IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
[CIVIL JURISDICTION]

DISTRICT REGISTRY
NO. 260 OF 2006L

BETWEEN : **RANJIT SINGH** formerly of Lautoka, Fiji but now residing in Toronto, Canada, Accountant.

PLAINTIFF

A N D : **LAUTOKA GENERAL TRANSPORT COMPANY LIMITED** a limited liability company having its registered office in Lautoka

1st DEFENDANT

A N D : **PYARA SINGH** and **GURBARCHANI** also known as **GURBACHANI SINGH** of Simla, Lautoka, in the Republic of Fiji, Domestic Duties and **MANPREET SINGH** of Canada, Businessman, as Executrix and Executor respectively and Trustees of the late **MALKIT SINGH** of Lautoka, Company Directors.

2nd DEFENDANTS

Before : Master U.L. Mohamed Azhar

Counsels : Mr. Ashnil Narayan for the Plaintiff
Mr. R. Gordon for the first Defendant and first named second defendant.
Mr. J. Prakashan for the second named second defendant

Date of Ruling : 05th June 2020

RULING

01. The plaintiff sued the first defendant company and his two biological brothers, namely Pyara Singh and Malkit Singh who were the directors of the first defendant company, for alleged breach of an agreement entered into by him and his brothers for sale of shares he (plaintiff) held in the first defendant company. The plaintiff originally took out the writ issued by this court through his previous solicitors and claimed in his statement of claim that, the second defendants by the agreement dated 02.07.1996 agreed to purchase 35,000 issued and allotted shares of the plaintiff in the first defendant company for the consideration of $ 290,000.00 and the sale was to be completed on 31.12. 1996. The

plaintiff further claimed that, the defendants agreed to pay the $ 200,000.00 by way of cheque to the trust account of plaintiff's solicitors and the balance amount was secured by way of an Acknowledgment of Debt which was to be paid on or before 30.06.1997. The plaintiff alleged that, the second defendants failed to pay the full consideration as agreed, but only paid a sum of $ 100,000.00 after their cheque for $ 200,000.00 was dishonoured. Therefore, the plaintiff prayed for judgment in sum of $ 793,494.79 against the defendants for the balance purchase price and the interest at the rate of 13% from 07.02.2006.

02. The 2nd defendants admitted entering into such agreement, however denied the liability claiming that, the 1st defendant company never passed the resolution for such transfer of shares. The 2nd defendants further stated that, there was no such acknowledgment of debt as alleged by the plaintiff and the amount of $ 100,000 paid to the plaintiff was for the repayment of monies lent by the plaintiff to the first defendant and was not in accordance with the alleged Acknowledgment of Debt. The defendants therefore moved the court to dismiss plaintiff's action with the cost on client/solicitor indemnity basis. The matter passed through all pre-trial steps with the copy pleadings for the reference of trial judge. The plaintiff then amended the claim two times with the leave of the court and the copy pleadings were filed for the second time. The matter was pending for trial and the second named second defendant passed away. The judge later stayed the matter pending substitution for the second named second defendant. The judge further ordered that, the defendants could take the notice under the Order 25 rule 9 if the plaintiff was inactive for more than six months.

03. The plaintiff then filed the instant summons seeking two orders. Firstly, the plaintiff sought leave to substitute Gurbarchani also known as Gurbachani Singh of Simla, Lautoka, in the Republic of Fiji, Domestic Duties and Manpreet Singh of Canada, Businessman, as Executrix and Executor respectively and Trustees of late Malkit Singh – the then second named second defendant. Secondly, the plaintiff sought an order on the defendants to disclose by affidavit the copies of the following documents :

a. **Annual Returns** lodged with the Companies Officer for the period 1996 to 2015 (both inclusive),

b. **All Notice of Meetings** issued to the Directors of the 1st Defendant for the period 1996 to 2015 (both inclusive),

c. **All Annual Financial Statements** (including Profit and Loss and Balance Sheets) of the 1st Defendant for the period 1996 to 2015 (both inclusive),

d. **All Income Tax Assessments of the 1st Defendant and 2nd Defendants** for the period 1996 to 2015 (both inclusive), and

e. **All Minutes of all Company Meetings**, held by the directors of the 1st Defendant including minutes of all Annual General Meetings, all Extraordinary Meetings and all Board Meetings for the period 1996 to 2015 (both inclusive).

04. The summons is supported by an affidavit sworn by an associate of the plaintiff's solicitors. The summons also seeks costs on indemnity basis. The defendants consented for the first order sought by the plaintiff to substitute the Executrix and Executor and Trustees of the Estate of late Malkit Singh. The court, by consent, made order to substitute the Executrix and Executor and Trustees for the original second named second defendant and the caption was amended accordingly as reflected above. However, the defendants objected the summons for specific discovery and filed affidavits in opposition and the plaintiff filed the affidavit in reply sworn by the same associate of his solicitors.

05. At hearing of the summons, the counsels made oral submission and later filed their respective written submission on the law and facts in relation to the specific discovery orders sought by the plaintiff. The counsel for the first defendant and the first named second defendant took up preliminary objections to the affidavits sworn by the associate of the solicitors for the plaintiff (hereinafter called and referred to as **the impugned affidavits**) and submitted that, the said affidavits have no force and avail in law and must be struck out. The counsel founded his objection on the following three reasons:

a. The deponent – the solicitor – is not a party to the proceedings; nor is she a witness for the plaintiff;

b. The matter deposed in the impugned affidavit are the matter which ought to be deposed by the plaintiff himself; and

c. The facts deposed by the deponent – solicitor – do not state the "ground" or the "source" of the information relied on.

06. The counsel relied on the decision of the High Court in **Bulileka Hire Services Ltd v Housing Authority** [2016] FJHC 322; HBC57.2011 (25 April 2016) in support of his above submission. The Court in the above decision struck out the affidavit sworn by a solicitor on behalf of his client in support of an application for leave to appeal and stay pending appeal.

07. It appears that, the preliminary objection stems from the sole reason that, the impugned affidavits were sworn by a person other than the plaintiff in this matter. As a result,

several questions arise out of the preliminary objection of the counsel on the impugned affidavits. Firstly, should a deponent be a party or witness in a proceeding to depose an affidavit? Secondly, should all affidavits in a civil suit be deposed by the party i.e. plaintiff or defendant only? Thirdly, how the 'source of information' or 'ground of belief' in an affidavit should be stated?

08. Affidavits are a source of providing evidence and anyone privy to knowledge and information has a right to depose to an affidavit (**Vodafone Fiji Ltd v Pacificconnex Investment Ltd** [2010] FJHC 419; HBE097.2008). Despite the courts, on numerous occasions, had dealt with several objections and issues in relation to the affidavits filed in civil suits, some issues are still being raised on admissibility and regularity of affidavits. **Kalabo Investments Ltd v New India Assurance Co Ltd** [2019] FJCA 210; ABU0010.2019, decided on 4 October 2019 is the latest case in which the Fiji Court of Appeal dealt with such an issue. Thus, it has become necessary to deal these issues along with the objection taken up against the impugned affidavits in this case. The Order 41 of the High Court Rules deals with the matters connected with the affidavits that are filed in civil suits. Though the rules do not directly state who can depose an affidavit, rule 5 provides for the contents of an affidavit which can give a clear idea as to who can depose it. The rule 5 reads:

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. (Emphasis added).

09. As emphasized in the above rule, a person, who is able of his own knowledge to prove such facts, can depose an affidavit to that effect, subject however to the specific rules mentioned therein and paragraph 2 of that rule. In this sense, the affidavit is equated to the oral evidence given in court. The **Supreme Court Practice (White Book) 1988** has the identical rule under Order 41. However the **Supreme Court Practice (White Book) 1988** clearly explains effect of the rule in an useful manner and it reads:

41/5/1 Effect of rule

This rule was taken from the former O.38, r.3. Its effect is to require that save in the excepted cases, an affidavit must contain the evidence of the

deponent as o such facts only as he is able to speak of to his own knowledge, and to this extent, equating affidavit evidence to oral evidence given in Court.

The excepted cases are:
(1) affidavits under O.14, rr.2(2) and 4(2) either by the plaintiff or by the defendant:
(2) affidavits made pursuant to an order under O.38, r.3(2)(a) that evidence of any particular fact may be given at the trial by statement on oath of information or belief; and
(3) affidavits for use in interlocutory proceedings. See also, O.49, r.2 (affidavit to obtain garnishee order nisi); O.50, r.1 (4) and r.3 (affidavit to obtain charging order on land or securities).

10. Since the rules are identical the above passage from the White Book can be used to understand the effect of our rules as well. Accordingly, the general rule is that a person, who is able to speak of the matter to his own knowledge, can depose an affidavit. The first category of exceptions is the affidavits under Order 14, rules 2(2) and 4(2), Order 86, rule 2(1). These affidavits must be sworn by the respective party to an action. If an affidavit under this category is sworn by a person other than the party to that action, he or she should state his or her means of knowledge and also the fact that he or she is authorized to make such affidavit. On that note, it must be emphasized that, the authorization is required only when a person other than the plaintiff or the defendant deposes an affidavit in relation to an application that falls under the first category of exception. It must also be emphasized that, there is no requirement to call for an authority be in writing and attached with the affidavit, as sometimes it is argued. Those who argue that an authority must be in writing and attached with such affidavit to consider it admissible, often rely on the note that appears at page 117 of the **White Book 1967.** It states as follows;

'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".*

11. On the face of it, the above note makes a general inference that, there must be an authority from the party, either the plaintiff or the defendant, if the affidavit is not deposed by him. However, a careful reading of the said authority **Chingwin –v- Russell** reveals that, it was decided under Order 14, which is one of the common exceptions mentioned in both High Court Rules of Fiji (Order 41 rule 5) and White Book 1988 as stated above. The following dictum of **Vaughan Williams L.J.** in that case makes it

crystal clear that, the courts required the authority from the respective party only in cases of first category of exceptions, which requires the respective parties to swear the affidavits, as identified by the above rules. His Lordship **Vaughan Williams** held that;

> *"Where an affidavit in support of a summons under Order 14 is sworn by a person other than the plaintiff he should state his means of knowledge and also the **fact** that he is authorized to make the affidavit."* (Emphasis added).

12. The above dictum makes two propositions abundantly clear. Firstly, the case (**Chingwin –v- Russell**) decided under one of the exceptions (Order 14) should not, generally, be applied to all the affidavits in the civil suits. Secondly, the court did not call for a written authority to swear the affidavit to be attached when a person other than the party deposed such affidavit, but, the court required the deponent to state the fact that he was authorized to do so, as emphasized above.

13. In that case, His Lordship **Vaughan Williams** cited another case, which is **Lagos v. Grunwaldt** (1910) 1 K.B 41. That case too was decided under Order 14. In that latter case, the plaintiff, who had acted as the legal representative of the defendants during litigation in South America, sent his bill of costs to their solicitors in England, and afterwards issued a specially indorsed writ against the defendants, claiming the professional charges and disbursements. An application for leave to sign judgment under Order XIV was supported by an affidavit made by a member of the English firm of solicitors who represented the plaintiff. This affidavit was sworn in London, and the deponent stated that he was a member of the firm of solicitors acting for the plaintiff; that the defendants were justly truly indebted to the plaintiff in the sum claimed in the writ for professional charges; gave the history of the case; and added that it was within his own knowledge that the debt was incurred and was till owing; such knowledge being obtained from correspondence received from the plaintiff and from correspondence and conversations the deponent had had with the defendant's solicitors. The deponent further stated that, he was duly authorized by the plaintiff to make the affidavit. The Court of Appeal unanimously held that;

> *There was a liquidated demand, but that the affidavit was irregular, **in as much as the deponent was not a person who could swear positively to the facts and verify the cause of action and the amount claimed within Order XIV, r.1, and his affidavit was only made on information and belief**. The conditions imposed by the rule were not fulfilled, and the Court had no jurisdiction to make an order under Order XIV.* (Emphasis added).

14. In the above case, the deponent had clearly averred in the disputed affidavit that, he was duly ***authorized by the plaintiff*** to make the said affidavit. However, the court did not require a written authority to be attached with the said affidavit, but, went on to examine whether the deponent could have *positively sworn to the facts*. **Cozens-Hardy M.R** said at pages 46 and 47 that;

> *He says, "I verily believe that there is no defence to this action," and then, "It is within my own knowledge that the said debt was incurred and is still due and owing, such knowledge being obtained from correspondence received from the plaintiff and also from correspondence and conversations I have had with Messers. Pritchard, Englefield & Co. I am duly authorized by the plaintiff to make this affidavit." In my opinion it is impossible to say that this is an affidavit made by a person who can swear positively to the facts. It is obviously nothing more than a statement made on his information and belief, that information being derived from his own client, the plaintiff, who tells him this is due – and that obviously will not be enough to enable him to make the affidavit – and from further statements made by Pritchard, Englefield & Co., who, beyond all doubt, were not the solicitors for the defendant Grunwaldt at the time when those statements were made. Is it possible that the deponent can swear positively to the facts as to the stamped paper for forty-three documents, which is the first item in the bill which is given here? Is it possible that he can swear this sum was paid? I might go through all the items. Is it possible that he can swear that the fees charged by Dr. Lagos and another attorney, amounting to 1,500l in all, were due? It seems to me we should be giving an irrational and improper extension to Order XIV, r.1, if we said that such an affidavit as that, made in aid of the plaintiff, was sufficient to bring his claim within the peculiar provisions of Order XIV. In my opinion on that ground there was no jurisdiction under Order XIV, to make the order which was made. We might as well say that the plaintiff's solicitor in every case could make an affidavit to satisfy Order XIV, and that would be dangerous beyond anything. There may be cases (I do not wish to be misunderstood on this point) in which the plaintiff's solicitor or the plaintiff's solicitor's clerk may be perfectly competent to make an affidavit satisfying the conditions of Order XIV, r.1. There are no conditions here which justify us in saying that the plaintiff's solicitor could make the affidavit and swear positively to the facts, and swear positively verifying the amount claimed.* (Emphasis added)

15. It follows from the above decisions that, the authority to swear an affidavit should be required only in those circumstances that fall under the first category of exception under Order 41 rule 5. However, the authority alone cannot make an affidavit admissible, but the court is still under duty to examine, whether the deponent can positively swear to the facts contained in the affidavits. An affidavit may still be irregular if the deponent is unable to positively swearing to the facts, even though he or she was authorized to do so, as described by the above decision. It follows that; those affidavits under this category cannot be made on information or belief.

16. The second exception is the affidavits made pursuant to Order 38, rule 3 of the High Court Rules. This Order deals with the evidence in trial of any action begun by writ and the court has discretion under this rule to order the affidavit of any witness be read in trial. In addition, the court may, under Order 38 rule 3, order any particular fact may be given by statement on oath of information or belief. Any person may depose an affidavit of any particular fact of information and belief for this purpose. This rule mainly applies to the witnesses and especially the expert and professional witnesses who give evidence which contains their professional opinion and expert ideas and therefore, no authorization, from the person on whose behalf the affidavit was made, is needed to depose such information and belief. In **Kalabo Investments Ltd v New India Assurance Co Ltd** (supra) the Fiji Court of Appeal held that, the authorization is not required when professional experts depose their professional opinion in affidavits.

17. The paragraph (2) of the Order 41 rule 5 operates as the third exception to the primary rule of evidence stated expressly in Ord 41, r 5(1) that a person may only give evidence as to 'facts', which he 'is able of his own knowledge to prove'. This paragraph provides that, 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 difference between this exception and the second exception under Order 38 rule 3 is that, the deponent, under this third exception, must state the source of information and grounds of belief as he or she deposes the said affidavit on behalf of others and that affidavit to be used in interlocutory proceedings. This exception plainly allows the deponent to adduce facts he heard from others in the interlocutory proceedings and also allows a statement of belief, that is to say an opinion. However, that belief must be that of the deponent, and such statements will have no probative value unless the sources and grounds of the information and belief are revealed. In **Savings and Investment Bank Ltd v Gasco Investments (Netherlands) BV and Others** [1984] 1 WLR 271, [1984] 1 All ER 296, Peter Gibson J explained the nature, operation and effect of paragraph 2 of rule 5 of Order 41 and held at page 305 that:

It is obvious from r 5(2) itself that it operates as an exception from the primary rule of evidence stated expressly in Ord 41, r 5(1) that a person may only give evidence as to 'facts', which he 'is able of his own knowledge to prove'. Rule 5(2), by including statements of information or belief, plainly allows the adduction of hearsay. It also allows a statement of belief, that is to say an opinion but in its context that belief must be that of the deponent, and such statements will have no probative value unless the sources and grounds of the information and belief are revealed. To my mind 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 prove but which, the deponent is informed and believes, can be proved by means which the deponent identifies by specifying the sources and grounds of his information and belief. What r 5(2) allows the deponent to state that he has obtained from another must, in my judgment, be limited to what is admissible as evidence.

18. The question is what applications are to be considered as interlocutory proceedings for the purpose of this exception and how the source of information and ground of belief to be averred? It must be emphasized that, all the interlocutory proceedings are not falling within the ambit of this rule. The English Court of Appeal construed this rule in a way which draws a distinction between the general interlocutory proceedings and the interlocutory proceeding where a right of a party to be determined. Accordingly, the proceedings such as the one that is made for the purpose of maintaining status quo till the rights are decided or for the purpose of obtaining some directions from the court are considered as interlocutory proceedings for the purpose of this rule. However, the interlocutory proceedings which decide the rights of the parties are not falling into this category, even though they are interlocutory proceedings per se. The authority for this proposition is found in the judgment of Lord Justice Cotton in **Gilbert v. Endean** (1878), 9 Ch.D. 259. Cotton L.J held at page 268 that:

"...for the purpose of this rule those applications only are considered interlocutory which do not decide the rights of parties, but are made for the purpose of keeping things in status quo till the rights can be decided, or for the purpose of obtaining some direction of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties. Now many of the cases which are brought before the court on motions and on petitions, and which are therefore interlocutory in form, are not interlocutory within the meaning of that rule as regards

evidence. They are to decide the rights of the parties and whatever the form may be in which such questions are brought before the court, in my opinion the evidence must be regulated by the ordinary rules, and must be such as would be admissible at the hearing of the cause.

19. The above decision was followed in two subsequent cases, namely **Rossage v. Rossage and Others** [1960] I W.L.R. 249; [1960] I All E.R. 600, C.A, and **Re J. (An Infant)** [1960] I W.L.R. 253; [1960] I All E.R.603 and both cases referred the above passage of Lord Justice Cotton.

20. The next is the source of information and grounds of belief to be averred in an affidavit. It must be noted that, one of the three reasons for objecting the impugned affidavit in this case is that, the deponent failed to aver the source of information contained in the said affidavit. Unlike the second exception under Order 38 rule 3, as discussed above, this exception [rule 5 (2)] requires the deponent of the affidavits used in interlocutory proceedings to give the source of information and grounds of belief. The purpose 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 prove but which, the deponent is informed and believes, can be proved by means which the deponent identifies by specifying the sources and grounds of his information and belief.

21. **In Re J. L. Young Manufacturing Company Limited** [1900] 2 Ch.D, 753 the affidavits, sworn without indicating the source of the information, drew the attention of the court and Lord Alverstone C.J. held at page 754 that:

> *This case is one of general importance as regards the practice of the admissibility of evidence by affidavit. In my opinion some of the affidavits in this case are wholly worthless and not to be relied upon. I notice 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 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 as evidence in any shape whatever; and as soon as affidavits are drawn so as to avoid matters that are not evidence, the better it will be for the administration of justice.*

22. In the same case, Rigby L.J. concurring with Lord Chief Justice stated at pages 754 and 755 that:

> *I will add a few words to what the Lord Chief Justice has said with regard to affidavits and the way in which they are often framed.*
>
> *In the present day, in utter defiance of the order (Rules of the Supreme Court, 1883, Order xxxviii., r. 3) (1), solicitors have got into a practice of filing affidavits in which the deponent speaks not only of what he knows but also of what he believes, without giving the slightest intimation with regard to what his belief is founded on. Or he says, "I am informed," without giving the slightest intimation where he has got his information. Now, every affidavit of that kind is utterly irregular, and, in my opinion, the only way to bring about a change in that irregular practice is for the judge, in every case of the kind, to give a direction that the costs of the affidavit, so far as it relates to matters of mere information or belief, shall be paid by the person responsible for the affidavit. At any rate, speaking for myself, I should be ready to give such a direction in any such case. The point is a very important one indeed. I frequently find affidavits stuffed with irregular matter of this sort. I have protested against the practice again and again, but no alteration takes place. The truth is that the drawer of the affidavit thinks he can obtain some improper advantage by putting in a statement on information and belief, and he rests his case upon that. I never pay the slightest attention myself to affidavits of that kind, whether they be used on interlocutory applications or on final ones, because the rule is perfectly general-that, when a deponent makes a statement on his information and belief, he must state the ground of that information and belief.*

23. Lord Justice Vaugan William in that case that further went on to suggest that, the solicitors should be punished with the cost if such affidavits without indicating the source of information and belief are filed in the civil suits. His Lordship held at page 755 that:

> *With regard to affidavits of the sort before us, it is quite a sufficient or satisfactory remedy to throw upon the party upon whose behalf such affidavits are put forward the liability of paying the costs of those affidavits. The only more satisfactory remedy is one which I am aware is difficult, if not impossible, to apply as the law stands : namely, that no one should pay for these affidavits at all, and that the solicitor who has drawn*

these affidavits and made copies of them, and so forth, should be left out of pocket thereby.

24. The above decision unanimously held that the affidavits without source of information and belief are worthless and ought not to be received as evidence in any shape whatever. Whilst renouncing such practice in both interlocutory and final ones, the English Court of Appeal held that, such affidavits should not be received as evidence and further suggested punishing the parties or their solicitors by way of imposing cost for making such affidavits.

25. In fact, the Supreme Court of Fiji too recognized in **Pacific Agencies (Fiji) Ltd v Spurling** [2008] FJSC 27; CBV0007.2008S (17 October 2008) that, affidavits sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof and the court further held that, the requirement to state the source of information to be adhered. The court referring Order 41 rule 5(2), held at paragraph 30 as follows:

> Order 41 rule 5(2) permits an affidavit sworn for the purpose of being used in interlocutory proceedings to contain statements of information or belief with the sources and grounds thereof. This practice can be traced back at least as far as the nineteenth century. So long as the requirement to state the source of information is adhered to, the practice is beneficial given that time may be of the essence. If there is a genuine contest about the information thus sworn to, it can be raised by a counter- affidavit as well as a submission as to weight. We would point out that any practice of disregarding the letter or spirit of Order 41 r 5(2) may have adverse consequences both in regards to timeliness and cost that must be kept in mind.

26. Furthermore, it is not sufficient for the deponent to identify only the source of his information when it is clear that, the said source is not the original source. If such original source is not identified, it will give an opportunity for the opponent to object the evidence contained in such affidavit and also will warrant the intervention of the court to decide the weight to be given to such evidence. Peter Gibson J in **Savings and Investment Bank Ltd v Gasco Investments (Netherlands) BV and Others** (supra) further held at page 305 that:

> *Further I find it impossible to accept counsel for SIB's submission that it is sufficient in order to comply with r 5(2) that the deponent should identify only the source to him of his information even though it is clear that that*

source was not the original source. Thus, if the deponent was informed of a fact by A, whom the deponent knows not to have firsthand knowledge of the fact but who had obtained the information from B, I cannot believe that it is sufficient for the deponent to identify A as the source of the information. That, to my mind, would largely defeat the requirement that the sources and grounds should be stated and would make it only too easy to introduce prejudicial material without revealing the original source of hearsay information by the expedient of procuring as the deponent a person who receives information second hand. By having to reveal such original source and not merely 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.

27. The above discussion concludes that the affidavits are equated with the oral evidence in court and the general rule is that a person who is able of his own knowledge to prove facts can depose an affidavit. However, the excepted circumstances are: firstly, the affidavits for purpose of Order 14, rules 2(2), 4(2), and Order 86, rule 2(1) should be sworn by the parties, either the plaintiff or the defendants. If not, by the person duly authorized by them. There is no requirement for a written authority being annexed with the affidavit, but the averment to that effect is sufficient. Even though the deponent is authorized to do so, the court should examine whether such deponent can swear positively to the facts contained in that affidavit and if not, that affidavit should not be admitted in evidence. Secondly, the affidavit made under Order 38 rule 3 to give evidence of any particular fact may contain statement on oath of information or belief. Final exception is the affidavit sworn for the purpose of being used in interlocutory proceedings. All interlocutory proceedings are not falling under this category, but the proceedings such as the one that is made for the purpose of maintaining status quo till the rights are decided or for the purpose of obtaining some directions from the court are considered as interlocutory proceedings for this purpose. Further the deponent in this case should identify the original source of information and belief and the failure will result in such affidavit being rejected by the court. Apart from this, there may be other form of affidavits which are mandatorily required by the rules, such as the Affidavits Verifying List of Documents of the parties [see: Or. 24 r, 5 (3)]. In such cases, the mandatory provisions must be met.

28. The counsel for the first defendant and first named second defendant raised another objection to affidavit supporting the summons for specific discover on the ground that it was sworn by an associate of the law firm of the plaintiff. Therefore, it is necessary to discuss that issue too before examining the impugned affidavits in this case. Citing the

decision in **Bulileka Hire Services Ltd v Housing Authority** (supra and hereinafter called and referred to as '**Bulileka Case**') the counsel submitted to strike out the above affidavit. The Court in the above decision struck out the affidavit sworn by the solicitor in support of an application for leave to appeal and stay pending appeal of his client. The court in that case relied on the Order 41 rule 9 and observed that, if an affidavit sworn before the barrister and solicitor of the party is not to be used, an affidavit of the solicitor himself has no force or avail in law. The court in that case, considered the decision of Fiji Court of Appeal in **Pacific Agencies (Fiji) Ltd v Spurling** [2008] FJCA 49; Civil Appeal Miscellaneous 10 of 2008S (22 August 2008) and further observed that the judgment of Court of Appeal does not suggest that the solicitor has right to depose an affidavit in behalf of his client. The question therefore is whether the impugned affidavits in this case which was sworn by an associate of the plaintiff's solicitors on his behalf should be rejected following the decision in **Bulileka Case** cited by the counsel for the first defendant and first named second defendant?

29. Certainly, the decision in '**Bulileka Case**' is binding on this court. However, I wish to consider few facts before coming to a conclusion on following that decision. Firstly, the affidavit is a statement of facts under an oath or affirmation administrated by a person duly authorized by law. Any person privy to a fact may depose an affidavit to that effect and it is equated to the oral evidence. Secondly, there is no provision either in any statute or rules of the court that prevents a solicitor from deposing an affidavit on behalf of his client. Thirdly, the court in '**Bulileka Case**' cited the decision of the Fiji Court of Appeal in **Pacific Agencies (Fiji) Ltd v Spurling** (supra) and held in paragraph 18 that, there is nothing in said judgment which suggests that the solicitor who represents a party in Court has the right to depose an affidavit on his behalf. However, Hickie JA delivering the judgment of the Court of Appeal in that case was of the view that the affidavit could have been sworn by the solicitor who knew the issues. He said at paragraph 6:

> There are a number of matters deposed to in the Affidavit which should have been sworn to by the Solicitor with the conduct of the matter. For example, how can a non-lawyer, depose as to:
>
> (a) what the Solicitors on the Court record did or did not do on 16 July 2008 (paragraph 4);
>
> (b) what "has been well settled law and common practice in Fiji" (paragraph 7) or the "usual rule and practice" (paragraph 7); or
>
> (c) "that the Defendant has valid and arguable grounds of appeal which raise important questions of law and have reasonable prospects of success" (paragraph 8)?

30. The Supreme Court, in the same case (**Pacific Agencies (Fiji) Ltd v Spurling** [2008] FJSC 27; CBV0007.2008S decided on 17 October 2008) had some concerns on the view of Hickie JA in relation to the sole knowledge of solicitors of the issues in that case and held paragraphs 31 and 32 that:

> [31] Hickie JA was critical of Ms Narayan's affidavit for having deposed to matters solely within the knowledge of her solicitor. We do not share such views.
>
> [32] We were informed that there is a practice within Fiji of objection being taken if the lawyer who swears an affidavit appears as advocate in the case. While we express no view as to when such objection may or may not be appropriate,

31. Whilst the Court of Appeal held that, the affidavit in that case should have been sworn by the solicitor who had sole knowledge of the matter, the Supreme Court did not comment on solicitors swearing an affidavit on behalf of the clients. What is important is that, neither the Court of Appeal, nor the Supreme Court did hold that, a solicitor cannot swear an affidavit on behalf of his or her client.

32. Fourthly, in **Lagos v. Grunwaldt** (supra) the affidavit supporting the application for summary judgement under Order 14 was sworn by the member of the law firm that represented the plaintiff. The English Court of Appeal rejected the said affidavit on the basis that, the deponent could not have positively sworn to the facts contained in that affidavit and not on the basis that it was sworn by the associate of plaintiff's solicitors. It appears for sure that, the superior courts both in Fiji and United Kingdom did not reject the affidavits solely on the basis they were sworn by the solicitors on behalf of their clients, because there is no special rule requiring rejection of such affidavits. Finally, the affidavits of the solicitors in respect of interlocutory matters may be the best evidence available. It may also be economical and timely to have solicitors or their associates swear an affidavit in support of interlocutory applications. If any such affidavit is filed it cannot be rejected as long as the said affidavit complies with the requirements under Order 45 rule 5 of the High Court Rules.

33. However, it is always best to discourage this practice of solicitors swearing affidavit on behalf their clients, for it carries the inherent risks such as, inadvertently putting the solicitor's credibility in issue, waiver of privilege and the solicitor being subject to cross examination etc. For these reasons, I prefer reasoning of Fiji Court of Appeal and Supreme Court in **Pacific Agencies (Fiji) Ltd v Spurling** (supra) and position of English Court of Appeal in relation to an affidavit sworn by the solicitors in **Lagos v. Grunwaldt** (supra) over the decision of **Bulileka Case** cited by the counsel for the first defendant and first named second defendant. Therefore, I decide an affidavit sworn by a

solicitor on behalf of his or her client should not be rejected solely on the basis it was sworn by such solicitor on behalf of his or her client. The court should consider whether any such affidavit complies with the Order 42 rule 5 or not before deciding either to receive in evidence or reject it.

34. In this background, I now turn to examine the impugned affidavit that supports the plaintiff's application for specific discovery. The deponent is a member of the law firm that represents the plaintiff in this case. Though, she stated in paragraph 2 of both affidavits that, she deposed the facts on her own knowledge, she could not have done so. She should have obviously deposed to the facts on instruction of the plaintiff and the solicitor who is in carriage of this matter as it appears from her affidavits. She stated in in paragraph 16 of the affidavit in reply that, she denied paragraph 3 of Gurbachani's affidavit on instruction of the plaintiff. Likewise, her reply in paragraph 23 of the same affidavit too is based on the instruction of the plaintiff as she expressly stated therein. In addition, the paragraphs 12, 20 and 22 of the same affidavit are evident that, she had been advised by Mr. Ashnil Narayan who is the counsel in carriage of this matter. Thus, the impugned affidavits are not falling in the general rule of Order 45 rule 5 that, a person who is able of his own knowledge to prove facts can depose an affidavit.

35. The next question is whether the said affidavit falls under any of the exceptions under that rule. Since the application for specific discovery is made under Order 24 rule 7, the first two exceptions that deal with the affidavits under Orders 14 and 38 are not relevant to the said affidavit. The last exception is the affidavit sworn for the purpose of being used in interlocutory proceedings. For an affidavit to fall under this exception, two requirements should be fulfilled. First the proceedings should be interlocutory as defined by Lord Justice Cotton in **Gilbert v. Endean** (supra) which was followed in two subsequent cases, namely **Rossage v. Rossage and Others** (supra) and **Re J. (An Infant)** (supra). The above decisions made it clear that, for the purpose of this rule those applications only are considered interlocutory which do not decide the rights of parties, but are made for the purpose of keeping things in status quo till the rights can be decided, or for the purpose of obtaining some direction of the court as to how the cause is to be conducted. The proceeding for specific discovery is literally an interlocutory proceeding, however, the courts do not just give some directions in this proceeding; rather they make decisions on the rights of the either party to have access to other party's documents which are otherwise privileged and/or sensitive and/or confidential in nature, and allow a derogation of right of privacy to some extent in relation to those documents ordered to be disclosed. Accordingly, the proceedings for specific discovery are not interlocutory in terms of above decisions for the purpose of third exception under Order 41 rule 5. As a result, the impugned affidavits neither fall under the general rule, nor under the exceptions under Order 41 rule 5 of the High Court Rules.

36. Even if I am wrong in holding that, the proceedings for specific discovery is not interlocutory for the purpose of third exception to Order 41 rule 5, the impugned affidavits still fail to fulfil the second mandatory requirement of disclosing the source of information and grounds of belief, to fall under that exception. The paragraphs 12, 16, 20, 22, and 23 of the affidavit in reply sworn by Ms. Samantha are evident that, her sources of information were the plaintiff and the counsel in carriage of this matter. Particularly, when the first named second defendant in paragraph 17 of his affidavit in opposition raised an issue on the relevancy of the documents sought by the plaintiff, the deponent in the affidavit in reply (paragraph 12) stated that, this matter will be addressed by the counsel in carriage at the hearing. The deponent replied in the same manner in paragraphs 20 and 23 as well. This shows that, she has no knowledge to respond to the opponents' assertion. Likewise, in paragraphs 16 and 23 of the affidavit in reply Ms. Samantha had replied to the affidavits of the defendants on the instruction she received from the plaintiff. On contrary, she averred in paragraph 2 of both affidavit that, she sworn the impugned affidavits on her own knowledge, which is not true. Therefore, the impugned affidavits violated the requirement of disclosing the source. The English Court of Appeal in **In Re J. L. Young Manufacturing Company Limited** (supra) unanimously held that, the affidavits which do not give the source of information and or grounds of belief are worthless and irregular. It must be noted that, Lord Justice Vaugan William in that case went on to say that, the solicitor who has drawn these affidavits and made copies of them, and so forth, should be left out of pocket thereby. It is now clear that, the impugned affidavits neither fall under the general rule of affidavit, nor under any of the three exceptions provided in Order 41 rule 5 of the High Court Rules. As the result, I uphold the preliminary objection raised on behalf of the first defendant and first named second defendant in this case and reject both affidavits sworn by the associate of solicitors of the plaintiff.

37. As Sir John Donaldson MR explained the justification for the discovery procedure in **Davies v Eli Lilly & Co. and Others** [1987] 1 WLR 428 at page 431, the litigation is conducted "cards face up on the table." Therefore, the rules of the court provide for the ways of discovery of documents in civil suits. The Order 24 of the High Court Rules provides for the discovery and inspection of documents. All seventeen rules under this Order, basically deal with (a) mutual discovery, (b) discovery by order of the court and (c) the failure to comply with the requirement for discovery and (d) variation of order made by the court. However, the court can intervene on issue of discovery between the parties only on application supported by an affidavit as per Or 34 rule 7 (3). The supporting affidavit must show the specific documents or class of documents do in fact exist or have existed, and are relevant. Further they were in possession, custody or power of the opposing party: **Ram Kumar Singh v. Minjesk Investment Corporation and Other** (Civil Action No HBC 148 of 2006). Since the supporting affidavit sworn by the

associate of plaintiff's solicitors is declared irregular as not complying with the provisions of the Order 41 rule 5, the application of the plaintiff for specific discovery fails.

38. Lord Justice Vaugan William whilst concurring with Lord Alverstone C.J. and Rigby L.J. in **In Re J. L. Young Manufacturing Company Limited** (supra) held that the solicitor, who has drawn the affidavits without giving source of information and grounds of belief and made copies of them, and so forth, should be left out of pocket thereby. Therefore, the defendants must be compensated with the reasonable cost in this matter.

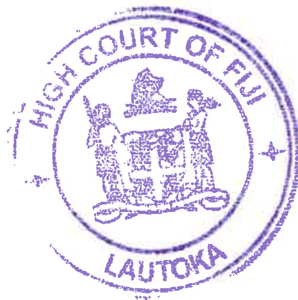
39. In result, I make the following orders:

a. The affidavits sworn by Ms. Samantha (the impugned affidavits) on behalf of the plaintiff are declared irregular and struck out,

b. The summons filed by the plaintiff for specific discovery is dismissed accordingly,

c. The plaintiff should pay a summarily assess cost of $ 1,500 to each of the first defendant, first named second defendant and $ 1,500 to both trustees of Estate of Malkit Singh within a month from today, and total cost to be paid by the plaintiff is $ 4,500.00, and

d. The matter is referred to Deputy Registrar to allocate this matter to a judge for trial.



U.L. Mohamed Azhar
Master of High Court

At Lautoka
05.06.2020