affidavit in support sworn by Mr Khan on behalf of his client, the first named second defendants.

[12] Moreover, this is a last minute adjournment application for adjournment filed an hour before the trial. This is the second time the second defendants make this application. The court has the discretion to adjourn the trial or hearing if it is expedient to do so in the interest of justice whether such application is objected to or not by the opposite party because it is a case management matter. The court will not adjourn a trial or hearing as a matter of course. I find no exceptional circumstances to adjourning the trial. I would, therefore, exercise my discretion not to adjourn the trial. I accordingly refuse the application to adjourn the trial made by the defendants.

Second defendants offered no evidence

[13] The trial was on the counterclaim made by the second defendants against the plaintiff.

[14] Neither the first named second defendants nor the second named second defendants was present in court.

[15] Following my ruling refusing to adjourn the trial, I asked Ms Khan of counsel appearing for the second defendants whether she is ready for the trial. In response, she informed the court that she cannot proceed with the trial, but not withdrawing as counsel for the second defendants.

[16] Mr Sharma of counsel appearing for the plaintiff on the other hand submits that the second defendants' counterclaim may be struck out as they failed to offer any evidence in respect of their counterclaim on the basis that there is no case to answer.

[17] The second defendants offered no evidence in respect of their counterclaim. I would, therefore, uphold the plaintiff's application for no case to answer submission as the plaintiff is entitled to make such an application in the circumstance. I accordingly dismiss and strike out the second defendants' counterclaim with summarily assessed costs of \$1,000.00 payable by the second defendants to the plaintiff.

The result

1. Application to adjourn the trial made by the second defendants refused.
2. Second defendants' counterclaim against the plaintiff dismissed and struck out.
3. Second defendants shall pay summarily assessed costs of \$1,000.00 to the plaintiff.

M. H. Mohamed Ajmeer
18/3/19

.....
M. H. Mohamed Ajmeer
JUDGE



At Lautoka
18 March 2019

Solicitors:

For the plaintiff: Messrs Janend Sharma Lawyers, Barristers & Solicitors

For the second defendants: Messrs Iqbal Khan & Associates, Barristers & Solicitors