

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

CIVIL ACTION NO.: HBC 25 of 2008

BETWEEN : ESAVA CAKAUNITAVUKI  
PLAINTIFF

AND : COLONIAL FIJI LIFE LIMITED & COLONIAL  
HEALTH CARE (FIJI) LIMITED  
DEFENDANTS

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APPEARANCES/REPRESENTATION

PLAINTIFF : Mr E Narayan [Patel Sharma Lawyers]  
DEFENDANTS : Mr J Apted with Ms W Chan [Munro Leys]  
RULING OF : Acting Master Ms Vandhana Lal  
DELIVERED ON : 22 March 2019

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**INTERLOCUTORY RULING**

[Discovery and Unless Orders]

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**Introduction**

1. On an application by the defendants for dismissal of the plaintiff's action for failure to comply with orders to make discovery and give inspection, my predecessor had on the 12 June 2018 made following orders:
  - a. *The plaintiff is hereby directed to comply in full with the court's ruling of 26 July 2016 within 14 days' time frame;*
  - 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's to comply with the orders at A and B hereinabove, the court will proceed to impose an "unless order" accordingly.*
2. Following the order, the plaintiff on 21 June 2018 filed with the registry its 5<sup>th</sup> supplementary affidavit verifying list of documents.

As per the said supplementary list of documents the plaintiff informs that he had but have not now in his possession, custody or power the documents relating to the matters in question in the action enumerated in schedule 2 hereto.

The documents mentioned in schedule 2 were last in the plaintiff's possession, custody or power on or about the date thereof. Said documents are:

- Tax Returns for the period of 2002-2014
- Notice of Assessment for the year 2005
- Salary Slip, evidence of income, contracts, advertisements of employment as a part-time Purchasing Officer during the 2010 period apart from the letter of the employer dated 15<sup>th</sup> September 2016.

The plaintiff is said to have either misplaced the documents due to moving houses several times; or his previous solicitors have not retained the documents; or he is unable to retrieve most of the documents stored electronically from my computer due to the volatile nature of storage in computers.

3. On 02 July 2018, Mr. Apted Counsel for the defendant raised objection to the 5<sup>th</sup> supplementary affidavit verifying list of document.

On the objection raised by Mr. Apted, court allowed time for parties to be heard on the issue whether an "unless order" should be imposed as ordered on 12 June 2018.

#### **The Substantive Claim**

4. An amended statement of claim filed on 7 December 2010.

The plaintiff pleads as follows;

- He was employed with Colonial Fiji Life Limited as the District Sales Manager based at Samabula, Suva.
- In April 1999 he continued in the said position and the appointment was purportedly brought under the purview of a District Sales Manager Agreement dated 8 April 1999.
- According to the plaintiff, by virtue of the agreement and representation made his appointment would continue for indefinite term unless terminated for good cause or in accordance with provisions of the 1999 Agreement.
- On or about 24 January 2002, Colonial Fiji Life Limited through its General Manager, Sales and Distribution purported to terminate the services of the plaintiff effective immediately.
- The plaintiff claims the said termination was unfair, wrongful, harsh, over the top, unlawful, invalid, null and void.
- Hence the plaintiff has been deprived of compensation; commission and other benefits he would have earned.

The plaintiff claims;

- a. *A Declaration that the Plaintiffs purported termination of appointment on 24<sup>th</sup> January 2002 by the First Defendant under*

- the 1999 District Sales Managers Agreement and/or in all the circumstances was wrongful, illegal and invalid;*
- b. Damages in the sums claimed and as set out in the paragraph 13 herein and/or damages as deemed just and appropriate under the 1999 Agreement;*
  - c. Interest on the said sums or as may be awarded;*
  - d. General damages and compensation for loss of benefits including for Provident Fund, travel and monetary prizes under the 1999 Agreement;*
  - e. An Order for payment of unpaid Commission pursuant to paragraph 10 of the claim;*
  - f. General damages for loss of reputation, anxiety and manner of termination;*
  - g. Exemplary damages;*
  - h. Costs of the proceeding on a full solicitor/client indemnity basis;*
  - i. Such further and or other relief as this Honourable Court may think just and expedient.*

#### **Proceeding Leading to the Making of Orders on 12 June 2018**

5. It is important to layout the plaintiff's Claim as this will assist the court in deciding whether or not there should be an "unless order" imposed.
6. Following certain interlocutory applications, the plaintiff on 18 December 2015 filed its summons for direction. Orders were made on 18 February 2014.
7. An affidavit verifying plaintiff's list of documents was filed on 01 July 2014.

As at 01 July 2014, the plaintiff had in his possession, custody or power copy pleadings and copy of District Sales Manager Agreement between the plaintiff and defendant.

He objected to produce following documents:

- Original documents originated by the defendants and were in defendants possession custody or power.
  - DSM contract and correspondence regarding the same.
  - Plaintiff's letter of recommendation emanating from the defendants.
  - Newsletters/ defendants internal circulars reporting of Plaintiff's achievement.
8. The Defendants list was filed on 21 July 2014.
  9. With the court's leave, the plaintiff filed a supplementary list of documents as the defendant raised objection to the earlier affidavit verifying list of documents not being in compliance with the rules.

The supplementary list disclosed that the Plaintiff had in his possession, custody or power following documents;

- a. Fiji Revenue & Customs Authority (FRCA) – Statement of Tax Account (1993-2001)*
- b. FRCA – Notice of Assessment of Income Tax for 1996*



- c. *FRCA – Notice of Assessment of Income Tax for 1998*
- d. *FRCA – Notice of Assessment of Income Tax for 1999*
- e. *FRCA – Notice of Assessment of Income Tax for 2000*
- f. *FRCA – Notice of Assessment of Income Tax for 2001*
- g. *Plaintiff's Earning Summaries (2003 – 2014) and Plaintiff's Estimate Earning Summaries from 1996 to 2002*
- h. *List of organizations and entities the Plaintiff has sought employment in.*

10. Later sometimes about the 05 February 2015 the defendants had requested the plaintiff for further documents.

On or about 9 March 2015, the defendants filed a summons dated 9 March 2015 for further and better discovery. The application was made pursuant to Order 24 Rule 7 of the High Court Rules.

Orders sought were:

- a. *A further and better list of the documents which are or have been in his possession, custody or power relating to any matter in question in this action; and*
- b. *An affidavit –*
  - i. *Verifying the said list;*
  - ii. *Stating whether he has or has at any time had in his possession, custody and power any document specified in the Schedule hereto; and*
  - iii. *If the said documents or any of them (whether on the list or specified in the Schedule hereto) has or have been but are now not in his possession, custody or power stating when he parted with the same, what has become of the same, and in whose possession they now are.*

*And for a further Order that the Plaintiff does within 7 days thereafter make available copies of such documents contained in the further and better list and as specified in the Schedule hereto for inspection on behalf of the Defendants.*

11. In their affidavit in support of the said application, the defendant reserved their right to rely on income earned by the plaintiff in mitigation of his damages.

The defendant alleged that plaintiff did not fully disclosed all necessary documents relating to the application to find alternative employment, alleged remuneration he earned in similar employment or appointments or taxes accounted for in respect of his alleged remuneration.

They requested via letter to plaintiff's solicitors additional documents:

- a. *The Plaintiff's tax returns for the years 2003-2014 inclusive;*
- b. *The Plaintiff's wage or pay slips or other evidence of income for the years 2003-2014 inclusive;*

- c. *All contracts or letters of employment for the years 2003-2014 inclusive;*
- d. *All application letters by the Plaintiff to the various organisations and entities he sought employment with for the years 2003-2014 inclusive; as well as response letter from the respective organisations and entities;*
- e. *All other documents relating to the earning of income/mitigation of loss from 2003.*
- f. *Plaintiff's Notice of Assessment for the years 2002 to 2014.*

According to the defendants, these documents are relevant to the mitigation of plaintiff's losses.

The documents listed in schedule 1 to the supplementary affidavit verifying list of documents was sent to the defendant's counsel. However there was no mention of the additional documents so requested.

They claim the plaintiff would have prepared and filed income tax returns/statements each year. The plaintiff can request copies from Fiji Revenue and Customs Authority or relevant Australian tax authority. He can also obtain some form of confirmation of employment and payment of wages from his previous and current employers.

According to the defendants, if the plaintiff cannot locate copies than he is required to state in an affidavit the dates on which each of the documents were last in his possession, custody or power, what has become of each of the said documents and in whose possession each of the documents now are.

12. Following a hearing on the said application, my predecessor on 26 July 2016 delivered his ruling and made following orders:
- a. *The plaintiff to file and serve an affidavit verifying list of documents in respect of Tax Returns and Notice 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.*
13. On 26 September 2016, the plaintiff filed his further supplementary list of document. He had in his possession, custody or power following documents:
- *PAYG Payment Summary dated 28<sup>th</sup> June 2006;*
  - *PAYG Payment Summary dated 27<sup>th</sup> June 2007;*
  - *PAYG Payment Summary dated 25<sup>th</sup> June 2008;*
  - *PAYG Payment Summary dated 30<sup>th</sup> June 2009;*
  - *PAYG Payment Summary dated 1<sup>st</sup> July 2010;*



- *PAYG Payment Summary dated 29<sup>th</sup> June 2011;*
- *PAYG Payment Summary dated 27<sup>th</sup> June 2012;*
- *PAYG Payment Summary dated 30<sup>th</sup> June 2013;*
- *PAYG Payment Summary dated 30<sup>th</sup> June 2014;*
- *PAYG Payment Summary dated 30<sup>th</sup> June 2015;*
- *PAYG Payment Summary dated 30<sup>th</sup> June 2016;*
- *Income Tax Return 2002;*
- *Notice of Assessment for ending 30<sup>th</sup> June 2003;*
- *Notice of Assessment for ending 30<sup>th</sup> June 2004;*
- *Notice of Assessment for ending 30<sup>th</sup> June 2006;*
- *Notice of Assessment for ending 30<sup>th</sup> June 2007;*
- *Notice of Assessment for ending 30<sup>th</sup> June 2008;*
- *Notice of Assessment for Tax Period ending 30<sup>th</sup> June 2009;*
- *Notice of Assessment for Tax Period ending 30<sup>th</sup> June 2010;*
- *Notice of Assessment for Tax Period ending 30<sup>th</sup> June 2011;*
- *Notice of Assessment for Tax Period ending 30<sup>th</sup> June 2012;*
- *Notice of Assessment for Tax Period ending 30<sup>th</sup> June 2013;*
- *Notice of Assessment for Tax Period ending 30<sup>th</sup> June 2014;*
- *Notice of Assessment for Tax Period ending 30<sup>th</sup> June 2015;*
- *Letter from Stamford Plaza Melbourne dated 15<sup>th</sup> September 2016 confirming employment since 14<sup>th</sup>;*
- *Letter to the Director Criminal Investigations, Criminal Investigations Headquarters, Suva Street dated 15<sup>th</sup> April 2016.*
- *Letter from Fiji Police Force Headquarters, Criminal Investigation Department dated 6<sup>th</sup> May 2016;*
- *Application to GM Stamford Plaza Melbourne dated 1<sup>st</sup> January 2015.*

14. On 6 December 2016, the defendants filed an application seeking orders for dismissal of the plaintiff's action for failure to comply with the orders to make discovery.

After hearing the parties, my predecessor made the orders of 12 June 2018 [outlined in paragraph 1 above.

15. On 7 March 2017, the plaintiff filed his fourth supplementary affidavit verifying list of documents.

Under schedule 1, part one there were no documents mentioned to be in the possession, custody or power of the plaintiff.

He had but now does not have in its possession, custody or power following documents:

- a. *Tax Returns for the period of 2002 – 2014;*
- b. *Notice of Assessment for the year 2005;*
- c. *Salary Slip, evidence of income, contracts, advertisements of employment as a part-time Purchasing Officer during the 2010 period apart from the letter of the employer dated 15<sup>th</sup> September 2016.*

The defendants raised objection to the document.

16. Following the order of 12 June 2018, the plaintiff on 21 June 2018 filed with the registry its 5<sup>th</sup> supplementary affidavit verifying list of documents.

#### **Determination**

17. Upon perusing the file I note there was a bundle of documents filed by the plaintiff on 02 December 2016.

Items numbered 22 – 34 are copies of notice of assessment by Australian Tax Authority. Only item missing from this is the assessment for the year 2005.

Items numbered 15 are copy of payment summary for the year 01 July 2009 till 30 June 2010. Whilst item 16 is payment summary for 01 July 2010 to 30 June 2011.

The above documents are sufficient discovery under order of 26 July 2016 except for the assessment for 2005.

18. There is no need for plaintiff to do further discovery of these documents except for the assessment for 2005.
19. I will allow plaintiff further time to obtain the assessment for year 2005 from the Australian Taxation Office and file his affidavit regarding the same.
20. Considering the above I do not find that an “unless order” is warranted for and hence will not make one.

#### **Final Orders**

21. The plaintiff in 21 days to obtain his assessment for 2005 and file necessary affidavit and complete discovery.
22. Parties are to meet and convene pre-trial conference and finalise the minutes in 21 days thereafter.
23. Cost to be in cause.



  
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**Vandhana Lal [Ms]**  
 Acting Master  
 At Suva.