

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 276 of 2019

BETWEEN

THOMAS JOHANSEN CONSULTANTS PTE LIMITED a limited liability company
having its registered office at 30 McGregor Road, Suva, Fiji.

PLAINTIFF

AND

CAFÉ THIRTY LIMITED a limited liability company having its registered office at
30 McGregor Road, Suva, Fiji.

SECOND PLAINTIFF

AND

HANS LORENZA AH SAM and **FIDELIS AH SAM** both of
3 Scott Street, Suva, Fiji.

DEFENDANTS

Counsel : Mr. Prasad V. for the Plaintiffs
Mr. Valenitabua S. for the Defendants

Date of Hearing : 14th April 2021

Date of Ruling : 28th September 2021

RULING

- [1] The plaintiffs in this matter, on 07th August 2020, filed Summons for Directions pursuant to Order 25 Rule 1 of the High Court Rules 1988 and on 13th August 2020 the court made orders in terms of the Summons for Directions.
- [2] The order No. 1 and 2 granted by the court are as follows:
1. That the Plaintiffs within twenty eight (28) days serve the Defendant with a list of documents relating the matters raised in the pleadings herein and file an affidavit verifying such list.
 2. That the Defendant within twenty eight (28) days serve the Plaintiff with a list of documents relating the matters raised in the pleadings herein and file an affidavit verifying such list.
- [3] The plaintiffs on 20th January 2021 filed summons pursuant to Order 24 rule 16(1)(b) of the High Court Rules 1988 seeking the following order:
- That the defence of the defendants herein filed on 01st July 2020 be struck out, and the Plaintiff's be at liberty to enter final judgment for damages to be assessed and plaintiffs' costs of this action including the costs of this application to be taxed, the defendants having failed to make discovery of documents as ordered under order made on 13th August 2020 by the High Court.
- [5] The summons was opposed by the defendants on various grounds. First preliminary issue is that there is no proof or evidence that Thomas Salvador Johansen is the sole Director and Shareholder of both plaintiff companies and therefore the affidavit evidence provided by the plaintiffs is not in compliance with section 53 of the Companies Act 2015.

[6] Section 53(1) of the Companies Act provides:

A Company may execute a document if the document is signed by—

- (a) 2 Directors of the Company;
- (b) a Director and a secretary of the Company; or
- (c) for a Private Company that has a sole Director who is also the sole secretary of the Company, that Director.

[7] In the affidavit of Thomas Salvador Johansen he states that he is the sole shareholder and director of the 1st plaintiff company which is the sole shareholder of the second plaintiff company. Section 53(1)(c) requires for the sole Director to execute a document on behalf of the Company, he must also be the sole Secretary. In this case the Director does not say in the affidavit that he is also the sole Secretary of the company. Therefore the affidavit of Thomas Salvador Johansen is defective.

[8] The second preliminary objection is that the plaintiff did not serve the order of the court within 28 days which fact is not disputed by the plaintiff. The order directs the defendant to file his list of documents within 28 days from the service of the order of the court. The late service of the order by the plaintiff did not deprive the defendant of the time of 28 days granted to him and also it is cannot be an excuse for the defendant file his list of documents out of time. Therefore, the 2nd preliminary objection must fail.

[9] Order 24 rule 16(1) of the High Court Rules 1988 provides:

(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.

[10] Order 24 rule 16(1)(b) confers a discretion on the court to dismiss the action of the plaintiff or to strike out the defence and to strike out the defence of the defendant if they failed to discover the documents.

[11] Order 24 rule 16(a) provides that the party who fails to discover documents shall not be entitled to tender such documents in evidence.

[12] In the case of **Pratap v Christian Mission Fellowship** [2006] FJCA 41; ABU0093J.2005 (14 July 2006) Court of Appeal held:


“to deprive a defendant of the right to defend is a serious step, only to be taken in the clearest cases”.

[13] I am also of the view that striking out the defence of the defendant is a very harsh way to punish the defendants for their failure to discover documents. Order 24 rule 16(a) anyway deprives the defendants from tendering the documents, which were not discovered, in evidence at the trial, which in my view is a sufficient punishment for their failure.

ORDERS

1. The summons filed on 20th January 2021 is struck out and the orders sought are refused.
2. There will be no order for costs.




Lyone Seneviratne

JUDGE

28th September 2021.