

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 218 of 2012

BETWEEN : **SUN INSURANCE COMPANY LIMITED** a limited liability company duly incorporated under Companies Act (Cap 247, Laws of Fiji) having its registered office at 1st floor, Front Building, Rodwell Road, Suva, Fiji.

PLAINTIFF

AND : **SOROJINI** of Qeleloa, Nadi, Housewife as the Administratrix of the Estate of **PARAS SHIWAN NAIKER** aka **PARAM SHIWAN NAICKER** of Qeleloa, Nadi, Handyman, Deceased, Intestate.

FIRST DEFENDANT

AND : **SHANKAR GENERAL HAULAGE LIMITED** a limited liability company having its registered office at 1 Foster Road, Walu Bay, Suva.

SECOND DEFENDANT

AND : **SACHINE SANJEEL REDDY** of Lomolomo, Lautoka, Driver.

THIRD DEFENDANT

Counsel : **Mr. Ashnil Narayan for the plaintiff**
: **The first defendant is released from the proceedings of the case.**
: **The second and third defendants are absent and unrepresented.**

Date of hearing : **Wednesday, 23rd January, 2019**

Date of ruling : **Thursday, 28th February, 2019.**

RULING

(A) INTRODUCTION

- i) The first defendant is the plaintiff in High Court Civil Action Number HBC 109 of 2012/L. The action was instituted on 16th May 2012 against the second and third defendants on behalf of the estate of 'Paras Shivan Naiker' aka 'Param Shivan Naicker' (the deceased).
- ii) The deceased was a passenger in the motor vehicle registration number DN 414 which involved in a collision with motor vehicle registration number DX 256 on 29th January, 2012 ,on the Queens Road, at Sabeto, Nadi.
- iii) The second defendant was the owner of the truck which was at the time of the collision driven by the third defendant.
- iv) The current matter is an originating summons filed by the third party insurers of the second and third defendants seeking, inter alia, a declaration from this court that *'the plaintiff is not obliged to provide an indemnity to satisfy any judgment which the first defendant may obtain against the second and third defendants in respect of the collision involving motor vehicles DN414 and DX256 on the Queen's Road, at Sabeto, Nadi on 29th January, 2012, due to the breach of a condition of the compulsory third party motor vehicle insurance policy issued by the plaintiff in respect of the use of motor vehicle number DX256, when at the material time the third defendant, being the driver thereof, was driving under the influence of intoxicating liquor'*.
- v) The plaintiff's originating summons, dated, 12th October 2012 came up for hearing today [after several adjournments] after the time – frame for completion of the pleadings being set on 02nd November 2012. The second and third defendants did not take part in the hearing before the court.

(B) THE AFFIDAVITS FILED

- i) By 'originating summons' dated 12th October 2012, the plaintiff company is seeking to avoid indemnification of the second and third defendants pertaining to an insurance policy.
- ii) The plaintiff's originating summons is supported by an affidavit of "Thomas Naua", the claims manager, employed by the plaintiff company.

- iii) The second and third defendants had filed two affidavits in response to the affidavit in support of "Thomas Naua", sworn on 24th September 2012.
- iv) Both reply affidavits have been sworn by the third defendant on behalf of the second defendant.

(C) THE PRELIMINARY OBJECTION

- i) At the commencement of the hearing before the court, counsel for the plaintiff raised two preliminary objections to the two affidavits in response filed by the second and third defendant sworn on 13th April 2013 and 15th May 2013.
- ii) Counsel for the plaintiff submitted that;
 - *The affidavits are irregular and produces no authority or resolution to swear the affidavits.*
 - *The affidavits are not properly sworn and contains scandalous contents in breach of order 41, rule 5 of the High Court Rules, 1988.*

(D) THE CONSIDERATION AND THE DETERMINATION

- (i) First, it was contented by counsel for the plaintiff that both affidavits sworn by the third defendant are irregular because they lack authority.

Let me now move to consider the "first objection".

- (ii) The second defendant is a limited liability company having its registered office at No.1, Foster Road, Walu Bay, Suva.

The deponent, the third defendant, states as follows in paragraph two (02) of both affidavits;

"(2) That I have been duly authorized by the Second Defendant to swear to the contents of this affidavit on his behalf too."

- (iii) The deponent, the third defendant, the driver of the second defendant company, needs sanction to swear on behalf of the second defendant company. But the deponent does not annex authority given to him by the company.

A similar affidavit was attempted to be adduced into evidence in Denarau Corporation Limited v Vimal Deo, as trustee of the Deo Family Trust, Civil Action NO. HBC 32 of 2013, where Justice Ajmeer held:

"[13]....A company being an artificial person cannot act by itself. It should act through agent. That agent must have proper authority to act on behalf of the company. Merely stating that the deponent is Chief Executive Officer of the plaintiff and has authority to swear on behalf of the plaintiff company is not sufficient. He must state the person who gave that authority, whether it is a director or secretary or other authorized officer of the company. In the absence of this the deponent will lack the authority to swear affidavit on behalf of the company.... For my part, I would say it is preferable to show authority when a deponent is giving evidence by affidavit. The court cannot take judicial notice in this regard. The deponent must show that he has proper authority to swear affidavit on behalf of the plaintiff which he has failed to do."

- (iv) I am left with the conclusion that the third defendant's affidavit is defective and a nullity because there is no 'ostensible' authority to prove that the third defendant was duly authorized to swear on behalf of the second defendant 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 authorized to make it. If not made by the plaintiff, the affidavit itself must state that the person making it is duly authorized to do so – Chingwin –v-Russell (1910) 27 T.L.R. 21".

Moreover, I take comfort in 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."

- (v) Let me now move to consider the **second objection**.

The second objection is this;

"The deponent states in both his affidavits that he deposes to the facts which are "within my own knowledge and that acquired by me in the course of negotiating with the Plaintiff and or its agents or servants save and except where stated to be on information, belief and whereto stated, I verily believe to be true". In the latter affidavit, the deponent does not refer to the Plaintiff but instead the "Respondents"

The deponents then goes on at paragraphs 8 and 9 (and also paragraph 9(a), (b) and (c) at pages 4 and 5 of the latter affidavit to swear to contents dealing with the Second Defendant company. The deponent does not state how he is aware of these contents. He has not said how he came across this information or who has authorized him to disclose this evidence. Irrespective of whether this information was deposed, the contents are in breach of Order 41 of the High Court Rules and ought to be expunged."

- (vi) Counsel for the Plaintiff relies on paragraph (8) and (9) of the reply affidavit of the third defendant sworn on 15th May 2013.

The paragraph (8) is in these terms;

THAT as to paragraph 9 of the said Affidavit I verily believe that after the Plaintiff's then solicitors notified the second and third defendants regarding the breach of policy conditions my employers paid excess premium to waive the breaches.

The paragraph (9) (a), (b) and (c) are in these terms;

- a. *THAT I say that the Plaintiff has waived any breaches made by the second and third defendants by virtue of accepting extra premium in the event the second and third defendant breach the Plaintiff's Insurance Policy. Annexed hereto and marked "SSR1" is a letter dated 20th April 2012 from Sun Insurance to the Managing Director of Ashok's Transport Limited.*
- b. *THAT the second defendant did pay to the Plaintiff the extra premium to cover breach of warranty under the insurance policy and in accepting the premium in the present case the plaintiff on the 16th day of August 2012 completely paid the sum of \$10,000.00 to the second defendant for all the damages that was caused to the motor vehicle that was involved in the accident. Annexed hereto and marked "SSR2" is the said cheque dated 16th day of August 2012.*
- c. *THAT in the circumstances I say that by the virtue of the second defendant paying the extra premium the Plaintiff is liable to all the claims that has been made by the first defendant against the second and third defendant.*

(vii) This is not interlocutory proceedings. As such order 41, rule 5(1) should be complied with. In relation to the payment of extra premium, is he, the driver of the second defendant company, speaking from his own knowledge? I cannot think of anything more hearsay.

What is more damaging is how can a driver (a non-lawyer) just boldly state;

- *".....the plaintiff has waived any breaches made by the second and third defendant by virtue of accepting extra premium in the event the second and third Defendant breach the Plaintiff's Insurance Policy....." paragraph 9 (a).*
- *".....by the virtue of the second defendant paying the extra premium the Plaintiff is liable to all the claims that has been made by the first defendant against the second and third defendant". paragraph 9(c).*

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 noticed 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 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.'

As noted above, r. 5 (2) provides for an exception on 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.

The need for and the importance of complying with the Rules were emphasized 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 Watson, Civil appeal No. CBV 0002 of 1992 at p.3 of the judgment.

In August, 1997, the Court of Appeal in Sitiveni Rabuka & Others v Ratu Viliame Dreunamisimisi & 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:

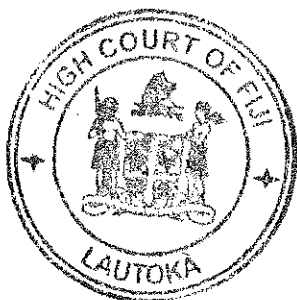
"The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified 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."

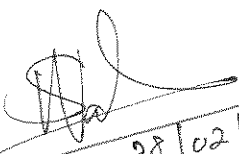
On the strength of the authority in the above judicial decisions, I wish to emphasize that the rules are there to be followed and non-compliance with those rules is fatal.

- viii) For the reasons which I have endeavored to explain in the preceding paragraphs, I uphold the preliminary objections raised by counsel for the plaintiff.

(E) ORDERS

- i) The preliminary objections are upheld.
ii) The paragraph 8 and 9, (a), (b) and (c) of the reply affidavit of the third defendant, sworn on 15th May, 2013 are expunged.
iii) In the interest of justice, the court grants leave to the third defendant to file and serve a supplementary affidavit (within 14 days from the date of this ruling) to submit the letter of authority.




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28/02/2019.
Jude Nanayakkara
Judge

At Lautoka,
Thursday, 28th February, 2019