

IN THE HIGH COURT OF FIJI
IN THE WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 332 OF 2019

BETWEEN : **BIJU INVESTMENTS PTE LIMITED** - a duly incorporated company
having its registered office at 1 Valetia Street, Lautoka.

[PLAINTIFF]

AND : **TRANSFIELD BUILDING SOLUTIONS (FIJI) LTD** - a duly
incorporated company having its registered office at Lot 19 Wilfred
Sugrim Road, Lautoka.

[DEFENDANT]

Appearance : (Ms) Setaita Ravai for the plaintiff
Mr Ashnil Narayan for the defendant

Decision : Wednesday, 31st March, 2021 at 9.00am.

DECISION

[A] **INTRODUCTION**

- (01) On 25th February, 2021, the plaintiff filed summons for stay of the decision of this court delivered on 29-01-2021 pending the determination of the appeal in Civil Appeal No. ABU 14 of 2021.
- (02) The plaintiff's application for stay is supported by an affidavit sworn by Marica Tavakuru, a solicitor and barrister in the employ of Vijay Naidu & Associates, the solicitors on record for the plaintiff in this action.

- (03) On 05th March, 2021, (being the first call date of the application for stay) counsel for the defendant raised a preliminary issue in regards to the application. The preliminary issue was based on the fact that the affidavit in support of the application ought to be deemed inadmissible and expunged from the court record.
- (04) The court granted seven days to the plaintiff to consider its position on whether they would be withdrawing their application or alternatively whether they are minded to contest the preliminary issue.
- (05) On the next call date, viz 12th March, 2021, counsel for the plaintiff advised the court of its position and that it would be contesting the preliminary issue. The court granted time to both parties to file their respective submissions simultaneously and adjourned the case for ruling on preliminary issue to 31st March, 2021.
- (06) The parties did not make oral submissions on the preliminary issue. Both parties filed written submissions on the preliminary issue.

[B] THE PRELIMINARY ISSUE

- (01) Counsel for the defendant in his written submissions filed on 17-03-2021, submits that the affidavit in support of Marica Tavakuru infringes the principles enunciated in recent decision of Honourable Acting Chief Justice Kamal Kumar, sitting as the President of the Supreme Court of Fiji in **Patrick Paul v Director of Lands & Ors.**¹ on the following grounds; [Reference is made to paragraph 3.3 of the written submission filed on 17-03-2021].

- i. The affidavit does not annex any authority from the Plaintiff authorizing the deponent to swear the affidavit on its behalf and therefore in direct contravention of guideline (i) in **Patrick Paul**. We envisage the Plaintiff may argue that Marica Tavakuru was previously authorized by the Plaintiff to file affidavits on its behalf in this action. On that note we refer to two affidavits filed by Marica Tavakuru in this action on 20th July, 2020 and 3rd September, 2020. Both affidavits disclose the same authority provided by the Plaintiff appearing as annexure “MT – 1”. However, it is significant to note that the authorities appearing in those affidavits were specific to only authorizing the deponent to swear and Affidavit “for the purpose of applying for video Conference Hearing via Skype or Zoom”. In the absence of any express authority “in writing” having been provided by the Plaintiff to the deponent to swear*

¹ Civil Appeal No. CBV0018 of 2019,

an affidavit in support of the application for stay, the affidavit is wholly inadmissible and ought to be struck out entirely on this ground alone.

- ii. *The affidavit is completely devoid of any information explaining why the director of the Plaintiff could not swear the affidavit in support of the stay application which is a direct contravention of guideline (ii) in **Patrick Paul**.*
- iii. *The deponent of the Affidavit has deposed matters that cannot possibly be “within” her knowledge and even in the event that it is, she has failed to provide the source of her information. The infringing paragraphs of the affidavit are as follows:*
 - *Paragraph 5 – the deponent does not state how she is aware that the monies in respect of the debt is available (or where it currently sits) and is no position to offer the payment of the debt into court. Take for an example this Honorable Court accepts the proposition to pay the sum of monies into the Court account, and subsequently, the Plaintiff fails to do so. How would one enforce the purported undertaking against the Plaintiff and/or its director?*
 - *Paragraph 9 – the deponent has said that the Respondent/Defendant has “seen fit to have published in the print media an article which is misleading and defamatory of the Director of the Applicant/Plaintiff”. How does the deponent know for certain and without any doubt that the Respondent/Defendant published the article? What is her source of belief and/or information? The content deposed is, with respect, scandalous and in direct contravention of the principles enunciated in **Patrick Paul**.*
 - *Paragraph 6 – How does the deponent know the subdivision was completed and that the project was “competently managed”? All the deponent says in the relevant paragraph is that she is “informed” and “verily believes” these facts. Who informed her of these facts?*
 - *Paragraph 10 – How can the deponent possibly alleged that the Plaintiff is “able to meet each and every debt as and when it arises and thereby satisfies any test of solvency that may be asserted otherwise”? It is an utterly remarkable comment to make when the*

affidavit is completely devoid of the source of information! Has she seen the financial reports and tax returns of the Plaintiff? Is she privy to the financial information of the Plaintiff? How is the deponent qualified to state that the company is "solvent"? Did she based her views on the contents of the Plaintiff's profit and loss statements? Or did she base it on the liquidity ratio of the company? Or perhaps it was simply based on the funds held by the plaintiff in its bank account(s)? The deponent alleges the Plaintiff can meet "each and every debt" when it arises, so what are the likely debts that are to arise in the near future and in what sums? Does the company have any mortgages or loan? Has she cited these loan facilities and verified the dues could be met? The questions could go on and on.

(02) The attention of this court is to drawn to paragraph (16) of Patrick Paul (infra) wherein his Lordship held;

[16] When Third Party including Law Clerks/Legal Executives/Litigation Clerks depose Affidavit on behalf of a party to the proceedings then he/she:-

- (i) must be authorized in writing by that party to depose such Affidavits.*
- (ii) must depose as to why that party and if a Company than why its director or authorized officer cannot depose the Affidavit;*
- (iii) **must not** depose Affidavits on basis of information or relief but depose facts the deponent has knowledge of those facts except where:*
 - (a) Affidavit is in support of or in opposition to Application for Summary Judgment;*
 - (b) Affidavit verifying facts in respect to action for specific performance pursuant to Order 86 of HCR only if directed by Court to do so;*
 - (c) Affidavit verifying evidence of facts during trial when directed by Court to do so pursuant to Order 38 Rule 3 of the HCR.*

(iv) *may depose Affidavits in support of or in opposition to interlocutory application but must do so on the basis of information received which they believe to be true and must disclose the source of such information or beliefs in addition facts that is within their personal knowledge.*

(03) On the other hand, counsel for the plaintiff expressed the followings in counter submissions filed on 16-03-2021.

- (*) *The affidavit in question sworn by the deponent is significant simply because she is the Solicitor, as she so deposes, who as barrister and solicitor is retained within the firm of Vijay Naidu & Associates, who are the Solicitors for the applicant for the stay and as such as the Appellant in the proceedings in the Court of Appeal.*
- (*) *The affidavit refers to deposition on the basis of personal knowledge and where those matters are not within that knowledge, the deponent, as a Solicitor of this Honorable Court, says in paragraph 2: "..... I have reference their truth by reference to its sources." At this stage, there is no identification of the sources explicitly, but it can be confidently submitted inferentially that the source of those matters are not only from within her legal expertise and competence as a practitioner admitted to practice in this honorable Court, but also from the fact that she is a member of the legal firm who are the Solicitors on record.*
- (*) *The affidavit of Ms Tavakuru sets out clearly the fact that there is and has been a Notice of Appeal filed which is annexed to the affidavit indicating it was filed on 24 February 2021.*
- (*) *The affidavit then says that in support of the application for a stay, the sum of the statutory demand said to be not in dispute (which is not admitted and is the subject of the Notice of Appeal) in the amount of FJ\$115,073.81 together with the costs awarded of FJ\$2,000 will be paid into Court in satisfaction of the application for the stay of proceedings as sought.*
- (*) *Ms Tavakuru, who is – again for the sake of emphasis, and lest it should not have been realized by the Solicitor and/or advocate for the Defendant who takes the objection – as legal practitioner of this Court, entitled to depose to the facts that she has an opinion that there are good and arguable prospects of success in the prosecution of appeal, which she so deposes in paragraph 6 of her affidavit. In addition to those matters that she so deposes to as to the prospects of success, she has also indicated that there is an answer to any deeming provision as to insolvency by reason of the statutory demand not being set aside and satisfied as to securing the debt which is the subject of the proceedings.*
- (*) *Ms Tavkuru goes on to further swear in to paragraph 7 that there is an Amended Statement of Claim that alleges among other causes of action a breach of contract which*

exceeds the statutory demand and is yet to be prosecuted and is relied upon in further support of her affidavit.

- (*) Considering that particular matter in paragraph 7, how then can it be asserted that the Solicitor for the Plaintiff – the Appellant in the proceedings – cannot be allowed to swear that matter? In other words, taking as a matter of prima facie admissibility, is she not entitled to so swear as to what the prospects of success are with respect to the Amended Statement of claim? In short, the objection taken as to her inability to so depose to the matter from her profession position is without foundation.*
- (*) Ms Tavakuru then deposes in the subsequent paragraphs of her affidavit that she has in all the circumstances a further opinion as to the matter being undertaken, and more importantly with respect to the development of the land in question, that it has been, despite the conduct of the Defendant Company (which is the subject of the Amended Statement of Claim as to its defective workmanship), the subject land has been completed to final stages of development and awaits the issuing of industrial and commercial leases with respect to the land so developed. In other words, the Plaintiff is solvent to the point where it not only can meet its debts as and when they arise, but can complete the transaction and the undertaking in question.*
- (*) In that regard, as the Solicitor on the record, and more importantly the Solicitor for the Plaintiff Developer. Ms Tavakuru is capable and we would respectfully submit able to be confidently accepted as undertaking matters that are deposed to from within her personal knowledge as to the ability of the Plaintiff to complete the development in question.*
- (*) If it were required, and no doubt if the matter were to be put to the point of being tested, the Solicitor is as can be seen from the affidavit on its face duly authorized to swear the affidavit by the Plaintiff Company, and one would respectfully submit as an able and just inference to be drawn therefrom that she does so on the authority of the Director of the Company.*
- (*) There are matters of record within the file that the Court can rely upon where an application was made for Mr. Vijay Naidu to give evidence and/or attend the proceedings with his counsel of choice, Mr. Stephen J. Stanton (currently situate in Australia), who was prepared to argue the matter on a zoom applications with Mr. Naidu, who is in Australia as a result of the pandemic and unable to return to Fiji for reasons of personal safety and more importantly to enable him to participate. The application was refused and there is no further need to address the application, save that it explains why the affidavit of Ms Tavakuru, which is resident within Fiji, physically present within Fiji and more importantly conducting (along with Ms Ravai the advocate in these proceedings) the matters under consideration to the point where her conduct of the litigation in question is clearly explicable as to the absence of any need by Mr. Naidu to give an affidavit.*
- (*) The funds the subject of the payment into Court are from within the knowledge of Ms Tavakuru clearly able to be relied upon. There is no mystique as to the source and the quantum of funding and the fact that it will be paid into Court.*

(*) *We now come to the decision in Paul (Infra)*

Consideration of the decision in Paul v Director of Lands

- (*) *We respectfully submit that a fair reading of the decision and the decisions referred to therein as undertaken with the acute analysis and customary erudition of his Honour the learned President of the Supreme Court are clearly directed to the position of law clerks and/or litigation clerks, but not Solicitors of this Honorable Court.*
- (*) *There is no doubt that the comments of the learned President concerning the criticism of the decision of the Court of Appeal by a law clerk are both justified and more importantly required to be made. It is hardly a matter of Judicial observation that a law clerk would have no competence to criticize any judge of this Honorable Court, let alone a member of the Court of Appeal, as to the unsatisfactorily aspects of their decision.*
- (*) *In that regard, the analysis of all decisions undertaken by the learned President led him to a deliver what he understood to be, for the purposes of his judgment, the concept of a Third Party which he defined as including Law Clerks/ Legal Executive/Litigation Clerks who depose affidavits on behalf of a party. His directions as given in [16] of the decision in Paul (infra) are, we would respectfully submit, of a just and deliberate consideration with respect to people who are not legally qualified. The same cannot be said of Solicitors who are only qualified but more importantly are Solicitors on the record and working within the firms who have the care, conduct and control of the litigation in question.*
- (*) *The matters upon which a third party is to depose to proceedings on behalf of a party as contained in Subparagraphs (i) – (iv) are in circumstances clearly distinguishable in our respectful submission from a legal practitioner, who is a Solicitor duly appointed and more importantly retained by the plaintiff as its agent for the purposes of deposing to the matters question that are not controversial and are clearly conventional for the purposes of an application for a stay.*
- (*) *The clear distinction with respect to Solicitors and/ or law clerks in borne out by the judgment in Paul (Infra) where the learned President said at [24]:*
- “This sort of behavior and comments from person who is not a Legal Practitioners is totally unacceptable and tantamount to greatest of disrespect to the Court of Appeal judges.”*
- (*) *Where then in the body of the affidavit of Ms Tavakuru is there any such semblance to confirm to the criticism rightly made by the learned President and justifiably condemnatory of the affidavit of the law clerk in question in Pauls case?*
- (*) *Simply put, the affidavit of Ms Tavakuru is an affidavit that she is entitled to swear and does so swear in the circumstances as deposed.*

- (*) *If one returns to Ms Tavakuru's affidavit, she rightly notes in paragraph 1 that she is a member of the firm who are the Solicitors for the Applicant/ Plaintiff in this matter under consideration.*
- (*) *Her deposition as to the matters from personal knowledge or if the matters are unknown to her personally, their truth having been ascertained by reference to the sources, is clearly also a matter beyond contention and more importantly devoid of conjecture that is sought to be raised by the Defendant's Counsel.*
- (*) *Rather, what should be understood and clearly seen to be the substance of the objection, and as baseless and meaningless as it is for the manner in which it has been raised, is that there is no basis upon which the objection to her affidavit as to incompetence could be asserted in anything like the manner that was undertaken in Paul's case.*
- (*) *If one were to test whether she had no basis for asserting by way of her affidavit the matters deposed to in paragraph 7 concerning the Amended Statement of Claim for breaches of causes of action that are said to arise by virtue of the Defendant's defective workmanship, it can clearly be seen that she is entitled to make that statement on the basis that it is an offsetting claim. In that regard, the manner in which such claims are to be considered for the purposes of these proceedings, and ultimately for the Court of Appeal in terms of the appeal to be propounded and ultimately argued, we rely upon the decision of Mr. Justice Barrett (as he then was) in *Beauty Health Group Ltd v Sholl* [2011] NSWSC 77 concerning the provision in s.459H (1) (b) of the Corporations Act 2000, which is to be read in conjunction with the definition of "offsetting claim" in s.459H(5), which are to be read as comparable to the Fijian provisions of the Companies Act 2015 from which the current insolvency regime with respect to statutory demands and offsetting claims has been drawn, at [23] where his Honour said:*

*".....requires the Court [offsetting claim] to consider whether the plaintiff has a 'genuine' claim against the defendant in respect of the matter raised. It is also necessary to ascribe an 'amount' to any 'genuine' claim in order to determine, under s.459H (2), the 'offsetting total' which plays a central part in determining whether the 'substantiate amount' is less than the statutory minimum of \$2,000. The Courts task is not to make any final choice between the competent contentions about the relevant matter. It need only see that the plaintiff has asserted a claim and that the claim rises to the level of a serious question to be tried. (*Scanhill Pty Ltd v Century 21 Australasia Pty Ltd* (1993) 12ACSR 341), is based on a cause of action advanced in good faith for an amount claimed in good faith (*Macleay Nominees Pty Ltd v Belle Property East Pty Ltd* [2001] NSWSC 743) and is not frivolous or vexatious (*Chadwick industries (South Coast) Pty Ltd v Condensing Vaporisers Pty Ltd* (1994) 13 (ACSR 37))"*

- (*) *In other words, we respectfully submit that the basis upon which Mr.Tavakuru's affidavit at paragraph 7 and equally at paragraph 9 to the conclusion of the affidavit are matters that she was clearly competent and able to so depose to in all the circumstances.*
- (*) *Where does the gravamen of the Defendants objection lie with respect to the inadmissibility of the affidavit? As best as one can discern from the manner in which the*

objection is raised, it is according to the decision in Paul (infra), that she has no competence. However, the affidavit in question in Paul (infra) was deposed to by a legal clerk, a person completely unqualified who was sufficiently arrogant, as so found, to castigate members of the Court of Appeal as to their decision in a manner that borders on heretical, and rightly deserving of the condemnation so expressed.

() There is nothing like that in Ms Tavakuru's affidavit. This is clearly a conventional affidavit for a stay and, as such, as a preliminary objection, must be overruled.*

() Accordingly, we seek to read and will rely upon the affidavit of Marica Tavakuru in support of the application for a stay.*

[C] CONSIDERATION AND THE DETERMINATION

(01) The first preliminary matter raised by the defendant is that the affidavit of Marica Tavakuru does not annex any authority from the plaintiff authorizing the deponent to swear the affidavit on its behalf and therefore is in direct contravention of guideline 16(1) of Patrick Paul (infra). It was further submitted that the affidavit is completely devoid of any information explaining why the director of the plaintiff could not swear the affidavit in support of the stay application which is a direct contravention of guideline 16(ii) of Patrick Paul (infra).

(02) It is to be noted that in paragraph (1) and (2) of the affidavit in support of Marica Tavakuru, a barrister and solicitor, she states;

(01) That I am a Barrister and Solicitor with Messrs Vijay Naidu & Associates, the solicitors for the Applicant/Plaintiff in this matter.

(02) That I depose this affidavit from my personal knowledge of the matters contained in this affidavit or, where matters are not known to me personally, I have ascertained their truth by reference to its sources.

(03) In the Patrick Paul's case (infra) the deponent was the Litigation Clerk in the firm of R. Patel & Co., Solicitors for the applicant. Upon a fair and a reasonable reading of Patrick Paul's case and taking into account the careful wording used by his Lordship, the concept of a third party which his Lordship defined as including Law Clerks/Legal Executives/Litigation Clerks who depose affidavits on behalf of a party are clearly directed to people **who are not legally qualified, but not solicitors of the court**, who are not only qualified but more importantly are solicitors on the record and working within the firms who have the care, conduct and control of the litigation in question.

- (04) Therefore, I hold that there is no requirement to annex any authority to the affidavit of Marica Tavakuru from the plaintiff authorizing the deponent Marica to swear the affidavit. Accordingly, I would not expect an explanation in the affidavit why the director of the plaintiff could not swear the affidavit in support of the stay application.
- (05) I would not accede to the submission of counsel for the defendant that the affidavit of Marica Tavakuru would amount to an infringement of the guideline 16(i) and (ii) of Patrick Paul's decision. I agree with the counter submissions of counsel for the plaintiff.
- (06) Referring back to the passage quoted from Patrick Paul's decision, counsel for the defendant next submits that deponent Marica Tavakuru has deposed matters that cannot possibly be within "her" knowledge and even in the event that it is, she has failed to provide the source of her information. The defendant identifies the following as offending paragraphs and raised the following concerns;

- **Paragraph 5** – *the deponent does not state how she is aware that the Monies in respect of the debt is available (or where it currently sits) and is in no position to offer the payment of the debt into court. Take for an example this honorable court accepts the proposition to pay the sum of monies into the court account, and subsequently, the plaintiff fails to do so. How would one enforce the purported undertaking against the plaintiff and/or its director?*
- **Paragraph 9** – *the deponent has said that the Respondent/Defendant has "seen fit to have published in the print media an article which is misleading and defamatory of the Director of the Applicant/Plaintiff". How does the deponent know for certain and without any doubt that the Respondent/Defendant published the article? What is her source of belief and/or information? The content deposed is, with respect, scandalous and in direct contravention of the principles enunciated in **Patrick Paul**.*
- **Paragraph 9** – *How does the deponent know the subdivision was completed and that the project was "competently managed"? All the deponent says in the relevant paragraph is that she is "informed" and "verily believes" these facts. Who informed her of these facts?*
- **Paragraph 10** – *How can the deponent possibly allege that the Plaintiff is "able to meet each and every debt as and when it arises and thereby satisfies any test of solvency that may be asserted otherwise"? It is an utterly remarkable comment to make when the affidavit is completely devoid of the source of information! Has she seen the financial reports and tax returns of the Plaintiff? How is the deponent qualified to state that the company is "solvent"? Did she base her views on the contents of the Plaintiff's profit and loss statements? Or did she base it on the liquidity*

ratio of the company? Or perhaps it was simply based on the funds held by the Plaintiff in its bank account(s)? The deponent alleges the Plaintiff can meet “each and every debt” when it arises, so what are the likely debts that are to arise in the near future and in what sums? Does the company have any mortgages or loans? Has she cited these loan facilities and verified the dues could be met? The questions could go on and on.

- (07) The affidavit refers to deposition on the basis of personal knowledge and where those matters are not within that knowledge, the deponent says in paragraph 2 “.....I have referenced their truth by reference to its sources”.
- (08) But there is no identification of the sources explicitly for the contents of the following paragraphs;
- (5) That in support of the application for a stay, the Applicant as Plaintiff in these proceedings is prepared to pay into court the sum of one hundred and fifteen thousand and seventy-three dollars and eighty-one cents (FJ\$115,073.81) together with the costs awarded in the sum of two thousand dollars (FJ\$2,000) pending resolution and determination of the appeal and in satisfaction of the application for the stay of the proceedings.
- (9) That the Respondent/Defendant has seen fit to have published in the print media an article which is misleading and defamatory of the Director of the Applicant/Plaintiff in so far as it has asserted that the project, the subject of the Statutory Demand was “mismanaged”. I am informed and verily believe that the project was, after the termination of the Contract in respect of which the Respondent was engaged and its departure from the subject site was thereafter competently managed and concluded to the point that the subdivision was completed to the satisfaction of all regulatory authorities and a Certificate for final occupation was issued, effectively refuting any claim as to mismanagement of the subject site. In that regard, the Director of the Appellant reserves his rights with respect to the libel published in the Fiji Sun on 4th February, 2021.
- (10) That the Applicant/Plaintiff has not only completed the subject site but is using the subdivision and is in all the circumstances able to meet each and every debt as and when it arises and thereby satisfies any test of solvency that may be asserted otherwise.

[Emphasis added]

- (09) It is submitted at paragraph (9) of the plaintiff's submission that "*The affidavit refers to deposition on the basis of personal knowledge and where those matters are not within that knowledge, the deponent, as a Solicitor of this Honorable Court, says in paragraph 2: "... .. I have reference their truth by reference to its sources.*" *At this stage, there is no identification of the sources explicitly, but it can be confidently submitted inferentially that the source of those matters are not only from within her legal expertise and competence as a practitioner admitted to practice in this honorable Court, but also from the fact that she is a member of the legal firm who are the Solicitors on record*". .
- (10) The present application is an interlocutory application. Under Order 41, Rule 5(2), an affidavit sworn by the deponent for use in interlocutory proceedings may contain statements of information or belief provided that the sources of information or the grounds of the belief are stated. Failure to comply with that requirement will usually affect the question of weight rather than admissibility.
- (11) Can it be said that the sources of matters set out in paragraph 5, 9 and 10 of the affidavit of Marica Tavakuru are from her legal expertise, competence and also from the fact being a member of the legal firm who are the solicitors on record for the plaintiff?
- (12) In my view, it cannot be and could not be. For example, in paragraph (9) of the affidavit she says ;
- I am informed and verily believe** that the project was, after the termination of the Contract in respect of which the Respondent was engaged and its departure from the subject site was thereafter competently managed and concluded to the point that the subdivision was completed to the satisfaction of all regulatory authorities and a Certificate for final occupation was issued, effectively refuting any claim as to mismanagement of the subject site.*
- (13) What is the source of her information? What is the ground of her belief? They are not stated. It was open to her to make a full and candid disclosure of her source of information and belief.
- (14) I hold that paragraph 5, 9 and 10 in the affidavit of Marica Tavakuru offends order 41, r 5(2) of the High Court Rules because they contain statements of information without stating explicitly the sources of information. The remedy would be to either have the affidavit removed from the court file or disregard either the whole affidavit or the offending parts.

- (15) For the sake of completeness, Order 41, rule 5 is reproduced below.

Order 41, rule 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), 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.*

- (16) As stated above, the present application is an interlocutory applications, so rule 5(2) applies to allow assertions of beliefs, but of course even these must be supported (with an explanation of the source of and basis for the belief stated) before they can be admissible evidence. In **Dawasamu Transport v Tebara Transport Ltd**² Calanchini J suggested that in the case of such affidavits, non-compliance with the requirements of Rule 5(2) would in most cases **affect weight rather than admissibility**.
- (17) Rather than striking out paragraphs in an affidavit that offend these rules, the court has an option to simply ignore them (**per Scott j in Peter J.B. Stinson v Miles Johnson**³.)
- (18) Under Order 41, Rule (6) a court may order to be struck out of any affidavit material which is scandalous, irrelevant or otherwise oppressive. I do not see any material that would fall within Order 41, Rule (6).
- (19) I would ignore paragraph (5), (9) and (10) in the affidavit since they offend Order 41, Rule 5(2).

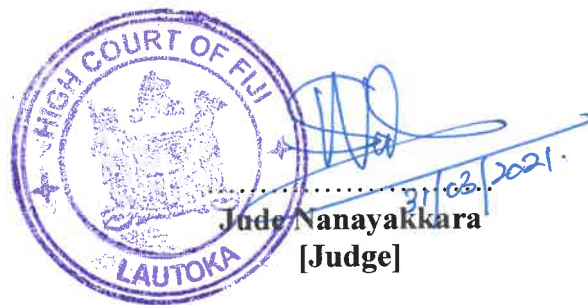
ORDERS:

- (01) The preliminary objection to the affidavit of Marica Tavakuru is partly allowed.

² [2015] FJCA 45

³ (unreported) 25 July 1996 HBC 326/94S

- (02) The court will ignore the contents of paragraph (5), (9) and (10) in the affidavit of Marica Tavakuru sworn on 24/02/2021 and filed on 25/02/2021 because they contain material disallowed under Order 41, Rule 5 (2) .
- (03) Subject to above, leave is granted to the plaintiff to read and rely on the affidavit of Marica Tavakuru sworn on 24/02/2021 and filed on 25/02/2021. **The affidavit will be considered in the context of relevancy and weight.**
- (04) There will be no order as to costs.



High Court – Lautoka
Wednesday, 31st March, 2021