

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**

**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 59 of 2011L**

**BETWEEN** : **CARPENTERS (FIJI)** a limited liability Company having its registered office at Suva and trading in the name and style of Carpenters Shipping having its head office at Suva and branches in Lautoka and Nadi Airport.

**PLAINTIFF**

**AND** : **MEICHEAL BHINNU G. JALAM** and **ARUNA WATI JALAM** both of opposite Hari Prasad Shop, Bavadra Road, Lautoka,

**FIRST DEFENDANT**

**AND** : **SARITA BAI MAKANJEE** trading as MAKANJI INVESTMENT of market square, Sigatoka Town, Sigatoka.

**SECOND DEFENDANT**

(Ms) Jyoti Sangeeta Singh Naidu for the Plaintiff  
Mr. Ravneet Charan for the First Defendant  
No appearance for the Second Defendant

Date of hearing : - 26<sup>th</sup> September 2016  
Date of ruling : - 15<sup>th</sup> December 2016

**RULING**

- (1) The matter before me stems from the Inter- Parte “**Summons**” filed by the Plaintiff, dated 23<sup>rd</sup> May 2016 to **re-instate** the action which was taken off the cause list on 05<sup>th</sup> April 2016 due to second consecutive non-appearance by the Plaintiff.
- (2) The Plaintiff is a limited liability Company. The Plaintiff’s application for re-instatement is supported by an Affidavit sworn by Premila Devi, a **law clerk** in the Chambers of Messers Patel Sharma Lawyers, Solicitors for the Plaintiff.

- (3) The Plaintiff's application for re-instatement is strongly contested by the first Defendant. Neither the second Defendant nor counsel appeared in court.
- (4) At the commencement of the oral hearing before the Court, Counsel for the first Defendant raised an objection to the Plaintiff's supporting Affidavit of the law clerk.

The objection raised is this;

*"The application for re-instatement of this action is a contested hearing and it is not appropriate for a law clerk to depose in support of it."*

Counsel for the Plaintiff did not argue this point.

- (5) Let me now move to examine the objection raised by the first Defendant.

**The swearing of affidavits by solicitor's clerks in contested proceedings should be a rare exception and the reason why the party is unable to depose ought to be explained.**

It is not disputed that the Plaintiff's application to re-instate the action is a contested proceeding.

I note that there is not a word in the law clerk's supporting affidavit explaining as to why the Plaintiff is unable to depose.

**In the case of Dr. Ramon Fermin Angeo v Dr. Sachida Mudaliar & Others, Lautoka High Court Civil Action No. 26 of 1997, the Court on page 3 stated;**

*"The Court will disregard the affidavit sworn by Yogesh Narayan. As a practice it is quite improper that law clerks swear affidavits on behalf of clients. Proceedings such as the present are matters in which the latter ought more appropriately to be involved. Too often solicitors allow their law clerks to swear affidavits because it is all too convenient. Such conduct must be discouraged. It trespasses the demarcation between client and solicitor roles."*

**I reiterate here the comments of Hon. Mr. Justice Jiten Singh in Deo v Singh [2005] FJHC 23; HBC0423.2004 (10 February 2005):**

*"The swearing of affidavits by solicitor's clerks in contested proceedings with alarming regularity before the courts. Arun Kumar*

*says he was duly authorised by defendants to dispose the contents. There is no authority annexed to the affidavit. Order 41 Rule 1 sub-rule 4 requires affidavit to be expressed in "first person". The affidavit put before the court is more like a statement defence in its wording rather than being expressed in first person. Swearing of affidavit by solicitor's clerk on contested matters should be a rare exception and the reason why the party is unable to depose ought to be explained".*

(Emphasis added)

Master Robinson in **Chand v Hussein** [2009] FJHC 286; Civil Action 17. 2007 {14 October 2009) warned of the inherent danger in such practice:

*"I do not wish to delve into the possible implications of solicitor's clerks swearing affidavits on behalf of clients except as to say that personal knowledge of the facts by the deponent is a necessary ingredient".*

In the case of '**Rupeni Silimuana Momoivlau v Telecom Fiji Ltd**', Civil Action No. HBC 527 of 1992, Hon. Justice Gerard Winter held;

*The habit of supporting or opposing applications to decide the rights of parties based on the information and belief of law clerks is an embarrassment to the clerk, her firm and the court file. Justice Madraiwiwi (as he then was) had this to say about the practice of using law clerks in this way:*

*"It is being made clear to counsel that affidavits by law clerks were not being entertained other than in non contentious matters such as service of documents where not disputed. The most appropriate person to have sworn the affidavit in these proceedings was Mr. Joji Boseiwaqa who appeared on instructions from the plaintiff at the relevant time. The court respectfully endorses the general thrust of dicta by Lyons J in Michael Harvey v Michael Kelly & Ray McGill, Civil Action No. HBC 323 of 1077 about the propriety of law clerks deposing affidavits".*

(Emphasis added)

I have no hesitation whatsoever in relying on the above Judicial decisions in the instant matter before me.

Applying those principles to the present case and carrying those principles to their logical conclusion, I have no hesitation in concluding that the affidavit of the law clerk filed in support of the Plaintiff's Summons to re-instate the claim is unacceptable. **Thus, I uphold the objection raised by the first Defendant.** Therefore, the whole of the affidavit is removed from the court record. The affidavit is worthless and ought not to be received in evidence in any shape whatever. This may leave the court with no option but to dismiss the Summons since there is no material on which the court can exercise its discretion to re-instate the action.

Leave that aside for a moment.

As noted earlier, the Plaintiff is a duly incorporated limited liability company having its registered office at Suva. The affidavit in support of the Plaintiff's Summons is sworn by a law Clerk of Plaintiff's Solicitors. The law Clerk needs the sanction of the Plaintiff Company to swear on behalf of the Plaintiff Company. But the law Clerk does not annex any authority given to her by the Company. As a result, I am left with the conclusion that the law Clerk's Affidavit is defective and a nullity because there is no 'ostensible' authority to prove that the law Clerk was duly authorised to swear on behalf of the Plaintiff Company. Therefore, I give it no weight whatsoever. I find considerable support for my view from the Supreme Court Practice.

In the Supreme Court Practice (1967) (The White Book) the following note appears at page 117:

*'The affidavit may be made by the Plaintiff or by any person duly authorised to make it. If not made by the Plaintiff, the affidavit itself must state that the person making it is duly authorised to do so-  
Chingwin -v- Russell (1910) 27 T.L.R. 21'.*

Moreover, I am comforted by the rule of law expounded in "Chul v Doo Won Industrial (Fiji) Ltd (2004) FJHC 24". Hon Justice Jitoko held;

*"The applicant himself is not a director. Any action taken on behalf of the Company, including this present application can only be done by a director under the seal of the Company. A director is a creature of the articles of association of the Company, as well as the Act. His duties and responsibilities are specifically set out in the Act and in the articles. In my view, a director cannot, by the instrument of a Power of Attorney, cede his legal authority, duties and responsibilities*

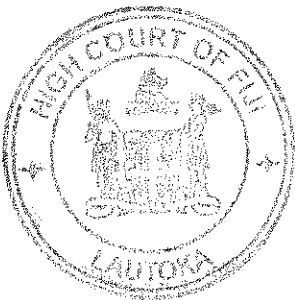
*imposed by law to another except than in accordance with the provision of the Act. But even if were possible to cede the powers vested in the directorship of a Company, to a third party, through a Power of Attorney, it can only be personal, the exercise of which if purportedly on behalf of the Company, will need the sanction of the Company."*

- (6) To sum up, in view of the approach I have adopted in relation to the supporting affidavit of the law clerk, I have no alternate but to dismiss the Plaintiff's Summons.


Thus, it will be at best a matter of academic interest only or at worst an exercise in futility to express my conclusion on the merits of the Plaintiff's application to re-instate the claim.

### **ORDERS**

- (1) The Plaintiff's Summons, dated 23<sup>rd</sup> May 2016 is dismissed.
- (2) The Plaintiff to pay costs of \$500.00 (summarily assessed) to the first Defendant within 14 days hereof.



**At Lautoka  
15<sup>th</sup> December 2016**

  
15/12/2016

**Jude Nanayakkara**  
**Master**