

IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. 301 of 2016

BETWEEN

FIJI NATIONAL PROVIDENT FUND BOARD a body corporate established
under the provisions of the Fiji National Provident Fund Act (Cap 219)
and continued under the Fiji National Provident Fund Decree 2011
and having its principle place of business at 33, Ellery Street, Suva.

PLAINTIFF

AND

AEQUI LIBRA ASSOCIATED LIMITED

1ST DEFENDANT

AND

BLIGH WATER SHIPPING LIMITED a limited liability company having
its registered office at 8th Floor, Dominion House,
Thompson Street, Suva.

2ND DEFENDANT

AND

MERCHANT FINANCE & INVESTMENT COMPANY LIMITED.

INTERESTED PARTY

Counsel : Ms. L. Macendru for the Plaintiff
Mr. K. Jamnadas for the 1st Defendant

Date of Hearing : 08th December, 2016

Written Submissions : 08th December, 2016 (by counsel of the 1st defendant)

Date of Order : 18th January, 2017

ORDER

[1] The plaintiff and the 1st defendant in or about 2009 invested in redeemable convertible notes with the 2nd defendant the value of which was \$163,946.00. The 2nd defendant was the owner of the ship named MV Westerland which was mortgaged by the 2nd defendant to the interested party and obtained a loan. It appears from the affidavit in support filed on behalf of the plaintiff that when the 2nd defendant failed to pay the loan as agreed the interested party sold after calling for tenders.

[2] The plaintiff filed ex-parte notice of motion (which was later converted into an inter-parte notice of motion by the court) under and in terms of Order 29 Rule 1(3), Rule 2(3 & 4) of the High Court Rules 1988, seeking the following reliefs:

- (a) An interim order that the Interested Party be restrained from paying out funds to the 1st defendant as per the mortgage sale process undertaken by the 2nd defendant;
- (b) An interim order that in the event a cheque has already been issued by the Third Party to the 1st defendant as per the mortgage sale process, the Third Party be compelled to issue a 'stop payment' on the said cheque or in the alternative the recipient of the cheque and/or funds on behalf of the 1st defendant be restrained from releasing the said funds to the 1st defendant and/or carrying out instructions on behalf of the 1st defendant; and
- (c) An interim order that the funds intended for the 1st defendant as per the mortgage sale process is to be estopped until determination of the plaintiff's claim.

[3] After hearing the respective counsel for the parties the court allowed them to file written submissions and only the counsel for the 1st defendant filed submissions in writing wherein he took up certain preliminary objections to the application of the plaintiff.

[4] It is submitted by the learned counsel for the 1st defendant that the affidavit of Suliano Ramanu filed in support of the Notice of Motion on 1st December, 2016 is defective for the following reasons;

1. The deponent does not appear to be a Director of FNPF nor is there any authority attached to the affidavit which would show that he is in fact authorised to swear the affidavit on behalf of FNPF; and
2. The affidavit is not in compliance with the provisions of Order 42 Rule 9(2) of the High Court Rules.

[5] The 1st & 2nd paragraphs of the affidavit of Mr. Ramanu read as follows;

1. I am the Manager Equities for the Fiji National Provident Fund (hereinafter referred to as "FNPF" or "Fund"), the plaintiff in this proceedings.
2. I am authorised to swear to this affidavit on behalf of the Defendant in support of the Ex-Parte Notice of Motion filed herein.

[6] An affidavit is sworn evidence in any proceeding before courts of law. Hence, before placing the signature on the affidavit the deponent must read and understand the contents thereof. It is more so because affidavit evidence are, especially in interim applications of this nature, not subject to cross-examination. It is clear from the above two paragraphs that the deponent has not read the affidavit before placing his signature. If he read the affidavit carefully he could certainly have detected the mistake which goes to the root of the validity of the affidavit.

[7] The learned counsel for the 1st defendant submitted that the affidavit is no compliance with Order 42 Rule 9(2). What he means is Order 42 Rule 9 of the High Court Rules 1988, there is no such Rule in the High Court Rules 1988. Order 42 of the High Court Rules 1988 deals with judgments and orders. It is order 41 that deals with affidavits. On the other hand there are only seven Rules in Order 42.

[8] Order 41 Rule 9 provides as follows;

- (1) Except as otherwise provided by these Rules, every affidavit must be filed in the Registry.
- (2) Every affidavit must be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without the leave of the Court.

[9] According to paragraph 2 of the affidavit Mr. Ramanu is authorised to swear the affidavit on behalf of the defendant and not on behalf of the plaintiff.

[10] In my view one does not have to have written authority to swear an affidavit on behalf of his employer. It is sufficient to declare in the affidavit that he or she is

authorised to swear the affidavit on its behalf. However, as I have stated earlier there is no such statement contained in the affidavit. The court therefore holds that there is no valid affidavit before the court.

- [11] It is also important to note that both the plaintiff and the 1st defendants are investors of the 2nd defendant and not its creditors and also there is no privity of contract between the plaintiff and the Third party. The plaintiff's position as a creditor of the 2nd defendant company cannot be changed by merely appointing one of its employees as a director of the 2nd defendant.
- [12] Both investor and creditor may help and support a business or entity by contributing additional money or assets to the business. An investor contributes asset in a form of capital or equity, while a creditor contributes asset in the form of debt or liability. However, these two are different from each other. An investor invests money to an investee in order to make profit through profit sharing (investment income or dividend), while a creditor lends money to a debtor in order to make profit through interest income and other credit fees on the loan.
- [13] It is a well-established principle of law that on incorporation, a company becomes a legal entity separate and distinct from its shareholders and it is not the agent of those shareholders, not even if it is a one-man company with one shareholder controlling all its activities. This fundamental principle of law was established by the House of Lords in **Saloman v Saloman Co.Ltd.** [1897] AC 22.
- [14] The plaintiff being an investor of the 2nd defendant company cannot interfere with its affairs. Since the plaintiff has no privity of contract with the Third party it cannot seek orders restraining it from managing its own affairs.
- [15] The plaintiff came to court by way of this notice of motion seeking the orders stated therein on basis that there was an urgency in the matter. However, the plaintiff had a duty to inform the court what its main claim was. It appears from paragraph (c) of the prayer that these orders are sought until the determination of the plaintiff's claim. It is pertinent to note that the plaintiff's attempt is to prevent the Third Party from paying out the funds derived by selling MV Westerland. However, it does not

appear from the averments in the affidavit (assuming that the affidavit is valid in law) that there is a cause of action accrued to the plaintiff against the third party.

[16] For the reasons aforementioned the court makes the following orders:

1. The notice of motion dated 01st December, 2016 is struck out and the reliefs prayed for in the said notice of motion are refused.
2. The plaintiff shall pay 1st defendant \$500.00 as costs of this application within fourteen (14) days from today.




Lyone Seneviratne

JUDGE

18th January, 2017.