

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 140 OF 2021

BETWEEN: **TAITUSI RASOKI KATA** of Namoli Village, Lautoka, **ILAITIA BAVADRA** of Viseisei Village, Lautoka.

PLAINTIFFS

A N D: **SOCIAL DEMOCRATIC LIBERAL PARTY** a body corporate duly registered pursuant to the Political Parties (Registration, Conduct, Funding & Disclosures) Act 2013 having its registered office at 66 MacGregor Road, Suva

FIRST DEFENDANT

A N D: **RATU APENISA CAKOBAU** c/ Party Headquarters, 66 MacGregor Road, Suva President.

SECOND DEFENDANT

A N D: **RATU NAIQAMA LALABALAVU, RO TEIMUMU KEPA** and **GEORGE SHIU RAJ** all of Party Headquarters, 66 Macgregor Road, Suva.

THIRD DEFENDANTS

A N D: **EMELE DUITUTURAGA** of 66 MacGregor Road, Suva, General Secretary.

FOURTH DEFENDANT

A N D: **LENAITASI BIAUKULA** of 66 MacGregor Road, Suva, Assistant General Secretary.

FIFTH DEFENDANT

Appearances: Mr. Maisamoa for the Plaintiffs/Respondents
 Mr. Vananalagi for the Defendants/Applicants
Date of Hearing: 23 September 2021
Date of Ruling: 08 October 2021

R U L I N G

INTRODUCTION

1. Before me is an application to strike out the Originating Summons filed by Vananalagi & Associates for and on behalf of the Defendants.
2. The application is supported by an affidavit sworn by Ratu Epenisa Cakobau on 30 July 2021.
3. Ratu Epenisa Cakobau asserts that he is the Party President of SODELPA. He claims that he is duly authorised to swear his affidavit for and on behalf of SODELPA and attaches a written authorisation which is worded as follows:

RESOLUTION OF THE SODELPA MANAGEMENT BOARD MADE ON THIS 15TH DAY OF JULY 2021

IT IS HEREBY RESOLVED by the Management Board that the President RATU EPENISA CAKOBAN is authorized to attend to all matters in respect of proceedings at the Lautoka High Court being *TAITUSI RASOKIA KATA & ANOR v SODELPA & ORS HBC 140/21*.

Such authority shall include swearing affidavits, give (sic) evidence and represent all the Defendants in the abovenamed proceedings.

This authority shall be a continuing authority until it is formally revoked in writing.

DATED this 15th day of July 2021.

Signed

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GENERAL SECRETARY

GROUND FOR STRIKING OUT APPLICATION

4. Ratu Epenisa deposes to the advice that his office has received from his solicitor. That advice is:

- (a) that the orders and issues sought in the Summons and Affidavit filed by the plaintiffs have already been dealt with by this court on 23 February 2021 in HBC 306/2020 following a Strike Out application.
- (b) that this current action is an abuse of process.
- (c) that his Solicitors have written a letter to the plaintiffs Solicitor demanding that they withdraw this action but to no avail...

OPPOSITION

5. The plaintiffs have filed an affidavit sworn by Taitusi Rasoki Kata on 08 September 2021 to oppose the application. Kata identifies himself as the President of the Ba, Tabua, Vatukoula Urban Constituency Council (BTVUCC) of SODELPA. He refutes as follows the assertion that Ratu Epenisa Cakobau is the President of SODELPA:

...Ratu Epenisa Cakobau could be safely labelled as a fraudulent President of the second Defendant for his presidency was declared by Emele Duituturaga, the fourth Defendant who was a General Secretary then and who has no lawful authority to chair the Management Board Meeting, unlawfully ousted Ratu Naiqama Lalabalavu from Chairing that meeting and assumed the position as Chairperson of the said meeting.

6. Kata further asserts (my paraphrase) that:

- (i) section 18.1(d) (ii) of the SODELPA Constitution provides that only the President or the Vice-President may chair a Management Board Meeting.
- (ii) Ms. Emele Duituturaga (the 4th defendant) has never, at any time, been a President or Vice President of SODELPA.
- (iii) however, on 25 July 2020, Ms. Duituturaga "ousted" the Vice President from chairing a Management Board Meeting and thereafter, assumed Chairmanship of that particular meeting,
- (iv) in doing so, Ms. Duituturaga acted in breach of section 18.1(d)(ii) of the SODELPA Constitution.
- (v) in acting in breach of section 18.1(d)(ii) of SODELPA Constitution, Ms. Duituturaga, in effect, had "hijacked" the Chairmanship of the said Management Board Meeting.
- (vi) Ms. Duituturaga did so on the pretext that there was a "constitutional crisis" in place.
- (vii) this, however, which "was a total lie" because Ms. Duituturaga "submitted no evidence to the Management Board to prove her allegation" of a constitutional crisis.
- (viii) even if there was evidence to show a constitutional crisis, Ms. Duituturaga had no color of right whatsoever to oust the lawfully appointed Vice President from his position as chairman on the occasion in question.
- (ix) it was in the course of that same meeting of 25 July 2020, in which Ms. Duituturaga proclaimed Ratu Epenisa Cakobau as President of SODELPA.

- (x) since Ms. Duituturaga had acted unlawfully in ousting the Vice President Ratu Naiqama Lalabalavu, her subsequent proclamation of Ratu Epenisa Cakobau as President was also unlawful
- (xi) accordingly, the appointment of Ratu Epenisa Cakobau as President of SODELPA was illegal.

7. Based on the above, Kata asserts that Ratu Epenisa is not authorized to depose any affidavit for and on behalf of SODELPA.

EARLIER RELATED FILE

- 7. The defendant's application to strike out the plaintiff's Originating Summons is premised entirely on some technical procedural points. Notably, there is nothing in the affidavit supporting the summons to strike out that addresses any of the substantive issues raised by Kata in his affidavit.
- 8. Last year, the plaintiff had filed an Originating Summons (HBC 306/20) seeking exactly the same declaratory relief based on the same cause of action and allegations which Mr. Kata makes (see paragraph 10 (i) to (xi) above).
- 9. That matter was struck out by this Court on 23 February 2021. The Order was sealed as follows:

IT IS HEREBY ORDERS AS FOLLOWS:

- (1) The Originating Summons is struck out under Order 18 Rule 18(1)(a) there being no proper evidence before the Court in light of the Supplementary Affidavit containing no annexure with the original one having been expunged;
 - (2) Costs to the Respondent which I summarily assess at \$1,600 to be paid in 14 days.
- 10. HBC 306/20 was struck out mainly because the affidavit which supported the Originating Summons had not been properly commissioned. The jurat in the supporting affidavit merely stated that the affidavit had been "witnessed" by a certain named witnessing solicitor who practices in Lautoka.
 - 11. However, the affidavit was lacking because the jurat did not state that the affidavit had been "sworn by" the deponent before the named Solicitor, nor did it state that the Solicitor had read over the affidavit to the deponent in the English language, nor did it state that the deponent, after being read the affidavit, appeared fully to understand the meaning and effect thereof.
 - 12. Because an affidavit is the testimony of the person who swears it, it is the equivalent of the oral evidence which the maker would, if called, give in court. It would follow then that an affidavit which has not been properly commissioned or attested will initially

raise issues of admissibility. If a judge allows such an affidavit, then questions about what weight to attach to the facts deposed therein may be raised. In certain circumstances, such an affidavit may even expose the deponent to allegations of perjury, not to mention, questions of competence and professionalism for the legal counsel involved and the Commissioner of Oaths administering the oath.

13. The effect the irregularity in the jurat is that the founding affidavit was not properly before the court. I did highlight all these to Mr. Nacolawa who was then acting for the plaintiff.
14. I then expunged that founding affidavit and adjourned the matter to give Mr. Nacolawa some time to file a properly commissioned affidavit so that the evidence he relies on is properly before this Court.
15. Mr. Nacolawa did file a supplementary affidavit. However, while this supplementary was now properly sworn and witnessed by a solicitor, it did not include any of the attachments in the original affidavit which had, by then, been expunged. It became clear that what Mr. Nacolawa intended was to rely on the attachments in the expounded affidavit.
16. I refused to grant Mr. Nacolawa additional time to refile another affidavit and instead, struck out the Originating Summons.

DEFENDANT- APPLICANTS' SUBMISSIONS

17. Mr. Vananalagi argues that the new proceedings are an abuse of process because:
 - (i) the court is now functus officio
 - (ii) accordingly - what the applicant should have done after the first process was struck out, is to file an appeal.

PLAINTIFF RESPONDENTS' SUBMISSIONS

18. In their submissions, the plaintiffs/respondents submit as follows:
 - (i) that this Court struck out HBC 306/2020 purely on technical procedural grounds because of the irregularity in the jurat of the first affidavit which carried no indication whatsoever that an oath had at all been administered before a Commissioner for Oaths.
 - (ii) the merits or demerits of the substantive issues was never dealt with by the Court.
 - (iii) accordingly, the issues are not *res judicata* and the plaintiffs are perfectly entitled to raise the same issues in these new proceedings.

ANALYSIS

19. The issue is whether this court can entertain the plaintiff's current Originating Summons HBC 140 of 2021 given that HBC 306 of 2020 which was struck out earlier this year was based on the same allegations and cause of action.
20. This is purely a question of whether or not the plaintiffs should now be estopped by *res judicata* from raising the same substantive issues in the present case.
21. As a general rule, if Mr. Vananalagi is to succeed in setting up *res judicata* by estoppel, he must establish the following (see Spencer-Bower & Turner: *The Doctrine of Res Judicata*, 2nd Edn., 1969, pp. 18,19).
 - (i) that the decision to strike out HBC 306 of 2020 was what in law is deemed such.
 - (ii) that the said decision was in fact pronounced, as alleged.
 - (iii) that this court has jurisdiction to pronounce that decision.
 - (iv) that the decision was final
 - (v) that the decision was or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppels is raised.
 - (vi) that the parties in HBC 306 of 2020 are the same persons as the parties in HBC 140 of 2021.
22. Having said that, I must comment that while a court is normally *functus officio* once it has delivered a final decision (subject of course to the SLIP rule under Order 20 Rule 10 of the High Court Rules 1988), a party will only succeed in raising *res judicata* by estoppel if he or she can establish that an issue which is being raised in a subsequent action has already been finally disposed of by another Court of competent jurisdiction, or even by the same Court, in an earlier action or proceeding.
23. Frankly, nothing has been placed before me by the defendants/ applicants to convince me that the issues raised in this case, which I have set out in paragraph 10 above, have been dealt with by this court or by any other Court.
24. I do note that Ratu Epenisa Cakobau has annexed to his affidavit a Judgement of the High Court in Suva dated 23 April 2020 in Watisoni Nata & Ors v SODELPA & Ors – HBC 296 of 2019. However, no submission was raised before me in Court or in the written submissions filed by counsel as to whether the said decision raises a point of *res judicata* by estoppel in the present case.

25. Accordingly, I decline the defendants' striking out application with costs to the plaintiffs which I summarily assess at \$1,800-00 (one thousand eight hundred dollars only).
26. Furthermore, I direct that the plaintiff do serve a copy of all documents filed (originating summons and supporting affidavit) on the Registrar of Political Parties within 14 days and, pursuant to Order 15 Rule 6(2) (b), that the Registrar of Political Parties be added as a party.
27. This case is adjourned to 22 October for mention only.



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Anare Tuilevuka

JUDGE

Lautoka

08 October 2021