

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 68 of 2012

BETWEEN : **AUSFURN FIJI LIMITED** a duly incorporated limited liability company having its registered office at Nadi.

PLAINTIFF

AND : **DIRECTOR OF LANDS**, Government Buildings Suva

1ST DEFENDANT

AND : **ATTORNEY GENERAL**, Attorney General's Chambers, Suva.

2ND DEFENDANT

AND : **MATRIX ENVIRONMENTAL SOLUTIONS LIMITED** a duly incorporated limited liability company having its registered office at Nadi.

3RD DEFENDANT

AND : **PETER MICHAEL McGAHAN** a Company Director of Nadi

4TH DEFENDANT

(Ms) Barbra Doton Jai for the Plaintiff
Mr. Nilesh Virendra Kumar for the Third and Fourth Defendants

Date of Hearing: - Tuesday, 31st May 2016
Date of Ruling: - Friday, 10th June 2016

RULING

(A) INTRODUCTION

(1) The matter before me stems from the Plaintiff's 'Notice of Motion', dated 25th November 2015, made pursuant to **Order 8, r.2** of the High Court Rules, 1988 and the inherent jurisdiction of the Court seeking the grant of the following Orders;

1. *THAT the within action be reinstated and the matter be relisted in the cause list.*
2. *THAT the costs of the application be costs in the cause.*
3. *THAT any other orders that this Court deem.*

(2) The Plaintiff is a limited liability company. The application for reinstatement is supported by an affidavit sworn by one "Ronnie Ram", Legal Executive, employed by Rams Law, Solicitors for the Plaintiff.

(3) The First and Second Defendants do not oppose the application. But the application is strongly resisted by the third and fourth Defendants.

(4) The third and fourth Defendants filed an 'affidavit in opposition' opposing the application followed by an 'affidavit in reply' thereto.

(5) The Plaintiff and the third and fourth Defendants were heard on the 'Notice of Motion'. They made oral submissions to Court. In addition to oral submissions, the Counsel for the Plaintiff filed a careful and comprehensive written submission for which I am most grateful.

(B) CHRONOLOGY OF EVENTS

10 th April 2012	The Plaintiff instituted the proceedings herein against the Defendants.
10 th April 2012	The Plaintiff filed an Inter-Parte Summons seeking, <i>inter alia</i> , injunctive relief against the Defendants.
24 th May 2012	Third & Fourth Defendants filed Statement of Defence and Counterclaim.
12 th June 2012	Plaintiff filed Reply to Third & Fourth Defendant's Statement of Defence and Counterclaim.

4 th July 2012	First and Second Defendant filed Statement of Defence.
12 th July 2012	Plaintiff filed reply to Defence of First and Second Defendant.
9 th August 2012	Plaintiff filed Summons for Directions.
17 th September 2012	Court granted Orders on Summons for Directions.
19 th September 2012	Plaintiff sealed the Order on Summons for Directions.
8 th October 2012	Plaintiff filed an Affidavit Verifying List of Documents.
1 st November 2012	Third and Fourth Defendants filed an Affidavit Verifying List of Documents.
30 th January 2013	First & Second Defendant filed Summons to Amend the Statement of Defence. First & Second Defendant filed Amended Statement of Defence without leave.
2 nd May 2013	The Plaintiff's application for injunction was heard before the Master of the High Court and the solicitors for the Third & Fourth Defendants informed the Court that there is a mortgage already registered on the subject property.
6 th may 2013	The Fourth Defendant filed Supplementary Affidavit with the registered mortgage attached.
7 th August 2013	Plaintiff filed application to amend the Inter-Parte Summons.
11 th June 2014	Plaintiff was granted leave to amend the Inter-Parte Summons.
6 th November 2014	Hearing of Plaintiff's injunction application before Justice A. Tuilevuka. Injunction refused.
13 th May 2015	Plaintiff filed an Amended reply to Amended Statement of Defence of First and Second Defendants.
29 th June 2015	First and Second Defendants filed an Affidavit Verifying List of Documents.
2 nd July 2015	Court gave directions for exchange of documents.
26 th August 2015	Court gave directions for filing of PTC Minutes by 23 rd September 2015.
24 th September 2015	Court granted leave for Plaintiff to file Supplementary Affidavit Verifying List of Documents and gave directions to file PTC Minutes thereafter.

16 th October 2015	Plaintiff filed a Supplementary Affidavit Verifying List of Documents.
27 th October 2015	Matter adjourned to 4 th November 2015.
4 th November 2015	No appearance by the Plaintiff. NOAH issued.
16 th November 2015	Second consecutive non-appearance by the Plaintiff. Matter taken off the cause - list.
25 th November 2015	Plaintiff filed the application herein for reinstatement of the matter.

(C) THE PLAINTIFF'S NOTICE OF MOTION FOR REINSTATEMENT

The Plaintiff is a limited liability company. The plaintiff's 'Notice of Motion' is supported by an affidavit sworn by one 'Ronnie Ram', Legal Executive, employed by Rams Law, Solicitors for the Plaintiff, which is substantially as follows;

1. *THAT I am employed by Rams Law, Barristers & Solicitors, Nadi as a Legal Executive.*
2. *THAT in so far as the contents of this affidavit is within my personal knowledge it is true and in so far as it is not within my personal knowledge it is true to the best of my knowledge, information and belief.*
3. *THAT save where otherwise expressly stated I depose the truth of all the facts in this affidavit from the files kept by my principal and from my own knowledge that I obtained from consultation with my principal.*
4. *THAT Messrs Rams Law has been acting for the Plaintiff herein and I have been assisting our solicitors in carrying out the clerical and paralegal work for the Plaintiff which includes but is not limited to the entering of Court dates in our diary and arranging city agents to appear on our behalf in certain matters on the instructions of our solicitors.*
5. *THAT the matter was listed for mention on the 27th day of October 2015 for mention only and we had instructed our city agents, Messrs Aman Ravindra Singh lawyers to appear on our behalf. Annexed hereto marked as "RR1" is the copy of our instruction sheet.*
6. *THAT on the 4th day of November 2015 we received a call from the High registry advising us that a NOAH was being sent to us by fax however we were facing difficulties in receiving the fax therefore I went to the High Court registry and uplifted the NOAH myself as I had other work to do in Lautoka on the said date.*
7. *THAT the NOAH stated that the matter was being called on 16/11/15 for mention only before the Master therefore I immediately entered the date in our diary upon my return to the office, annexed hereto marked as "RR2" is a copy of the NOAH that was uplifted from the court registry.*

8. *THAT on Friday, the 13th day of November 2015, we instructed Messrs Aman Ravindra Singh Lawyers to appear on our behalf on the 16th day of November 2015 advising that we had received a NOAH from the Lautoka High Court registry and to seek directions for filing of PTC Minutes that had been finalised. Annexed hereto and larked as "RR3" is the copy of our instruction sheet.*
9. *THAT later during the day on the 16th day of November 2015 I received a call from Mr. Charan of Aman Ravindra Singh Lawyers advising that he was late to court due to his travel from Ba and as a result could not appear in the above matter which was subsequently struck out for our non- appearance.*
10. *THAT upon receiving the call from Mr. Charan I contacted the solicitors for the Defendants, namely Mr. Nilesh Prasad and Ms. Mary Lee, respectively, via telephone and requested if they would consent to having the matter reinstated and thereafter sent letters dated the 17th day of November 2015 formally requesting for their consent to reinstate the matter. Annexed hereto marked as "RR4" and "RR5" is the copy of letters dated the 17th days of November 2015 to Mitchell Keil Lawyers and the Attorney General's Office, respectively.*
11. *THAT to date we have not received a response from the Defendants' to the said letters dated the 17th day of November 2015.*
12. *THAT we thereafter received the faxed outcome from Aman Ravindra Singh Lawyers and noted that as per the said outcome it was the second time that we failed to appear in Court.*
13. *THAT I spoke with Mr. Charan via telephone after receiving the outcome and am advised by Mr. Charan and verily believe that according to the Court's records we had failed to appear in Court on the 4th day of November 2015.*
14. *THAT I thereafter called the Lautoka High Court registry to confirm whether we had in fact not appeared in Court on the 4th day of November 2015 and was advised by one Ms. Archana at the Lautoka High Court registry and verily believe that the matter was called on 04th of November 2015 and the court ordered a NOAH to be served on our office in default of our appearance.*
15. *THAT I then made enquiries with Mr.Charan of Messrs Aman Ravindra Singh Lawyers whereby he confirmed sending us the outcome of the matter on the 27th day of October 2015 via fax which stated that the matter had been adjourned to the 04th day of November 2015. I then made my own enquiries in our office however our receptionist has advised that she cannot recall receiving any fax of the outcome on the said date. As a result of the above the matter was not entered in our diary and hence we did not instruct out agent to appear on the 4th day of November 2015. Annexed hereto and marked as "RR6" is a copy of the relevant diary page.*
16. *THAT to our knowledge we had been making all appearances in court on all occasions except for the 16th day of November 2015 due to the reasons disposed hereinabove and upon receiving the outcome from Mr. Charan and discovering that we had also failed to appear on the previous occasion we had*

made all necessary enquiries to obtain confirmation and ascertain the reason for our non – appearance.

17. *THAT we had every intention of complying with the Court's directions and had been liaising with the Defendants to finalise the Pre-Trial Conference Minutes to have this filed in Court. By email on the 12th day of November 2015 addressed to the Third and Fourth Defendant's solicitors and copied to the First and Second Defendants' solicitors, our principal Mr. Ram and myself, our Mrs. Doton forwarded the finalised Pre Trial Conference Minutes to the Defendants' solicitors for execution. Annexed hereto marked as "RR7" is a copy of the said email to the Defendants' solicitors.*
18. *THAT our non-appearances on the 16th November 2015, and previously on the 4th day of November 2015, were not intentional and not meant to disrespect the Court or its process.*
19. *THAT the Plaintiff's claim is a genuine claim and the matter is at the pre-trial stage and Pre Trial Minutes has been forwarded to the Defendants solicitors for execution.*
20. *THAT the Defendants will not be prejudiced if the matter is reinstated as there has been no delay in filling the application herein and furthermore, PTC Minutes have been finalized and are awaiting execution by the Defendants' solicitors before it can be filed in Court. The Third and Fourth Defendants also have a counterclaim against the Plaintiff therefore it would also be in the interest of the Third and Fourth Defendants to have the matter reinstated.*

(D) AFFIDAVIT IN OPPOSITION

The fourth Defendant, 'Peter Michael McGhan', who is also a Director of third Defendant filed an "affidavit in opposition" sworn on 01st March 2016, which is substantially as follows;

1. *I am the within named Fourth Defendant and a Director of Matrix Environmental Solutions Limited the Third Defendant in this action (hereinafter referred to as "Matrix") and make this Affidavit for both Defendants. I have perused this file as kept by us and the matters to which I depose to herein are based on information contained therein and also within my knowledge except where expressly stated.*
2. *I have read the Affidavit of Ronnie Ram sworn on 24 November 2015 (hereinafter referred to as "Ram's Affidavit") for and on behalf of the Plaintiff.*
3. *In answer to para 5 of Ram's Affidavit, on 27 October 2015 Ravneet Charan appeared for the Plaintiff on instructions of Rams Law and final 7 days were*

given by the Court for pre-trial conference minutes to be filed. This was to be done on or before 3 November 2015. The case was adjourned to 4 November 2015. It has to be expected that Mr Charan appearing for the Plaintiff on instructions would have advised his principal Rams Law or alternatively Rams Law would have contracted Mr. Charan for an appearance report.

4. *In answer to para 6 of Ram's Affidavit, when the case was called in Court on 4 November 2015 there was no appearance on the part of the Plaintiff. The Defendants' counsels were present. The Plaintiff's solicitors either knew or ought to have known the date however did not enter an appearance. From our agent's appearance report of 4 November 2015 I note that the Court came to the aid of the Plaintiff's counsel and directed that a Notice of Adjourned Hearing (NOAH) be served on the Plaintiff. The NOAH is admitted to have been uplifted by the Plaintiff's counsel personally on 4 November 2015 which stated that the case would next be called on 16 November 2015.*
5. *In answer to para 6 of Ram's Affidavit, I have received advice from our solicitors that the onus was on the Plaintiff's counsel to ensure that there is appearance for and on their behalf. The said onus was even greater since there was no appearance on their part on the previous date. The fact that there was no appearance the second time displays lack of commitment on the part of the Plaintiff in prosecuting this action.*
6. *In answer to paras 12, 13 and 14 of Ram's Affidavit, it was or ought to be known to the Plaintiff's counsel when they personally uplifted the NOAH that there was no appearance on their part of the Plaintiff on 4 November 2015. It was not something that could have been learnt after the matter was de-listed by the Court as is portrayed in these paragraphs.*
7. *In answer to para 15 of Ram's Affidavit, I repeat the contents of para 5 herein and say that the onus was on the Plaintiff's counsel to source a copy of the appearance report from Mr. Charan. If the facsimile was not received in a timely fashion then inquiries ought to have been made to source it. This was not done which displays lack of commitment to prosecute this action.*
8. *In answer to para 16 of Ram's Affidavit, the Plaintiff's counsel did not appear in Court on an earlier occasion on 30 October 2013 to move its own Inter-Parties Motion and the matter had to be vacated by the Court.*
9. *In answer to para 18 of Ram's Affidavit, the matters as deposed above show a clear lack of interest in prosecuting this action with diligence.*
10. *In answer to para 19 of Ram's Affidavit, the Plaintiff's claim is misconceived and is doomed to fail in any event.*
11. *In answer to para 20 of Ram's Affidavit, this case was instituted on 10 April 2012 and it has been almost 4 years. The prejudice to the Third and Fourth Defendants is clear and apparent.*

(E) **AFFIDAVIT IN REPLY**

The Plaintiff filed an 'affidavit in reply' by Ronnie Ram, litigation Clerk from its Solicitors firm, sworn on 29th March 2016, which is substantially as follows;

1. *THAT I am employed by Rams Law, Barristers and Solicitors, Nadi as a Legal Executive*
2. *THAT in so far as the contents of this affidavit is within my personal knowledge it is true, in so far as it is not within my personal knowledge; it is true to the best of my knowledge and information and belief.*
3. *THAT save where otherwise expressly stated I depose the truths of all the facts in this affidavit from the files kept by my principal and from my own knowledge that I obtained from consultation with my principal.*
4. *THAT Messrs Rams Law has been acting for the Plaintiff herein and I have been assisting our solicitor in carrying out the clerical and paralegal work for the Plaintiff which includes but is not limited to the entering of Court dates in our diary and arranging city agents to appear on our behalf in certain matters on the instructions of our solicitors.*
5. *THAT I seek leave of this Honorable Court to refer to the Affidavit in Answer of Peter Michael McGahan sworn on the 1st da of March 2016 and filed in the proceedings herein on the 4th day of March 2016 (herein referred to as "the Affidavit").*
6. *THAT in response to paragraph 3 and 4 of the Affidavit I state that it was due to a technical issue that the fax report sent to us by our city agents was not received and as a result the return date of 4th November 2015 was not entered in our dairy.*
7. *THAT I deny the allegations contained in paragraph 5 of the Affidavit, I am advised by our solicitor and verily believe that at all material times we have been in contact with the Defendants' solicitors in regards to the finalizing of the PTC Minutes and had scheduled a meeting with the Third and Fourth Defendant's solicitors in an attempt to finalise the minutes. Furthermore, we had also communicated via email requesting for the executed PTC Minutes so that this could be filed in Court however did not receive a response to our last email communication on the 12th day of November 2015 which clearly indicates that we had every intention of complying with the Court's direction. We are at the time of sending the email on the 12th day of November 2015 not aware of our previous non-appearance therefore had requested for the minutes to be executed so that it could be filed and we had subsequently made arrangements for our appearance on the 16th of November 2015. Annexed hereto and marked as "RRI" is a copy of trail of email communications with the Defendants' solicitors regarding the PTC Minutes.*

8. *THAT as to paragraph 6 of the Affidavit I state that when I went to collect the NOAH from the Court registry I was not informed that it was due to our non appearance in Court as I was under the impression that we had made all appearances in Court as I had made arrangements for our appearance during all dates that we had entered in our diary.*
9. *THAT as to paragraph 7 of the Affidavit I state that I had attempted to obtain the outcome and had requested for an oral update however was informed that Mr. Charan would provide the report as he was the solicitor appearing and was aware of the outcome however as earlier deposed the fax report was not received by us and hence the date of 4th of November 2015 was not entered in our diary.*
10. *THAT as to paragraph 8 of the Affidavit I have perused the earlier records of our file and admit the allegations therein.*
11. *THAT I deny the allegations contained in paragraph 9 of the Affidavit and reiterate what has been deposed in paragraph 7 hereinabove.*
12. *THAT I deny the allegations contained in paragraph 10 of the Affidavit and state that the Plaintiff does have a meritorious claim against the Defendants.*
13. *THAT as to paragraph 11 of the Affidavit I state that the plaintiff also wished to have its claim heard and therefore has tried to finalise PTC Minutes as this is one of the final pre-trial requirements before a hearing date can be set and therefore respectfully seeks orders in terms of the application herein. I further wish to state that the Defendants can be compensated by costs as the non-appearance was not intentional.*

(F) **ANALYSIS**

- (1) At the commencement of the hearing before the Court, the Counsel for the third and fourth Defendants raised objections to the Plaintiff's Notice of Motion for reinstatement and the affidavit in support of the law Clerk on the following grounds;
 - (i) The Plaintiff's Notice of Motion is irregular because Order 8, r.2 of the High Court Rules, 1988 cannot be applied for an application for reinstatement.
 - (ii) The supporting affidavit contains material which is pure hearsay.
 - (iii) The application for reinstatement of the action is a contested hearing, it is not appropriate for a law clerk to depose in support of it.

(2) Let me now move to consider the **first objection**, viz, **Notice of Motion is irregular**.

The Plaintiff's Notice of Motion for re-instatement is made pursuant to Order 8, r.2

It was contended by the 3rd and 4th Defendants that Notice of Motion is irregular because Order 8, r.2 cannot be applied for an application for reinstatement of an action.

Let me have a close look at Order 8, r.2

Order 8, r.2 provides;

Notice of Motion (O.8, r.2)

2.-(1) Except where an application by motion may properly be made ex parte, no motion shall be made without previous notice to the parties affected thereby, but the Court, if satisfied that the delay caused by proceedings in the ordinary way would or might entail irreparable or serious mischief may make an order ex parte on such terms as to costs or otherwise, and subject to such understanding, if any, as it thinks just; and any party affected by such order may apply to the Court to set it aside.

(2) Unless the Court gives leave to the contrary, there must be at least 2 clear days between the service of notice of a motion and the day named in the notice for hearing the motion.

The wording of Order 8, r.2 is perfectly clear to me. Order 8, r.2 contains provisions relating to 'Notice of Motions' and it makes no provision for reinstatement. The Plaintiff's application for reinstatement should have been made pursuant to Order 32, r.6. This is not disputed by the Counsel for the Plaintiff. There is a world of difference between general provisions relating to 'Notice of Motions' from an application to reinstate an action.

In any event, the third and fourth Defendant's objection must fail because of the delay involved.

Order 2, r.2 provides that an application to set aside any proceedings for irregularity shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity. The requirements are cumulative. Since the application is not made within a reasonable time, the application will not be allowed. If the Defendants had considered that the 'Notice of Motion' was in an irregularity, they could have moved under Order 2, r.2 before they filed an Affidavit in Opposition. Instead, they did not do so. They have

waived their right by filing an Affidavit in Opposition. It is now too late to raise such an argument even if it had any validity.

For the sake of completeness, Order 2, r.2 is reproduced below in full.

Application to set aside for irregularity (O.2, r.2)

2.-(1) *An Application to set aside for irregularity any proceedings, any step taken in any proceedings or any documents, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.*

(2) *An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion.*

The need for and the importance of complying with the Rules were emphasised as far back as 1983 by the Court in "Kenneth John Hart v Air Pacific Ltd", *Civil Appeal No. 23 of 1983*.

In 1995, the **Supreme Court**, the highest Court in the land warned; "We now stress, however, that the Rules are there to be obeyed. In future practitioners must understand that they are on notice that noncompliance may well be fatal to an appeal" See; *Venkatamma v Ferrier –Watson*, *Civil Appeal No. CBV 0002 of 1992 at p.3 of the judgment*.

In August, 1997, the **Court of Appeal** in *Hon Major General Sitiveni rabuka & Others v Ratu Viliame Dreunimisimisi & Others* (*Civil Appeal No. ABU0011 of 1997*) held as follows-

"In all the circumstances, having regard to the history of the proceedings in the High Court and bearing in mind what the Supreme Court said in *Venkatamma*, we have decided that the proper course for us to follow now is to reject the application for further time to comply with rule 17 and to dismiss the appeal."

In the decision of the **Privy Council** in *Ratnam v Cumarasamy and Another* [1964] *3 All E.R. at page 935*;

Lord Guest in giving the opinion of the Board to the Head of Malaysia said, *inter alia*:

“The rules of court must, Prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation. The only material before the Court of Appeal was the Affidavit of the appellant. The grounds there stated were that he did not instruct his solicitor until a day before the record of appeal was due to be lodged, and that his reason for this delay was that he hoped for a compromise. Their lordships are satisfied that the Court of Appeal was entitled to take the view that this did not constitute material on which they could exercise their discretion in favour of the appellant. In these circumstances, their lordships find it impossible to say that the discretion of the Court of appeal was exercised on any wrong principle.”

(Emphasis Added)

On the strength of the authority in the above judicial decisions, I wish to emphasise that the rules are there to be followed and non-compliance with those rules is fatal. **Therefore, I reject the first objection raised by the third and fourth Defendants.**

- (3) Now let me move to consider the **second objection** raised by the 3rd and 4th Defendants.

It was contended by the 3rd and 4th Defendants that the Affidavit in Support of the law Clerk contains material which is pure hearsay.

Counsel for the 3rd and 4th Defendant relies on a passage in the law Clerk’s Affidavit. It is in para (9). The para (9) is this;

“THAT later during the day on the 16th day of November 2015 I received a call from Mr. Charan of Aman Ravindra Singh Lawyers advising that he was late to court due to his travel from Ba and as a result could not appear in the above matter which was subsequently struck out for our non- appearance.”

Counsel for the 3rd and 4th Defendant asserted that in the absence of an Affidavit from Mr. Charan deposing as to the reason for non-appearance on the 16th November 2015, no reliance could be placed on the Statement in the Affidavit of the law clerk, referring to the reason for non appearance on the 16th November 2015. Counsel seeks to strike out para (9) in the Affidavit of the Law Clerk which is intended to be used by the Plaintiff.

In 'adverso', the Counsel for the Plaintiff submits that RHC Order 41, r.5 (2) provides for an exception in interlocutory proceedings, permitting the inclusion of hearsay and secondary evidence in Affidavits filed in such proceedings.

It is, of course, true that the Statement made to the law Clerk by Mr. Charan explaining the reason for non appearance on 16th November 2015 is hearsay in the absence of an Affidavit from Mr. Charan deposing as to the reason for non-appearance. This is not disputed by the Counsel for the Plaintiff. The Counsel for the Plaintiff submits that the Court in the exercise of its discretion under RHC Order 41, r. 5(2) should not accede to the 3rd and 4th Defendant's application, because this is interlocutory proceedings.

I acknowledge the force of the submission of the Counsel for the Plaintiff. The Plaintiff's Notice of Motion for reinstatement of the action is a true interlocutory proceeding.

Let me have a close look at RHC Order 41, r.5.

Order 41, r.5 provides;

Contents of affidavit (O.41, r.5)

5.-(1) Subject to Order 14, rules 2 (2) and 4 (2), to Order 86, rule 2 (1), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an Affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

The wording of Order 41, r.5 (2) is perfectly clear to me; "*An Affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the source and ground thereof.*"

It is obvious from r.5 (2) itself that it operates as an exception from the primary rule of evidence stated expressly in Order 41, r.5 (1) that a person may only give evidence as the "facts" which he 'is able of his own knowledge to prove'. r.5 (2), by including Statements of information or belief plainly allows the adduction of hearsay. But such Statements will have no 'probative value' unless the sources and grounds of the information and belief are revealed. The purpose of r.5 (2) is to enable a deponent to put before the Court in interlocutory proceedings, frequently in circumstances of great urgency, facts which he is not able of his own knowledge to provide but which, the deponent is informed and believes, can be provided by means which the deponent identifies by specifying the original sources and grounds of his information and belief.

By having to reveal original source (not the immediate source), the deponent affords a proper opportunity to another party to challenge and counter such evidence, as well as enabling the Court to assess the weight to be attributed to such evidence.

The importance of these dual disclosures is obvious as was stated by **Lord Alverstone C.J.** over a century ago in **J.L Young Manufacturing Co. Ltd. V J.L. Young Manufacturing Co. Ltd.** (1900) 2 Ch. 753 at 754:

'In my opinion some of the affidavits in this case are wholly worthless and not to be relied upon. I notice that in several instances the deponents make statements on their 'Information and belief' without saying what their source of information and belief is, and in many respects what they so state is not confirmed in any way. In my opinion so-called evidence on 'information and belief' ought not to be looked at at all, not only unless the Court can ascertain the source of the information and belief but also unless the deponent's statement is corroborated by someone who speaks from his own knowledge. If such affidavits are made in future, it is as well that it should be understood that they are worthless and ought not to be received in evidence in any shape whatever.'

Returning back to the instant case, as noted earlier, the Plaintiff's Notice of Motion for reinstatement of the action is a true 'interlocutory proceeding.'

As noted above, r. 5 (2) provides for an exception in interlocutory proceedings, permitting the inclusion of hearsay and secondary evidence in Affidavits filed in such proceedings. The relaxation is allowed only if the deponent discloses 'the original source' of his information and 'the grounds' of his belief.

I keep well in my mind the paragraph in question, viz, para (9) of the law Clerk's Affidavit in Support which is in this form;

"THAT later during the day on the 16th day of November 2015 I received a call from Mr. Charan of Aman Ravindra Singh Lawyers advising that he was late to court due to his travel from Ba and as a result could not appear in the above matter which was subsequently struck out for our non- appearance."

The Statement made by Mr .Charan is highly relevant to the interlocutory proceeding before me.

The deponent, viz, law Clerk has clearly identified the original source to him of his information. This is sufficient in order to comply with r.5 (2) that the deponent should identify original source to him of his information. Therefore, I have reached the clear conclusion that paragraph (9) of the Law Clerk's Affidavit is relevant, because it contain material admissible by virtue of Order 41, r.5 (2) in interlocutory proceedings.

It is for the Court hearing the motion to decide whether any and if so what weight should be attached to that material.

For the reasons which I have endeavoured to explain, I do not uphold the second objection.

- (4) Let me now move to consider the **third objection** raised by the 3rd and 4th Defendants, viz, law Clerks swear affidavits on behalf of Clients.

The affidavit in support of the Plaintiff's Notice of Motion for reinstatement is sworn by a law Clerk employed by the Plaintiff's Solicitors.

It was contended by the 3rd and 4th Defendant that the application for reinstatement of the Plaintiff's claim is a **contested hearing** and it is not appropriate for a law clerk to depose in support of it. In the same breath, the counsel for the third and fourth Defendants contended that the law clerks of Solicitors are neither litigants nor competent legal persons to swear in contested legal matters. (It is not in dispute that the Plaintiff's application for reinstatement is a contested hearing.)

I acknowledge the force of the submission by the Counsel for the third and fourth Defendants.

In this, I am comforted by the rule of law expounded in the following judicial decisions:-

In the case of Dr. Ramon Fermin Angco 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".

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 Gerad 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”.

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 its logical conclusion, I have no hesitation in concluding that the affidavit of the law clerk filed in support of the Plaintiff’s Notice of Motion for reinstatement is unacceptable. **Thus, I uphold the third objection.** Therefore, the whole of the affidavit is removed from the court record. This may leave the court with no option but to dismiss the Notice of Motion, since there is no valid affidavit explaining the reasons for plaintiff’s non appearance in court on 04th November 2015 and 16th November 2015.

This should be made clear; I am not prepared to hallow an irregular practice. It is not the function of this Court. The Plaintiff should clothe the practice in the garment of legal acceptability!!!

Leave all that aside for a moment.

As noted earlier, the Plaintiff is a duly incorporated limited liability company having its registered office at Nadi. The affidavit in support of the Plaintiff’s Notice of

Motion 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 him 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;

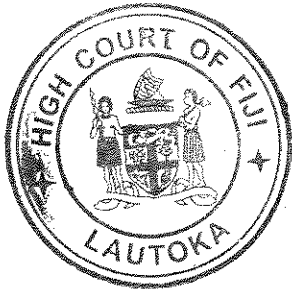
"The applicant himself is not a director. Any action taken on behalf of the Company, including this present application can only be done by a director under the seal of the Company. A director is a creature of the articles of association of the Company, as well as the Act. His duties and responsibilities 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."

In view of the approach, I have adopted, 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 for reinstatement.

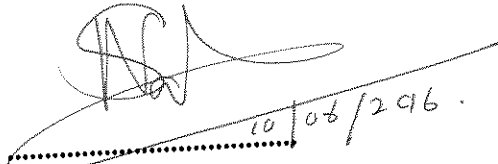
Essentially, that is all I have to say!!!

(G) **FINAL ORDERS**

- (1) The Plaintiff's "Notice of Motion" dated 25th November 2015 is dismissed.
- (2) The Plaintiff is ordered to pay costs of \$500.00 (summarily assessed) to the third and fourth Defendants which is to be paid within 14 days hereof.



At Lautoka
10th June 2016


10/06/2016
Jude Nanayakkara
Master