IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 112 of 2016

BETWEEN : **HARISH CHAND** trading as **ITAUKEI FOOD INDUSTRIES** of Level 1 Unit 1/9 Lot 9 Bila Stret, Carreras Road, Votualevu, Nadi

PLAINTIFF

AND : **RAJSAMI INVESTMENT LIMITED** having its registered office at 8 Mile, Nasinu.

1st DEFENDANT

AND : **RAM SAMI & SONS LTD** having its registered office at 37 Badal Place Makoi, Nakasi.

2nd DEFENDANT

AND : **RAJENDRA SAMI** of 8 Miles, Makoi, Nasinu, Director

3rd DEFENDANT

(Ms) Patricia Valesasa Mataika for the Plaintiff
(Ms) Roneesh Shoma Singh for the Defendants

Date of Hearing : - 02nd December 2016
Date of Ruling : - 17th March 2017

RULING

(1) The matter before me stems from the Plaintiff's Summons, dated 14th August 2016, made pursuant to Order 2, rule 2 (2) and Order 20, rule 5 of the High Court Rules, 1988 and the inherent jurisdiction of the Court seeking the grant of the following Orders;

1. *That the Plaintiff's amended writ of summons filed without leave of Court on the 2nd day of August, 2016 herein be allowed as an amendment with the leave of the honourable Court and the Defendants file defence thereto within 14 days of such leave.*

2. *That alternatively, the Plaintiff be allowed to amend his writ of summons as in the same terms as that filed on the 2nd day of August, 2016 and file the same within 14 days of date of Order.*

(2) The Plaintiff's Summons to amend the "Amended Writ of Summons" is supported by an Affidavit sworn by 'Khusbu Sharma', the Manager of the Plaintiff Company.

(3) The Plaintiff's Summons to amend the 'Amended Writ of Summons' is strongly contested by the Defendants. The Defendants filed an "Affidavit in Reply" sworn by 'Rajendra Sami', the third named Defendant and the Director of First and Second Defendant Companies. The Plaintiff did not file an "Affidavit in Response". Thus, the matters raised by the Defendants in their "Affidavit in Reply" remain uncontroverted and untraversed.

(4) The Plaintiff and the Defendants were heard on the Summons. They made oral submissions to Court. In addition to oral submissions, Counsel for the Plaintiff and the Defendants filed a careful and comprehensive written submissions for which I am most grateful.

(5) The sole ground upon which the Defendants opposed the Plaintiff's application seeking leave to amend the 'Amended Writ of Summons', filed on 02nd August 2016 is that the 'Amended Writ of Summons' was filed without seeking leave of the Court.

Counsel for the Plaintiff was characteristically frank and brief in relation to the objection raised by Counsel for the Defendants. She admitted that the 'Amended Writ of Summons' was filed without seeking leave of the Court. As I understand it, the contention was that as a matter of principle the practice should be to look to see whether any prejudice had been caused by the 'irregularity' as such, and if it had not, as in this case, since the Defendants have failed to serve a defence on the Plaintiff, the Court should not contemplate setting aside the Amended Writ of Summons, as extraneous circumstances are irrelevant.

(6) Let me now move to consider the substantive application.

I note that the Plaintiff's Summons is only confined to the Amended Writ of Summons and not Statement of Claim that has been filed on 02nd August 2016.

"A Statement of Claim is the first pleading in actions begun by writ and constitutes the document in which the plaintiff formulates the factual grounds on which he bases his claim or the relief or remedy which he seeks against the Defendant, and not merely, as the general indorsement of writ is required to do, a concise statement of the nature of the claim made or the relief or remedy required in the action."(See; **Bullen & Leake and Jakobs "Precedents of Pleadings" 12th edition at page 51).**

What is of present significance in the instant case is that the Court can only allow amendments to the 'Writ of Summons' and not the 'Statement of Claim' which is indorsed on the Writ. It should be born in mind that a generally indorsed Writ of Summons is not a pleading.

See; **Murray v Stephens (1887) (19) QBD 60**

Leave all that aside for a moment!

Upon perusal of the Court Record, it is observed that the Plaintiff has amended its Writ of Summons and the Statement of Claim on **three times** without seeking leave of the Court. The first time was on 17th June 2016, thereafter on 29th June 2016 and 02nd August 2016.

The Defendants have filed an application by Summons on 18th August 2016 seeking that the Plaintiffs action be struck out and that the amendments incorporated to the Statement of Claim on 29th June 2016 and 02nd August 2016 be disallowed on the ground that the same was filed without the leave of the Court.

(The Defendants have not served a Statement of Defence on the Plaintiff.)

(7) Let me now turn to the statutory context of Amendment of Writ and Amendment of Pleadings.

Order 20, rule 1 provides;

Amendment of writ without leave (O.20, r.1)

*1. –(1) Subject to paragraph (3), the plaintiff may, without the leave of the Court, amend the writ **once** at any time before the pleadings in the action begun by the writ are deemed to be closed.*

(2) Where a writ is amended under this rule after service thereof, then, unless the Court otherwise directs on an application made ex

parte, the amended writ must be served on each defendant to the action.

(3) This rule shall not apply in relation to an amendment which consists of –

(a) the addition, omission or substitution of a party to the action or an alteration of the capacity in which a party to the action sues or is sued, or

(b) the addition or substitution of a new cause of action, or

(c) (without prejudice to rule 3 (1) an amendment of the statement of claim (if any) indorsed on the writ,

unless the amendment is made before service of the writ on any party to the action.

(Emphasis added)

Order 20, rule 3 provides;

Amendment of pleading without leave (O.20, r.3)

3. –(1) A party may, without the lave of the Court, amend any pleading of his ***once*** *at any time before the pleadings are deemed to be closed and, where he does so, he must serve the amended pleading on the opposite party.*

(2) Where an amended statement of claim is served on a defendant –

(a) the defendant, if he has already served a defence on the plaintiff, may amend his defence, and

(b) the period for service of his defence or amended defence, as the case may be, shall be either the period fixed by or under these Rules for service of his defence or a period of 14 days after the amended statement of claim is served on him, whichever expires later.

(3) Where an amended defence is served on the plaintiff by a defendant –

(a) the plaintiff, if he has already served a reply on that defendant, may amend his reply, and

(b) *the period for service of his reply or amended reply, as the case may be, shall be 14 days after the amended defence is served on him.*

(4) In paragraphs (2) and (3) references to a defence and a reply include references to a counterclaim and a defence to counterclaim respectively.

(5) Where an amended counterclaim is served by a defendant on a party (other than the plaintiff) against whom the counterclaim is made, paragraph (2) shall apply as if the counterclaim were a statement of claim and as if the party by whom the counterclaim is made were the Plaintiff and the party against whom it is made a defendant.

(6) Where a party has pleaded to a pleading which is subsequently amended and served on him under paragraph (1) then, if that party does not amend his pleading under the foregoing provisions of this rule, he shall be taken to rely on it in answer to the amended pleading, and Order 18, rule 13 (2), shall have effect in such a case as if the amended pleading had been served at the time when that pleading, before its amendment under paragraph (1), was served.

(Emphasis added)

Order 20, rule 4 provides;

Application for disallowance of amendment made without leave (O.20, r.4)

4. –(1) Within 14 days after the service on a party of a writ amended under rule 1(1) or of a pleading amended under rule 3(1), that party may apply to the Court to disallow the amendment.

(2) Where the Court hearing an application under this rule is satisfied that if an application for leave to make the amendment in question had been made under rule 5 at the date when the amendment was made under rule 1(1) or rule 3(1) leave to make the amendment or part of the amendment would have been refused, it shall order the amendments or that part to be struck out.

(3) Any order made on an application under this rule may (be) made on such terms as to costs or otherwise as the Court thinks just.

The Supreme Court Practice, 1999, Part I, Page 374 at paragraph 20/4/2 reads;

> *"the main object on Rule 3 is to save costs and time by allowing amendments of pleadings to be made without leave instead of by application to the Court for leave to amend, but this does not give any wider or different right to amend. Amendments should not be made without leave which could not or might not have been allowed to be made with leave."*

(8) As I said earlier, the Plaintiff has amended its Writ of Summons and Statement of Claim three times without seeking leave of the Court. The first time was on 17th June 2016, thereafter on 29th June 2016 and 02nd August 2016.

I am abundantly clear in my mind that the Plaintiff's last two amendments to the 'Writ of Summons and Statement of Claim' are irregular documents because the Plaintiff has not sought leave of the Court for the amendment under Order 20, rule 5. It was an irregularity, and on a proper construction of the provision of Order 2, rule 1 (1) an "**irrelevant step**" in the action or "**an irregular thing done**" in the action which constitutes a failure to comply with the requirements of the rules.

So, I should come to **Order 2, rule 1,** which I quote;

> ***EFFECT OF NON-COMPLIANCE***
>
> ***Non-Compliance with rules (O.2, r.1)***
>
> *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.*
>
> *(2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such term as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.*

(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other than the one employed.

As a matter of construction of that rule, it is clear that, where there had been irregularity by non-compliance with the rules, the consequence would be that by reason of the irregularity, unless the Court so directed, the power of the Court, when an irregularity was noted, was either to set the proceedings aside or to amend them or otherwise deal with them as the Court thought fit. The content of Order 2 is designed to enable the Court, whenever faced with anything done or left undone in proceedings which constitutes a failure to comply with the requirements of the rules, to exercise the powers conferred by the rules without having first to decide whether the jurisdiction conferred by the rules applies at all.

Order 2, rule 2 describe the procedure when a Defendant wishes to apply to set aside proceedings. Such an application shall not be allowed unless made within reasonable time and before the party applying takes any further steps.

Order 2, rule 2 provides;

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 motions.

As I construe Order 2, r 1, from the moment a step in proceedings is tainted by irregularity through failure to comply with the rules the irregular step or document remains irregular inter partes until the matter has been brought before the Court and the Court has decided in which way to exercise the jurisdiction conferred by Order 2, r 1(2). Order 2, r 2 does not restrict the power of the Court in the sense of restricting its jurisdiction, and it does not have the effect of suspending the irregularity until the application under Order 2, r 2 is made. The purpose and effect of Order 2, r 2 is to prescribe the procedure if and when an opposite party decides to apply so that the Court on recognising the irregularity may exercise its powers under r 1(2) by taking the action of killing or curing the irregular proceeding.

Where, in the course of proceedings, the court finds that a failure of the nature referred to in r 1(1) has occurred, which has not been waived by the other party either expressly or by implication, the court is given by r 1(2) a choice of courses to pursue at its own discretion, whether or not an application under Order 2, r 2 is before it. In such a situation, in the exercise of its discretion under r 1(2), it may either adopt the more draconian course of setting aside wholly or in part the proceedings in which the failure occurred, or the relevant step taken in those proceedings or the relevant document or order. Alternatively, it may make such order ... 'dealing with the proceedings generally as it thinks fit'. The last mentioned words are, in my opinion, manifestly wide enough to empower it to make a dispensing order waiving the relevant irregularity.

See ; Leal v Dunlop Bio-Processors Ltd [1984] 2 All ER 2007 at 211 – 212 [1984] (1) WLR 874 at 880 per Stepehnson LJ.

(9) Moreover, where a litigant, having failed to comply with a specific requirement of the Rules of the High Court, is seeking the indulgence of the Court under Order 2, r 1 (2), he cannot, in my Judgment, expect the Court to assess the requirements of justice with its eyes in blinkers; he must look at all the circumstances.

His opponent in the litigation, in my opinion, entitled to rely on a technical failure to comply with the requirements of a particular rule if, in the event of the waiver of the breach, the other Rules of the High Court would operate to confer a benefit on the party in default which justice requires that he should not receive on the particular facts of the particular case.

See; Goff J in Carmel Exporters (Sales) Ltd v Sea-Land Services Inc (1981) (1) ALL E.R. 993.

On the question whether the Plaintiff's breach of the rules has caused prejudice to the Defendant, the Defendants deposed that; (I focus on paragraphs 4(iii), 4(iv), 4(v), (7) and (8) of the Defendants affidavit in reply.)

Para 4(iii) I am advised that the second amendment on 29 June 2016 was carried out as a response to an application for dissolution of injunctive orders. The said statement of claim was amended without leave and filed just a day prior to the hearing of Defendants notice of motion seeking dissolution of ex-parte injunctive orders.

(iv) I am further advised that the last amendment on 2 August 2016, again without leave was carried out in response to Defendants letter requesting for further and better particulars on 21 July 2016, a copy of which is annexed hereto and marked "RS-A".

(v) That the Plaintiff and /or its solicitors to date have not supplied further and better particulars of its statement of claim filed previously but instead chose to again without leave amend its claim

7. *The Plaintiff had on the 14 of June 2016 filed an affidavit in support for injunctive orders whereby he deposed at paragraph 21:*

"that the Plaintiffs have assets and business detail and feasibility studies documents for implementation in partnership with the Government of Fiji on ethanol and biodiesel production worth approximately 20 million dollars including information on industrialization of Fiji Nation".

8. *That taking into account the Plaintiff's Affidavit sworn on 14 June 2016, he was already aware that certain documents were allegedly missing from the premises. As such the Deponent's reasons to amend the statement of claim to include this allegation on 29 June 2016 is a distortion of facts and a statement only designed to mislead the High Court.*

So, the Plaintiff's failure to comply with Order 20, rule 5 has caused a real risk of prejudice to the Defendants.

No Affidavit in Response has been filed by the Plaintiff. Thus, the above matters raised in the Defendants 'Affidavit in Reply' remain uncontroverted and untraversed.

In the absence of Affidavit in Response by the Plaintiff, I hold the inference inescapable that the Plaintiff does not oppose the matters raised in the Defendant's Affidavit in Reply.

See; **Jai Prakash Narayan v Savita Chandra**
Civil Appeal No. 37 of 1985

I am satisfied that the Defendants in this case have suffered prejudice as a direct consequence of the Plaintiff's breach of Order 20, rule 5.

One word more, whilst it is always open to parties to litigation to try and utilise the rules of the Court to improve their position and optimize any advantage accruing to them, they must ensure that their own actions are not subjected to any criticisms.

(10) I do not believe that it is my responsibility to regularise the Plaintiff's defects. Needless to say I reject in *limine* the Plaintiff's last two amendments to the Writ of Summons and the Statement of Claim. It is not the function of the court to point out to the Plaintiff how it should amend the Writ of Summons and the Statement of Claim.

It would be an abuse of practice of the court to permit **irregular documents** to remain upon the record. This court has a duty to discharge towards the public and the suitors, in taking care that its records are kept free from **irregular documents**.

It would be absurd to say that the Plaintiff should not in the ordinary way be denied an adjudication of its Claim on its merits because of its failure to comply with the requirements of the rules (Order 20, rule 5) unless the default causes prejudice to its opponents for which an award of costs cannot compensate. If this argument is followed, a well-to-do Plaintiff willing and able to meet orders for costs made against it could flout the rules with impunity, confident that it would suffer no penalty unless and until the Defendant could demonstrate prejudice. This would of course circumscribe the very general discretion conferred by Order 2, rule 1(2) and would indeed involve a substantial rewriting of the rule.

(11) Perhaps it is splitting hairs, but to my mind, the Plaintiff by instituting its action, submitted itself to an explicit and mandatory regime, set out in the High Court Rules. If it wishes to continue notwithstanding its transgression of the Rules, it must make the running so as to persuade the court that in the interest of justice the action ought to go ahead.
The Rules are an indispensable framework for the orderly administration of justice. The Rules of the court and the associated rules of practice, devised in the public interest to promote orderly and expeditious dispatch of litigation must be observed.

The Plaintiff has failed to show a good reason for its failure to comply with the requirements of the rules. Thus, the dismissal of its last two amendments to the Writ of Summons and the Statement of Claim is an inevitable consequence, under Order 2, rule 1 (2).

I cannot shut my eyes to the fact that in the negligent way in which the amendments were made, Order 20, rule 5 is systematically ignored. Does it follow that this court is bound to ignore the rules and that the court can say, because the rules are systematically disregarded by those whose duties is to regard them, therefore the rules must be treated as obsolete and of no consequence ? I dissent from any such proposition. I find it hard to believe that this court should be powerless to intervene to prevent such a systematic breach of the rules. This court would be acting contrary to its plainest duty if it refused to observe the rules.

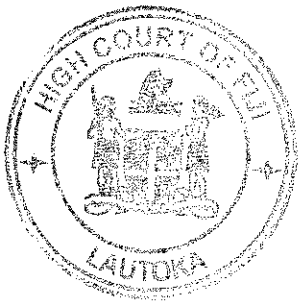
I am of course, not hesitant, in the exercise of my discretion to direct this amendments to the Writ and the Statement of Claim to be struck off the record of the court under Order 2, rule 1 (2) because the waiver of the breach of the rules of the High Court would operate to confer a benefit on the party in default which justice requires that they should not receive. This approach accords with that of **Robert Goff J in Carmel Exporters (Sales) Ltd V Sea-Land Services Inc (1981) 1 ALL.E.R 984** where his Lordship referred to the flexibility which is now generally characteristic of the Rules of the High Court , and which enables the court to ensure that justice may be done.

ORDERS

(1) I refuse to grant Orders prayed in Plaintiff's Summons dated 14th August 2016.

(2) The Plaintiff's last two amendments to the Writ of Summons and the Statement of Claim filed on 29th June, 2016 and 02nd August 2016 is wholly set aside under Order 2, rule 1 (2).

(3) The Plaintiff is to pay costs of $1000.00 (summarily assessed) to the Defendants within 14 days hereof.



17/03/2017.

Jude Nanayakkara
Master

At Lautoka
17th March 2017