

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 105 of 2011

BETWEEN : **AZAM ALI** trading as **R AZZAM INVESTMENTS** of Moto Ba,
Postal address P.O. Box 2987, Ba, Businessman.

PLAINTIFF

AND : **MERCHANT FINANCE & INVESTMENT COMPANY** a limited
liability company having its registered address at Level 1, 91 Gordon
Street, Suva.

DEFENDANT

Mr. Nazeem Sahu Khan for the Plaintiff
Mr. Krishnil Patel for the Defendant

Date of Hearing : - 16th September 2016
Date of Ruling : - 27th September 2016

RULING

(A) INTRODUCTION

- (1) The matter before me stems from the Defendant's Summons dated 20th May 2016, made pursuant to Order 25, rule 9 and Order 18, rule 18 (1), (2) of the High Court Rules, 1988 and the inherent jurisdiction of the Court for an Order that the Plaintiff's action be struck out for want of Prosecution and abuse of Court process.
- (2) The Defendant is a limited liability Company. The Defendant's Summons is supported by an Affidavit sworn by one 'Bobby Intiaz', the Manager of the Defendant Company.

- (3) The Defendant's Summons is vigorously contested by the Plaintiff. The Plaintiff filed an Affidavit in Answer on 21st June 2016 followed by an Affidavit in Reply thereto.
- (4) At the commencement of the hearing before the Court, Counsel for the Plaintiff raised an objection to the Defendant's Affidavit in Support. It was contended by the Plaintiff that the Affidavit in Support is defective and a nullity because there is no 'ostensible' authority to prove that the deponent, viz, Bobby Imtiaz was duly authorised to swear on behalf of the Defendant Company.
- (5) Now, let me move to consider the objection raised by the Plaintiff.

Let me have a closer look at the Affidavit in Support filed by the Defendant Company.

Reference is made to paragraph (02) and (03) of the 'Affidavit in Support' deposed by 'Bobby Imtiaz', the Manager of the Defendant Company.

Para 2. THAT I am duly authorised by the Defendant Company to swear this Affidavit on its behalf.

3. THAT I am duly authorised by the Defendant to swear this Affidavit on its behalf and that is 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 and information and belief.

- (6) It is true that there is no 'ostensible' authority to prove that the deponent 'Bobby Imtiaz' was duly authorised to swear on behalf of the Defendant Company.

The Plaintiff in his 'Affidavit in Answer' has criticised the 'irregularity' of the Defendant's 'Affidavit in Support'.

Reference is made to paragraph (4) of the Plaintiff's 'Affidavit in Answer';

Para 4. THAT as to paragraph 2 of the said Affidavit I am unaware of the contents therein and therefore deny the same and further say that no authority as alleged by the deponent is Annexed to the said Affidavit which ought to have been therefore I pray that the said Affidavit ought to be struck out.

- (7) In reply Affidavit, the deponent 'Bobby Imtiaz Ali' deposed as follows at paragraph 3.

Para 3. As to paragraphs 3, 4 and 5 of the said Affidavit I deny the Plaintiff's allegations therein and further say that the Defendant had provided me with the requisite authority to carry out all acts that are necessary to protect the Defendant's interests in the action herein including swearing of affidavits. I now produce a copy of the said authority marked "BIA-1".

- (8) Upon perusal of annexure "BIA-1" it is observed that the annexure "BIA-1" is **undated. Therefore, I give it no weight whatsoever.** As a result, I am left with the conclusion that the Affidavit in Support of "Bobby Imtiaz Ali" is defective and a nullity because there is no 'ostensible' authority to prove that he was duly authorised to swear on behalf of the Defendant Company.

In this, 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."

(Emphasis added)

As counsel for the Plaintiff pointed out in argument, the letter of authority, viz, annexure BIA-1, was not annexed to the Defendant's affidavit in support. The first time it appears is in the Defendant's affidavit in reply to the Plaintiff's affidavit in

Answer with the result that the Plaintiff has been denied the opportunity to address it in his affidavit in Answer.

The Counsel for the Defendant ought to know that all the facts and evidence he intends to rely should be provided in the affidavit in support.

In this I am comforted by the rule of law enunciated in the following judicial decisions.

In **“Ridout v Ridout” (2001) MBOB 48**, The Court held;

.... “The moving party must include in their initial affidavit all the facts they intend to rely on in support of their motion. They can file a second affidavit to reply to any new matter raised in the responding party’s affidavit. ‘New Matter’ does not mean a new fact relating to an area or issue already raised by the moving party; it means a new area or issue that was raised for the first time by the responding party.”

In **“Lotz v Lotz” 2012, MBQB 57**, the Court stated;

“The purpose of a reply affidavit is not to reiterate one’s position; it is to reply to new matters. Raised for the first time does not mean a different view on an area or issue already raised by the moving party. It means a new area or issue entirely”.

In **“Millage v City of Sioux City” 258 F. Supp . 2d 976**, the Court held;

“The Court does not approve of ‘hiding the ball’ on any issue until after the non-moving party has responded. Such a policy effectively deprives the non-moving party of a full and fair opportunity to address pertinent arguments. Moreover, the purpose of a reply is not to assert arguments that could and should have been asserted in support of the original motion, but to address “newly –decided authority or to respond to new and unanticipated arguments made in the resistance.”


This may leave the Court with no option but to dismiss the Defendant’s Summons to strike out the Plaintiff’s Claim for want of prosecution and an abuse of court process since there is no evidence in support.

I cannot see any other just way to finish the matter than to follow the law.

FINAL ORDERS

- (1) The Defendant's Summons dated 20th May 2016 is dismissed.
- (2) The Defendant is to pay costs of \$500.00 (summarily assessed) to the Plaintiff which is to be paid within 14 days hereof.




27/09/2016
.....
Jude Nanayakkara
Master.

At Lautoka
27th September 2016