

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

Civil Action No. HBC 153 of 2015

**BETWEEN :** **DIGICEL (FIJI) LIMITED** a limited liability company giving registered office at 1<sup>st</sup> Floor, Kadavu House, Victoria Parade, Suva.

**PLAINTIFF**

**AND :** **INFORMATION TECHNOLOGY & COMPUTING SERVICES** of Ministry of Finance, 310 Victoria Parade, GPO Box 784, Suva.

**FIRST DEFENDANT**

**AND :** **MINISTRY OF FINANCE** 310 Victoria Parade, GPO Box 784, Suva.

**SECOND DEFENDANT**

**AND :** **THE OFFICE OF THE ATTORNEY GENERAL** of Level 7 Suvavou House, Victoria Parade, GPO Box 2213, Government Buildings, Suva.

**THIRD DEFENDANT**

**BEFORE:** **Master Vishwa Datt Sharma**

**COUNSEL:** Mr. Katia - for the Plaintiff  
Ms. Ali - for the First Defendants

**Date of Hearing:** 31<sup>st</sup> May, 2016

**Date of Ruling:** 07<sup>th</sup> July, 2016

**RULING**

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Application filed in terms of a Motion and Affidavit in Support filed by 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants seeking leave to file an amended Statement of Defence and Extension of time to conduct the Pre-Trial Conference and Costs - Pursuant to Order 20 Rule 5 (5) of the High Court Rules, 1988.

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## INTRODUCTION

1. 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants Motion sought the leave of this court to file an **Amended Statement of Defence** together with an **extension of time to conduct Pre Trial Conference and Costs**.
2. The **Motion is supported by an affidavit** sworn on behalf of the Defendants by Ajay Singh.
3. The application is made pursuant to *Order 20 Rule 5 (5) of the High Court Rules, 1988*.
4. The **Plaintiff** opposed this application and filed an **Affidavit deposed by Law Clerk, Josefa GiniGini**.

## THE LAW

5. *Order 20 Rule 5 (1) of the High Court Rules, 1988* provides:

*5.-(1) Subject to Order 15, rules 6, 8 and 9 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.*
6. *Order 20 Rule 5 (5) of the High Court Rules, 1988* provides for Amendment of writ or pleading with leave:

*5.-(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.*



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**1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> DEFENDANT'S SUBMISSIONS**

*Counsel representing submitted:*

7. (a) Order 20 Rule 5(1) empowers the Honourable Court to allow any party to amend his or her pleading at any stage of the proceedings.
- (b) The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants ('defendants') rely on the case of **Ruth Fong v Suva Private Hospital Limited & Ors** HBC 184 of 2014, where a similar application was made by the 3<sup>rd</sup> defendant. In this case, at the outset, it was stated that the 3<sup>rd</sup> defendant's application had been made early in the proceedings, that is, before the summons for directions, so this was not a last minute application that was made shortly before trial.
- (c) In **Fong** (supra), the Honourable Court canvassed a number of authorities and emphasised that only if the application to amend pleadings was made in bad faith, could the Court properly consider not granting the leave to amend pleadings.
- (d) The Honourable Master further emphasised that the object of the Court was to allow parties to put all salient matters before the Court so it could properly decide on the rights of the parties; the Court's object was not to be punitive and punish the parties for mistakes.
- (e) The defendants' further state that the issues addressed by amending the statement of defence are not paltry in nature as alluded to by the plaintiff. The defendants submit that the ending of the trial period and proper authority to execute the contract under contention is very much at the heart of this matter.
- (f) The defendants further deny that amendment of its statement of defence will cause any injustice or prejudice to the plaintiff. The defendants submit that the parties are today in the same position as they were at the commencement of this action.

## PLAINTIFF'S SUBMISSIONS

*Counsel representing submitted:*

8. These are the plaintiff's submissions opposing the Defendant's application seeking leave to amend its Statement of Defence and Extension of Time to conduct Pre-Trial Conference with Costs.

- (a) The matter commenced with the plaintiff's Writ of Summons and Statement of Claim ("Claim") filed and served on 14 April 2015 claiming that the first defendant had entered into an agreement to pay the plaintiff for providing telecommunication services to the first defendant for a term of 3 years beginning 7 February 2011.
- (b) Due to non-payment by the first defendant, the parties agreed to suspend the services for December 2011, within which time the first defendant, would fully settle the outstanding bill, after which the agreement would resume.
- (c) The first defendant settled this outstanding and then proceeded to utilize the services to the end of the term of the agreement.

The defendants now claim that they do not owe the plaintiff any money, and the plaintiff has initiated this action to recover funds due and owing to it.

- (d) The defendant filed its Acknowledgment of Service on 17 April 2015, and Statement of Defence and Counter-Claim on 14 May 2015 denying the Claim and stating that the plaintiff failed to provide the services as per the terms and conditions of the agreement, though they do not explicitly deny using the services, and that the plaintiff should repay monies already paid to it for the services as it was paid in error.
- (e) The plaintiff in its reply to the Defence and Defence to the Counter-Claim, filed on 1 June, 2015 the plaintiff pointed out a discrepancy in a letter sent by the first defendant to the plaintiff and the Defence that the defendants have adopted in their Statement of Defence, and the fact that there was no explicit denial of the use of the plaintiff's services during the part they are claiming that the agreement was cancelled by them.



After much delay, the defendant filed a Supplementary Affidavit verifying List of Documents on 23 November 2015.

- (f) On 24 November 2015 the Defendant filed its application to amend its Statement of Defence, stating that it had only just become aware of pertinent details that were missing in the Defendant's Statement of Defence.
- (g) The plaintiff filed its Affidavit in Opposition and the matter has been set for hearing on 31 May 2015.

### ANALYSIS and DETERMINATION

- 9. I have perused the **Defendants application in terms of the Motion filed coupled with an Affidavit in Support** together with the **Affidavit opposing the Defendant's application to file an amended Statement of Defence and grant of an extension of time to conduct the Pre-Trial Conference with Costs.**
- 10. The Motion filed and issued on 24<sup>th</sup> November, 2015, is neither **signed** nor **dated** by the Counsel for the **Defendants** intending to move this motion seeking grant of abovementioned orders.
- 11. Further, the Motion once issued by the Court gives Notice to other parties to the proceedings of the following:
  - (i) *Who is moving the Motion;*
  - (ii) *When will the court be moved as a returnable date would be assigned upon issuance of the Motion;*
  - (iii) *What orders are being sought;*
  - (iv) *What are the grounds for seeking such orders and informs the party(ies) that the Motion is filed in support of an Affidavit deposed by the Deponent;*
  - (v) *Under which provision of the Law the application is being made or Motion moved.*

12. The mover of the **Motion** is required to **endorse the signature** and the **date** in order to ensure that the **Motion is valid** for the purpose of the orders being sought.
13. The **Motion** filed and served herein is a **pleading** in itself and the **affidavit** deposed therein is the **evidence** on which the Defendant in this case needs to deliberate upon and the Court will determine whether certain orders sought, should be granted or not.
14. This Court finds that because the **Motion** is not endorsed with the **Defendant's signature** and **date**, it should not be treated as an application of the Defendants.
15. In fact there is **no application** before this Court and in **absence of the application**, this Court cannot **accede to grant** any orders as sought by the Defendants in terms of *Order 20 Rule 5 (5) of the High Court Rules, 1988*.
16. I have also taken into consideration *Order 2, Rule 1 (O.2, r.1) of the High Court Rules, 1988* which deals with non-compliance of the rules and provides as follows-

*'1.-(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.*
17. Bearing in mind the abovementioned provisions of the Law, the Defendants failure in not endorsing a signature and the date on the



Motion is an irregularity and therefore will not nullify the Defendants Motion.

18. For the aforesaid reasons I make the following final orders, accordingly.

### ORDERS

1. The Defendants are hereby granted leave to file and serve an **Amended Motion** to **regularise** the **irregularity** in terms of their Motion within 7 days.
2. Failure to carry out the Amendment and service within time will result in the Motion before this Court being Dismissed.
3. This case will now be adjourned to 14<sup>th</sup> July, 2016 for further directions.

DATED at Suva on 07<sup>th</sup> July, 2016



  
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**VISHWA DATT SHARMA**  
Master of the High Court, Suva

Cc. Siwatibau & Sloan Lawyers, Suva.  
Attorney Generals Chambers, Suva.