

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

CIVIL ACTION NO. HBC 84 OF 2021

BETWEEN: **VINOD NADAN** of Benai, Ba, Farmer, as Administrator for the Estate of Swamy Nadan.

PLAINTIFF

AND: **TEVITA VOLAVOLA t/a SAFE LANDING RESORT**, whose principal place of business is located at C/2 Tukani Street, Lautoka.

FIRST DEFENDANT

AND: **SAIMONI NACOLAWA and TORIKA NACOLAWA t/a NACOLAWA & CO** of Level 1, Flat 2, Prouds Building, Lautoka.

SECOND DEFENDANTS

APPEARANCES : Mr. Lagonilakeba, for the Plaintiff
Mr. S. Nacolawa, for the 1st Defendant and In Person as the 1st named Second Defendant

DATE OF HEARING : 11th May, 2022

DATE OF DECISION : 5th July, 2022

JUDGMENT

1. Before me is an Originating Summons dated and filed on 18th March 2021 by the Plaintiff, namely, Vinod Nandan, being the Administrator for the Estate of Swamy Nandan, seeking the following reliefs;

- a) *An order that the First Defendant pay the debt amount of \$34,000.00 (Thirty-four Thousand) with interest of 5% per annum.*
- b) *Alternatively, an order that pursuant to the undertaking letter dated 7th May, 2018, the Second Defendants or their agents and/or their servants do forthwith release the debt amount of \$34,000.00 (Thirty-Four thousand dollars) together with interest calculated at the rate of 5% per annum on behalf of the First Defendant to the Plaintiff forthwith.*
- c) *AND that Costs and incidental to this application be paid by the Defendants on a strict solicitor/client indemnity basis.*

2. The Summons was supported by the Affidavit of the Plaintiff, sworn on 17th March 2021 and documents annexed as “VN -1” to VN -5” thereto.
3. The First Defendant and the 1st named Second Defendant on 6th May 2022, filed their respective Affidavits in opposition both sworn on 29th April 2022. The First Defendant’s Affidavit was supported by documents annexed as “TV-1” to “TV-4”, while the 1st named Second Defendant’s Affidavit was filed sans document. The First Defendant also filed a supplementary Affidavit, which was not objected to by the Counsel for the Plaintiff.
4. The Plaintiff proceeded for hearing without filing his Affidavit in reply, seemingly owing to the apparent admission of the debt unto the plaintiff by both the Defendants in their respective Affidavits in opposition and particularly by the letter annexed as “VN-5” by the Plaintiff.
5. At the hearing before me, learned Counsel for both the parties made extensive oral submissions and subsequently have filed their helpful written submissions as well, for which I am thankful to them.

SUBMISSIONS:

By the Counsel for the First Defendant and the Second Defendant.

6. Learned Counsel for the first Defendant (by raising preliminary objections at the hearing, has taken up a stern position that the Plaintiff’s action is misconceived, irregular and ought to be struck out, owing to naming the Managing Director “TEVITA VOLAVOLA” in his personal capacity as the First Defendant to this action. Counsel draws my attention to paragraphs 5 and 8 of the Plaintiff’s Affidavit in support in this regard.
7. Commenting on the contents of paragraph 5 of Plaintiff’s Affidavit in support, Counsel for the Defendants has drawn my attention to paragraph 6 of the **First** and **Second** Defendant’s Affidavits in response, wherein both Defendants have refuted the contents of said paragraph 5 which is on the propriety of the naming of “Tevita Volavola” as the first Defendant. Paragraph 6 of Affidavit in Response states as follows.

Paragraph 6 of 1st Defendant’s Affidavit.

- a) *That **Tevita Volavola** is the Managing Director of the said Company, a separate person from the company.*
 - b) *There are two Directors of the said Company*
 - c) ***Tevita Volavola** is not the name of the business, but **Cavacola Company Limited** trading as **Safe Landing Resort**. (emphasis mine)*
8. Counsel also draws my attention to First Defendant’s denial to the contents of Paragraph 8 of the Plaintiff’s Affidavit in support, wherein the first Defendant states that

there is no such a Company by the name of “**Tevita Volavola t/a Safe Landing Resort**”. The 1st named Second Defendant too in his Affidavit in opposition said to have taken up the same position similar to that of the First Defendant as far as the propriety of naming the First Defendant is concerned in the Originating Summons.

9. All in all , what the learned Counsel for the First Defendant and the 1st named Second Defendant in his submissions and in Affidavits in response emphasizes is that naming the First Defendant as “**Tevita Volavola t/a Safe Landing Resort**” is misconceived, wrong ,irregular and the action should be struck out on this ground alone as this action could not have been filed and proceeded against **Tevita Volavola**, who is a natural person, being the Managing Director of **Cavacola Company Limited t/a Safe Landing Resort**.
10. Learned Counsel for the Defendants heavily relies on the decision in the celebrated case of **SALAMON V SALAMON Co Ltd (1897) ACC 22/(1896)** and has taken up the position that the plaintiffs could not have named said **Tevita Volavola** in his personal capacity as the First Defendant as he is only a Managing Director of the Company called **Cavacola Company Limited t/a Safe Landing Resort**.
11. Accordingly, Counsel argued that the present action cannot be proceeded against the First Defendant, said Managing Director, **TEVITA VOLAVOLA** in the manner it is filed since he is protected by Corporate Veil and Plaintiff has to file a fresh Action against the Company called **Cavacola Company Limited t/a Safe Landing Resort**.
12. Another argument advanced by the learned Counsel for the Defendants was that his letter dated 7th May 2018 marked as “VN-5” addressed to the Manager of the Plaintiff’s establishment , namely, “**Nandan’s Island Investment**” was not an undertaking for his Law Firm to pay the said sum of Money on behalf of the First Defendant , but only an assurance given that once the sale of the First Defendant’s Resort is finalized , then that payment of \$34,000.00 would become due to the plaintiff, however , subject to the verification of the said sum with the relevant invoices and for that there must be sufficient proof attached to the Affidavit in support.
13. Counsel submits further that when he wrote the impugned letter of undertaking , though the said “**Cavacola Company Limited**” owed to the Plaintiff in the region of \$34,000.00 , it could not be released to the Plaintiff as the intended sale of the Resort did not materialize and failed at last Minute.

Submissions by the Counsel for the Plaintiff:

14. In response to the preliminary objection of the Counsel for the Defendants , learned Counsel for the Plaintiff has made submissions to the effect that filing the action by naming the First Defendant as “**Tevita Volavola trading as Safe Landing Resort**” instead of naming “**Cavacola Company Limited trading as Safe Landing Resort** “ is an irregularity Occurred due to a minor oversight as the correspondence with the Second Defendant

had always suggested that his client was “Tevita Volavola trading as Safe Landing Resort”.

15. Counsel for the Plaintiff draws my attention to the first paragraph of the Second Defendant’s undertaking letter annexed as “VN-5” wherein it has been stated as “*We, the Solicitor for TEVITA VOLAVOLA t/a SAFE LANDING RESORT...*”. Counsel states further that by carrying out a business search on Safe Landing Resort and giving the address of its principal place of business as per the searched document annexed as “VN-3” for all intents and purpose the plaintiff intended to file this action against “**Cavacola Company Limited t/a Safe Landing Resort**”.
16. Counsel alleges that it was the Second Defendants and their letter marked “VN-5” that ultimately misled the plaintiff into believing that “**Tevita Volavola t/a Safe Landing Resort**” was their client that owed money to the Plaintiff. Accordingly, Counsel argues that the Defendants cannot now rely on their own misgiving and expect the Court to come to their aid and if they had any issues on this, they should have filed necessary application to strike out, which they did not.
17. It is also submitted by the Counsel for the plaintiff that the personal service of the Originating Summons on the presently named first Defendant “**Tevita Volavola t/a Safe Landing Resort**” also can be treated as the due service on “**Cavacola Company Limited t/a Safe Landing Resort**” through its Managing Director.
18. Accordingly, learned Counsel for the Plaintiff admits that what has happened is an irregularity pursuant to Order 2 Rule 1 of the High Court Rules 1988, as the Counsel for the Defendant alleged and submits that there will not be any prejudice caused to the Defendants if the First Defendant’s name is amended as “Cavacola Company Limited t/a Safe Landing Resort”. Counsel for the Plaintiff relies on the decided case law authority in ***KOTOBALAVU V HOME FINANCE COMPANY LIMITED CENTRE (2017) FJHC 730; CIVIL CASE HBC 227 of 2015***(29 September 2017) in support of his argument.

ANALYSIS:

19. As the liability of the debt unto the Plaintiff has, more or less, been admitted by both the Defendants in their respective Affidavits in opposition and particularly by the aforesaid letter marked as “VN-5” dated 7th May 2018 written by the 1st named Second Defendant (the Solicitor of the First Defendant) addressed to the Manager of the Plaintiff’s establishment, the task before me has almost been boiled-down to two issues, namely, “the Corporate Veil” and “the Undertaking” as pointed out by the learned Counsel for the first Defendant in paragraph 1.1 of his written submissions.
20. The main issue that begs adjudication by me is the propriety and legality of naming the First Defendant in the Originating Summons as “**Tevita Volavola t/a Safe Landing Resort**” instead of naming it as “**Cavacola Company Limited t/a Safe Landing Resort**”.

21. The letter dated 7th May 2018 annexed as “VN-5” which the Plaintiff received from the Second Defendant also has given the picture that he (Solicitor) acts for his client “**Tevita Volavola t/a Safe Landing Resort**”. The position that it was “**Cavacola Company Limited**” which in fact was trading as **Safe Landing Resort** or that he was acting for such a Company was not brought out by this letter.

22. Although, the Certificate of Registration of a Business Name, marked as “VN-3”, reveals that the **Safe Landing Resort** is a registered business name of **Cavacola Company Limited**, the particulars given in the Application for Registration of Business Name as to the ownership of **Safe Landing Resort** is rather confusing. Thus, naming the First Defendant in the Summons as **Tevita Volavola t/a Safe Landing Resort**, in place of **Cavacola Company Limited t/a Safe Landing Resort**, could very well be treated as a genuine mistake occurred on the part of the Solicitors for the Plaintiff, which in my view could be regularized under Order 2 Rule 1 of the High Court Rule, with no prejudice being cause to the Defendants as argued by the Counsel for the Plaintiff, for the following reasons.
 - I. Naming “**Tevita Volavola t/a Safe Landing Resort**” as the First Defendant in the summons need not necessarily defeat the claim of the Plaintiff as it could be amended as “**Cavacola Company Limited t/a Safe Landing Resort**”.
 - II. By serving the Summons on Tevita Volavola, personally, who is the Managing Director of the **Cavacola Company Limited t/a Safe Landing Resort**, the plaintiff has demonstrated his intention to sue “**Cavacola Company Limited trading as Safe Landing Resort**”.
 - III. It is observed that by document annexed as “TV-1” to the Affidavit in response, Tevita Volavola has been authorized to represent the **Cavacola Company Limited t/a Safe Landing Resort** in this action, by which the Company has, tacitly admitted its position as the First Defendant in this action.
 - IV. The Affidavits in opposition by the First Defendants or that of the Second Defendant, who himself a Solicitor, do not contain any averment that the error in question is fatal to the proceedings and no application has so far been made to strike out the claim on that ground.
 - V. In paragraph 2, (under sub-heading (II) “UNDERTAKING”) found in page 5 of the Defendant’s written submissions, by referring to annexure “TV-3”, which is a Board Resolution to dispose the land, the Counsel for the Defendant has conceded the fact that the First Defendant is none other than “**Cavacola Company Limited t/a Safe Landing Resort**”.
 - VI. I am guided by the case law authority in **KOTOBALAVU V HOME FINANCE COMPANY LIMITED CENTRE (2017)** (Supra) in arriving at the decision that the Court, in the interest of justice, can act under Order 2 Rule 1 of the HIGH Court

Rules 1988 to remedy this predicament resulted due to an inadvertence on the part of the Plaintiff's Solicitors.

- VII. Now, the Plaintiff does not intend to proceed against the Managing Director Tevita Volavola personally, and instead moves to substitute the name of the entity called "**Cavacola Company Limited**" trading as "Safe Landing Resort". Thus, the case law authority in SALAMON V SALAMON (Supra) relied on by the Defendants will have no application.
23. In view of the foregoing reasons, this Court can arrive at the safest conclusion that it was "**Cavacola Company Limited t/a Safe Landing Resort**" should have been named as the First Defendant in this matter and the naming of "Tevita Volavola t/a Safe Landing Resort" in the Originating Summons was an inadvertency occurred on the part of the Plaintiff's Solicitors, which can now be regularized as stated above by substituting the words "**Cavacola Company Limited**" in place of the words "**Tevita Volavola**" as the correct name of the First Defendant in this Summons.

LIABILITY FOR DEBT

24. As far as the liability of the impugned debt in a sum of \$ 34,000.00 is concerned, I am convinced that there is no need for further scrutiny of it, in view of the overwhelming admissions made in their Affidavits in response by the Defendants and particularly in the letter annexed as "VN-5" by the Plaintiff.
25. All the averments in the Affidavit in support, as far as the debt of \$ 34,000.00 is concerned, have been unreservedly admitted in the Affidavits in response filed by both the Defendants, except for calling for verification of debt, which in my view is a clear afterthought entertained by the Defendants in order to defeat and/or delay the claim of the Plaintiff that is due to the Estate of the Deceased.
26. However, the liability on the part of the Second Defendants, being the Solicitors for the First Defendant, would arise and be limited only to release the said sum of Money with the interest from their Trust Account, only as and when the Money comes in to the Account on behalf of the First Defendant.
27. Having carefully considered all the evidence, submission placed before me and the relevant provisions of The Law Reform (Miscellaneous Provisions) (Death and Interest) Act, I decide to grant interest at the rate of 3% from the date of filing the action and further interest at the rate of 4% on the adjudged amount from the date of this judgment till the total amount is settled in full.

FINAL ORDERS.

- a. "**Tevita Volavola** trading as, **Safe Landing Resort**", who is named as the First Defendant, is removed from the proceedings.

- b. "Cavacola Company Limited trading as Safe Landing Resort" is substituted as the First Defendant.
- c. Plaintiff's claim is allowed and a Judgment is entered in his favor for the recovery of \$ 34,000.00 from the First Defendant, together with the interest of 3% from the date of filing the action and thereafter at the rate of 4% from the date of this judgment.
- d. The Second Defendant's liability is hereby limited only to release the said amount with the interest thereto and the Costs, unto the Plaintiff, as and when the funds come into their Trust Account on behalf of the First Defendant.
- e. The Plaintiff is entitled for a summarily assed costs of \$ 1,500.00 payable by the First Defendant.




A.M. Mohammed Mackie
Judge

At High Court Lautoka this 5th day of July, 2022

SOLICITORS:

For the Applicant: Millbrook Hills Law Partners

For the Defendants: Nacolawa & Co.