

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

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 225 OF 2013

BETWEEN : **DORSAMI NAIDU** of Kennedy Avenue, Nadi, Barrister
and Solicitor

Plaintiff

AND : **DAMENDRA AMAS GOUNDER**, of Martintar, Nadi,
Secretary General of TISI Sangam

Defendant

Before : Hon. Mr. Justice R. S. S. Sapuvida

Counsel : Mr. D. Naidu In Person
Mr. W. Pillay for the Defendant

Date of Hearing : 27 August 2015

Date of Written Submissions : 01 September 2015

Date of Ruling : 15 October 2015

INTERLOCUTORY RULING

(AMENDMENT OF PLEADINGS IN THE STATEMENT OF CLAIM)

- [1]. This is a summons for leave to amend the statement of claim [as it visible from the surface of summons] filed by the plaintiff's solicitors dated 14 July 2015. [The plaintiff is a barrister and solicitor in the law office of PILLAI, NAIDU &

ASSOCIATES- BARRISTERS & SOLICITORS - 17 SAGAYAM ROAD NADI TOWN-FIJI (hereinafter referred to as the plaintiff's solicitors) and the plaintiff appears In Person for his own case as counsel too].

- [2]. The plaintiff's application, according to the summons so filed indicates that it is made pursuant to Order 20, Rule 5, of the High Court Rules 1988[HCR] and under the Inherent Jurisdiction of this Court.
- [3]. Further, it says that the plaintiff relies on the affidavit in support of Krishneel Kunal Kumar [KKK] filed therewith.
- [4]. The plaintiff has not filed an affidavit in support of his proposed amendment. The proposed amendment is also filed by KKK who is a law clerk according to his affidavit.
- [5]. KKK of Nadi Town, Nadi, in his affidavit dated 14 July 2015, states that he is a law clerk employed by the firm of Pillai Naidu & Associates, Barristers and Solicitors of Nadi.
- [6]. He further affirms that he made the affidavit based on information contained in the files maintained by his employer's office and otherwise on his own knowledge as to the subject matter of this action.
- [7]. Moreover, he deposes in para 3 of his affidavit that the amended statement of claim of the plaintiff was filed on 31st December 2013, and an amendment is required to be made to the said amended statement of claim in terms of the summons filed herein, in order to put before the court a material fact that was not available at the time of the filing of the amended statement of claim and for the purpose of determining the real controversy between the parties. The proposed amended statement of claim is annexed to his affidavit as "KKK1".

[8]. The summons, the affidavit of KKK, and the undated proposed amended statement of claim [KKK1] are reproduced below:

"SUMMONS FOR LEAVE TO AMEND THE STATEMENT OF CLAIM

LET ALL PARTIES concerned attend before the Judge at the High Court Lautoka on Wednesday the 22nd day of July 2015, at 9.00 o'clock in the fore noon or so soon thereafter as counsel can be heard on the hearing of an application on the part of the Plaintiff to Amend the Statement of Claim, a copy of which is annexed hereto.

This application is made pursuant to Order 20 Rule 5 of the High Court Rules, 1988 and under the Inherent Jurisdiction of this Honourable Court.

The Plaintiff also relies on the Affidavit in Support of **KRISHNEEL KUNAL KUMAR** filed herewith.

DATED this 14th day of July 2015.

This Summons for Leave to Amend the Statement of Claim was prepared and filed by Messrs Pillai, Naidu & Associates, Solicitors for the Plaintiffs whose address for service is at their chambers at 17 Sagayam Road, Nadi Town and also at their city agents Messrs S B Patel & Company, Lautoka.

**AFFIDAVIT OF KRISHNEEL KUNAL KUMAR IN SUPPORT OF SUMMONS
FOR LEAVE TO AMEND THE STATEMENT OF CLAIM**

I, KRISHNEEL KUNAL KUMAR of Nadi Town, Nadi, Law Clerk, make oath and say as follows:

1. I am employed by the firm of Messrs Pillai Naidu & Associates, Solicitors of Nadi as a Law Clerk and I have been duly authorized by the Plaintiff and my employer to make this affidavit on his behalf.
2. I make this affidavit based on information contained in the files maintained by my employer's office and otherwise on my own knowledge as to the subject matter of this action. I confirm that I have been providing assistance to the solicitor in carriage of this matter.
3. **The amended Statement of Claim of the Plaintiff was filed on 31st December 2013.**
4. An amended is required to be made to the above Statement of Claim in terms of the Summons filed herein in order to put before the Court a material fact that was not available at the time of the filing of the Amended Statement of Claim and for the purpose of determining the real controversy between the parties. Annexed hereto and marked "KKK1" is a copy of the proposed amended Statement of Claim.

SWORN by the said **KRISHNEEL KUNAL KUMAR**]

at Nadi this 14th day of July, 2015 before me after the]

contents hereof were read over and explained to him]

in the English language and he appeared fully to]

understand the meaning and effect thereof:]

.....

A COMMISSIONER OF OATHS

AMENDED STATEMENT OF CLAIM

1. The Plaintiff has been a legal practitioner for over thirty years and derives income from his practice as such.
2. The Plaintiff has been and still is a financial member of TISI (Then India Sanmmarga Ikya Sangam of Fiji hereinafter called "TISI") for over 27 years. He has been a part of its governing body for 26 years. For 9 those years he has been its National President.
3. The Defendant is also a member of TISI and is currently a member of the governing body of TISI.
4. The TISI by its constitution and rules has an annual general meeting (hereinafter called "AGM") at which it holds elections to elect officers who are constitute its governing body.

A. FIRST INSTANCE OF DEFAMATION BY THE DEFENDANT

5. The Plaintiff was a duly nominated candidate for President at the TISI AGM when its elections were held on the 31st of March, 2013.
6. The Defendant was the returning officer of the elections held at the AGM held on the 31st day of March, 2013.
7. Prior to the elections at the said 2013 AGM, the Defendant told the meeting and the assembled voters that the Plaintiff had 'tampered with TISI membership register held at TISI headquarters' ('hereinafter called the "**speech**') and thereby slandered and/or defamed the Plaintiff.
8. The speech was made by the Defendant as returning officer for the said 2013 election of TISI and he thereafter disqualified the Plaintiff's candidature for President of TISI. The Defendant by his conduct prevented the Plaintiff from standing for the position of President for 2013 and deprived the Plaintiff of his right to do so without holding an investigation into allegations made.

9. The speech was made by the Defendant over a sound system and heard by over two thousand TISI members. Some non-members were also present at the AGM and heard the same.
10. The legal adviser of TISI Mr. Salend Krishna had by letter given his legal opinion that the Plaintiff was able to stand and contest the elections.
11. At the AGM the Defendant referred to some other legal opinion he had obtained but did not produce the same.
12. The Defendant acted in breach of the principles of natural justice in disqualifying the Plaintiff and abused his position as returning officer and acted in a biased and discriminatory way against the Plaintiff.

B. SECOND INSTANCE OF DEFAMATION BY THE DEFENDANT

13. There was a national executive meeting of TISI held on 13 April, 2013 where more than ten persons were present. In their hearing and presence the Defendant:-
 - a. Again said and/or alleged that the Plaintiff had tampered and/or altered TISI membership records.
 - b. He further stated the Plaintiff was 'very ungrateful as TISI had come to his aid when the National Federation Party had "chucked him out" of the Party' or words to that effect.
 - c. The Defendant further said that he would ensure that the Plaintiff's membership in TISI would be removed from the membership register. There were more than ten people present at that meeting.

C. THIRD INSTANCE OF DEFAMATION

14. The Defendant again stated at the Council Management meeting of the TISI on Monday, 15 April 2013 at the TISI head office that the Plaintiff had tampered with the membership register at TISI head office. He also stated that the Plaintiff had carried out "fraudulent acts". These remarks were made in the presence of the

Chief Executive Officer of TISI and several other members including **** and ****
(Your witnesses; You did not confirm whether there are minutes of the meetings.
*They may produce the same and your witnesses may have signed it.)

15. The speech and subsequent allegations made by the Defendant against the Plaintiff are false, unfounded and malicious. They were made by the Defendant to embarrass and ridicule him and to discredit, libel and defame the Plaintiff.

DEFAMATORY IMPACT OF THE Defendant's speech and subsequent remarks about the Plaintiff

16. In their natural and ordinary meaning, the said words referred to in the three instances of slander and/or defamatory statements made meant and were understood to mean and/or by way of innuendo the following:-
- a. That the Plaintiff had dishonestly and/or fraudulently altered the membership register of TISI.
 - b. That the Plaintiff was a disreputable and untrustworthy person.
 - c. That the Plaintiff is a fraud and/or had engaged in fraudulent conduct;
 - d. That the Plaintiff had not discharged his duties and responsibilities honestly;
 - e. That the Plaintiff is not worthy of public trust and had abused his position as a member of TISI;
 - f. That the Plaintiff is not worthy and unfit to stand for the position of President of TISI and/or or public office.
17. That the Defendant's speech and subsequent remarks and his actions is disqualifying the Plaintiff from standing for the position as President of TISI has caused the Plaintiff intense humiliation and great damage to him both personally and professionally as a lawyer. It has led to the spread of rumour and innuendo in the Sangam community and community at large about the Plaintiff's conduct as President of TISI, in particular rumour and innuendo about the Plaintiff using

the office of President of TISI to fraudulently register his former partner as a member of TISI.

18. That the Defendant's speech, subsequent remarks and resultant rumour mongering in the community ('conduct') has caused the Plaintiff emotional stress and trauma.
19. That the Defendant's conduct has caused the Plaintiff to avoid some social and religious functions and/or interaction with members of the Sangam community and community at large.
20. That the Defendant's conduct has caused the Plaintiff great pain and suffering and this includes the loss of pride, dignity, reputation and respect in the community including that of friends, colleagues and family members.
21. The Plaintiff has, in consequence thereof, been seriously injured in his character, credit, and reputation as a reputable lawyer and has been brought into public scandal, odium and contempt and has suffered considerable distress, embarrassment and has been subjected to ridicule.

Damages

22. The Plaintiff has suffered emotional and psychological stress and trauma as a result of the Defendant's conduct.
23. The Plaintiff has lost pride, dignity, respect and reputation as a result of the Defendant's conduct.
24. The Plaintiff has suffered damages and losses as a result of the Defendant's conduct.

Wherefore the Plaintiff claims the following from the Defendant:

- (a) An injunction restraining the Defendant and/or his servants and/or agents from further repeating the words and allegations complained of concerning the Plaintiff;

- (b) Damages including aggravated and/or punitive damages.
- (c) All costs incurred in this action; and
- (d) Any other Order deemed just and equitable by this Honourable Court.

Dated this day of , 2015

Pillai Naidu & Associates

.....

Solicitors for the Plaintiff"

- [9]. The defendant filed his own affidavit in opposition to the plaintiff's above styled application objecting to any amendment to the plaintiff's statement of claim earlier filed and finally he prays that the orders prayed for the summons be dismissed with costs to be awarded on indemnity basis and/or on the higher end of the scale.
- [10]. Then both parties agreed upon to file their respective written submissions expecting a ruling on submissions, and yet only the plaintiff has filed his written submissions on 01 September 2015. However, written submissions of the plaintiff as I see is a thesis on basic principles pertaining to the amendment of pleadings burdened with case law authorities on the subject and yet, which has no focus at all to the real quandary that the plaintiff is facing in the instant application which I will be dealing with later in this ruling. However, now I consider all materials before me including the plaintiff's written submissions on the same in arriving at the final ruling.

- [11]. After the careful perusal of the case record I find no **amended statement of claim** filed by the plaintiff dated 31 December 2013, even though the law clerk KKK testifies in his affidavit that an amendment is required to the “**amended statement of claim of the plaintiff filed on 31 December 2013**”.
- [12]. This is what happens when a third party who has no knowledge at all of the actual matter at issue files affidavit on behalf of the real party to the action. It becomes more harmful to the real parties to the litigation and also it converts the whole proceedings into an absolute mockery when the law clerks fling into the shoes of the litigants in this manner.
- [13]. It is more than hilarious I say, to notice the fact that the law clerk KKK mentions in his affidavit when he says that “*an amendment is required to be made to the said statement of claim in terms of the summons filed herein in order to put before the court a material fact that was not available at the time of the filing of the amended Statement of Claim and for the purpose of determining the real controversy between the parties*” , because, for one reason is that there is no such “amended statement of claim” before this court to be amended, and the other reason is that the instant is a case filed by the plaintiff claiming damages against the defendant for the loss and damages the plaintiff personally suffered as a result of the defendant’s alleged conduct which cannot at all be a fact or facts that is/are subject to the personal knowledge of the law clerk KKK though he confesses so in his affidavit.
- [14]. Any material fact relating to the dispute between the plaintiff and the defendant whether available or not at the time of filing the amended statement of claim (however there is no such amended statement of claim) should have been a fact which is/was subject to the personal knowledge of the plaintiff, but it cannot be subject to the personal knowledge of the law clerk KKK since he is not a party to

the litigation and he has not claimed any damages against the defendant in this case.

- [15]. The law clerk KKK's affidavit is not in support of any non-contentious matters such as service of documents or related issues, but he testifies to the facts which are intensely contentious between the plaintiff and the defendant and that are contained in the pre-trial conference minutes as facts in dispute.
- [16]. The whole action of the plaintiff against the defendant is a claim for defamation based on some statements made by the defendant against the plaintiff during the period from 31 March 2013 to 15 April 2013.
- [17]. Therefore, for the reasons explained I have no faith whatsoever regarding the affidavit filed by the law clerk KKK in order to determine the present application of the plaintiff for amendment to any statement since it is irrelevant to the present matter at issue, and I toss it away by striking out as if the plaintiff has not supported the instant application with an affidavit.
- [18]. I would like to emphasize what, His Lordship Justice Winter, in REPENI SULIMUANA MONOIVALU vs TELECOM FIJI LIMITED [03 March 2006] (unrep) Suva High Court Civil Action No. 527 of 1997, commented regarding the affidavits by law clerks at page 3 in the Judgment as follows:

"The habit of supporting or opposing applications to decide the rights of parties based on the information and belief of law clerks is an embarrassment to the clerk, her firm and the court file. Justice Madraiwiwi (as he then was) had this to say about the practice of using law clerks in this way:

" It is being made clear to counsel that affidavits by law clerks were not being entertained other than in non-contentious matters such as service of documents where not disputed. The most appropriate person to have sworn the affidavit in

these proceedings was Mr. Joji Boseiwaqa who appeared on instructions from the plaintiff at the relevant time. The court respectfully endorses the general thrust of dicta by Lyons J in *Michael Harvey v Michael Kelly & Ray McGill*, Civil Action No. HBC 323 of 1977 about the propriety of law clerks deposing affidavits".

"The affidavit barely engages the applicant defendant in any meaningful way and is in any event quite illegitimate. Although the defendant has in part responded to this document by law clerk I intend to give it absolutely no weight whatsoever."

- [19]. Therefore, having regard to the sentiments made in the above case, I would, with no hesitation give the affidavit of law clerk KKK in this case absolutely no weight or no relevancy whatsoever.
- [20]. Moving on to the next episode, I certainly would like to have a close look at the annexure to KKK's affidavit submitted as "KKK1" in order to see whether or not the document KKK1 has been identified & certified by the person before whom the affidavit was sworn and attested as required by Order 41, Rule 11 (2) of the HCR.
- [21]. It is indeed proper to look at Order 41, Rule 5,6,8, and 11 of the HCR in order to grasp a further magnification of the description on execution, relevancy, who disqualifies of attesting, and contents of affidavit as it explains more comprehensively under Order 41 as follows:

Contents of affidavit [O.41, r.5 (1)]

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.

Scandalous, etc., matter in affidavit (O.41, r.6)

6. The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive.

Affidavit not to be sworn before barrister and solicitor of party, etc. (O.41, r.8)

8. No affidavit shall be sufficient if sworn before the barrister and solicitor of the party on whose behalf the affidavit is to be used or before any agent, partner or clerk of that barrister and solicitor.

Document to be used in conjunction with affidavit to be exhibited to it (O.41, r.11)

11.-(1) Any document to be used in conjunction with an affidavit must be exhibited to the affidavit.

(2) Any exhibit to an affidavit must be identified by a certificate of the person before whom the affidavit is sworn.

[22]. The exhibit KKK1 annexed to the affidavit of law clerk KKK has not been identified and certified by the commissioner for oaths who attested the affidavit. It is just a piece of paper which carries no date, no signature, but only contains some statements with no authenticity. Then a genuine question arises as to whose exhibit is the KKK1 which the commissioner of oaths identified at the time of attestation of KKK's affidavit to annex it as an exhibit? Thereby KKK1 too becomes an irrelevant document having regard to the Order 41, Rule 11 (1) & (2) of the HCR 1988.

[23]. Having exhaustively explained how defective, faulty, and unreliable is the affidavit of KKK and the exhibit to it KKK1, I cannot remain silent of what Order 41, Rule 8 says as I cited above, when it comes to the issue of attestation of affidavit i.e. before whom an affidavit shall not be sworn. I repeat and reprint here Order 41, Rule 8 for easy reference in order to highlight another important hint which is commonly disregarded by the parties and their solicitors.

Order 41. Rule 8:

No affidavit shall be sufficient if sworn before the barrister and solicitor of the party on whose behalf the affidavit is to be used or before any agent, partner or clerk of that barrister and solicitor.

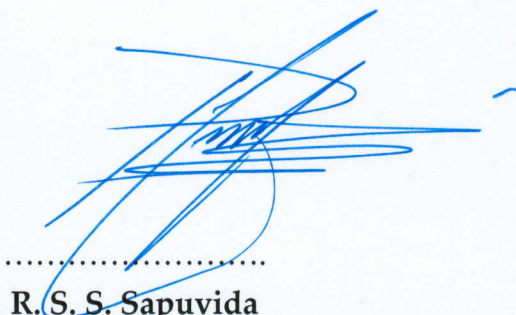
[24]. In the instant, the affidavit is given in support of the plaintiff by KKK who is the clerk [employee] of the barristers and solicitors of the plaintiff whilst the plaintiff himself is the employer of KKK and the counsel of his own case (barrister and solicitor).

[25]. Therefore, when it expressly prohibits affidavit to be "**sworn before**" a barrister and solicitor of a party on whose behalf the affidavit is to be used, **or before any agent, partner or clerk of that barrister and solicitor**, let alone the legitimacy of affidavit "**sworn by**" the clerk of the barrister and solicitor of the plaintiff on whose behalf the affidavit is to be used, and interestingly in the instant, the employee[KKK] of the law firm of the plaintiff prepares, swears, and submits the affidavit on behalf of his employer[barrister and solicitor(plaintiff)].

[26]. Then I rightfully conclude that, I see no legitimate application for leave to amend the amended statement of claim [as KKK pleads] or to amend the plaintiff's statement of claim filed on 31 December 2013.

- [27]. On the above premise, I am not committed to discuss the merits or demerits of the application of basic principles pertaining to the subject of amendments to pleadings with reference to the instant case and the plaintiff's written submissions.
- [28]. For the foregoing reasons, I affirm that the summons filed on behalf of the plaintiff through his law clerk KKK dated 22 July 2015, along with KKK's affidavit and KKK1 to amend the statement of claim is struck out and dismissed with costs summarily assessed \$ 1000. 00 payable to the defendant by the plaintiff.
- [29]. The cause shall now be preceded as before.
- [30]. The matter will be called to fix for trial on 13th November, 2015 at 9 a.m. in court No.3.




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R. S. S. Sapuvida
Judge

Dated on this 15th day of October 2015 at Lautoka

Solicitors: *Pillay Naidu & Associates for the plaintiff*
Gordon & Co for the defendant