

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 59 of 2018

BETWEEN

JOSAIA VOREQE BAINIMARAMA of New Wing, Government Buildings,
Suva, Prime Minister of the Republic of Fiji.

FIRST APPLICANT - PLAINTIFF

AND

AIYAZ SAYED-KHAIYUM of Suvavou House, Victoria Parade, Suva,
Attorney-General, Minister of Economy, Civil Service and
Communications of Fiji.

SECOND APPLICANT-PLAINTIFF

AND

AMAN RAVINDRA-SINGH of Tukani Street, Lautoka, Fiji,
Barrister and Solicitor.

DEFENDANT - RESPONDENT

Counsel : Mr. Sharma D. with Ms. Fatima G. for the Applicants
Mr. Aman Ravindra-Singh in person

Date of Hearing : 16th March 2021

Date of Ruling : 01st April 2021

RULING

(On preliminary objections)

- [1] In this matter the court, on 12th October 2020, granted leave to move for an order for committal against the defendant-respondent.
- [2] On 05th November 2020 the plaintiffs-applicants filed an ex-parte notice of motion seeking leave to serve the notice of motion for committal, affidavit of the 2nd plaintiff-applicant on the defendant-respondent by posting the said documents to the defendant-respondent's last known address.
- [3] When the matter came up for hearing before this court today the defendant-respondent raised the following preliminary objections:
1. That the leave granted on 12th October 2020 to issue committal proceedings has lapsed – In breach of Order 52 rule 3(2)
 2. That there was no personal service on the respondent after leave was granted – In breach of Order 52 rule 3(3).
 3. That the order for substituted service dated 09th November 2020 was irregular and based on hearsay evidence and misleading evidence.
 4. That the orders sought by the applicants in its motion are imprecise and does not refer to any court orders that were made and subsequently breached.

5. That as such the court cannot make any orders for committal as the motion filed is void of particulars. For example, that there are no grounds listed in the motion which would support the order sought for committal of the respondent.

[4] Order 52 rule 3 of the High Court Rules 1988 provides:

- (1) When leave has been granted under rule 2 to apply for an order of committal, the application for the order must be made by motion and, unless the Court granting leave has otherwise directed, there must be at least 8 clear days between the service of the notice of motion and the day named therein for the hearing.
- (2) Unless within 14 days after such leave was granted the motion is entered for hearing the leave shall lapse.
- (3) Subject to paragraph (4), the notice of motion, accompanied by a copy of the statement and affidavit in support of the application for leave under rule 2, must be served personally on the person sought to be committed.
- (4) Without prejudice to the powers of the court or judge under Order 65, rule 4, the Court or judge may dispense with service of the notice of motion under this rule if it or he thinks it just to do so.
- (5) Saving for power to commit without application (O.52, r.4)

[5] Order 52 rule 3(2) of the High Court Rules 1988 provides that unless the motion is entered for hearing the leave shall lapse. The motion seeking leave to issue committal proceedings was filed on 15th October 2020 and the next date was 26th October 2020 which was within 14 days timeline. On that day too, the respondent was absent and unrepresented and he was avoiding the service of the motion and other documents. The court was informed twice that the respondent could not be found at the given address to effect the service.

[6] On 26th October 2020 the court, acting under the provisions of Order 3 rule 4(1) and (2) the court extended the time. Order 3 rule 4(1) and (2) provides:

- (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings.
- (2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

[7] On 26th October 2020 the learned counsel for the plaintiffs informed court that the notice of motion had not yet been served and the court granted the application for substituted service.

[8] Order 53 rule 3(3) requires the court to serve the notice of motion and, copy of the statement and affidavit personally on the person sought to be committed. However, under Order 52 rule 4 the court has the power to dispense with the service of the notice of motion without prejudice to the powers conferred upon the court under Order 65 rule 4(1) which provides:

If, in the case of any document which by virtue of any provision of these Rules is required to be served personally or a document to which Order 10, rule 1, applies, it appears to the Court that it is impracticable for any reason to serve that document in the manner prescribed on that person, the Court may make an order for substituted service of that document.

[9] In view of the above provisions it is clear that Order 52 rule 3(3) does not take away the power of the court to serve the notice on motion and the documents by substituted service. It is also important to state that Order 52 rule 3(3) does not take away the power of the court to effect substituted service in a proper case.

[10] The respondent also submits that orders sought by the applicants in its motion are imprecise and does not refer to any court orders that were breached.

[11] Order 52 rule 2(2) provides:

An application for such leave must be made *ex parte* to a judge in chambers, and must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

[12] The applicants have filed a statement as required by the above rule stating the grounds for committal.

[13] The respondent submits that the order for substituted service dated 09th November 2020 was irregular and based on hearsay evidence and misleading evidence. The motion seeking an order for substituted service was filed on 5th November 2020. In the affidavit the Senior Litigation Clerk states that the documents were sent to their city agent in Lautoka and they were advised the bailiff made several attempts to serve the documents but was unsuccessful.

[14] The Civil Evidence Act does not totally exclude hearsay evidence. Section 3 of the Civil Evidence Act provides that in Civil proceedings evidence must not be excluded on the ground that it is hearsay.

[15] Section 6 of the Civil Evidence Act provides for certain grounds the court should take into consideration in deciding the reliability of such evidence. Section 6(a) provides:

Whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness.

[16] The bailiff who was entrusted with the service of the motion and the documents was from Lautoka and it would not have been reasonable or practicable to come to Suva to swear an affidavit. On the other hand since the respondent does not challenge the contents of

this affidavit it cannot be said that any injustice would be cause to him by accepting this affidavit.

[17] For the above reasons the court makes the following orders.

ORDERS

- (1) The preliminary objections raised by the respondent are overruled.
- (2) The court makes no order for costs.




Lyone Seneviratne

JUDGE

01st April 2021