

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**

Civil Action Number: **HBC 85 of 2017**

**BETWEEN** : **PAULINE STEPHEN MORRIS**  
**(Executor and trustee of the estate of Sebastian Fai Morris)**

**1<sup>ST</sup> PLAINTIFF**

**AND** : **PAULINE STEPHEN MORRIS**

**2<sup>ND</sup> PLAINTIFF**

**AND** : **SABIR QAUIYUM HUSSAIN *t/a* SABIR BUILDERS**

**DEFENDANT**

**BEFORE** : **M. Javed Mansoor, J**

**COUNSEL** : **Mr. E. Kumar for the first and second plaintiffs**

: **Mr. V. Kumar for the defendant**

**Date of Hearing** : **08 May 2023**

**Date of Decision** : **24 May 2023**

# DECISION

*PRACTICE & PROCEDURE Application to strike out – Claim of impersonation – Service of writ out of jurisdiction*

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1. The defendant has filed a strike out application on the basis that he was impersonated by his father.
2. The plaintiffs filed action based on a building contract that the parties entered into on 2 March 2016. In their statement of claim, the plaintiffs pleaded that the defendant did not perform its obligations under the building contract. The plaintiffs sought damages and an order directing the defendant to complete the contract dated 2 March 2016.
3. Acknowledgement of service was filed on 24 April 2017. Statement of defense was filed by Amrit Chand Lawyers on 3 May 2017. The plaintiff filed a reply to defence on 9 June 2017. Summons for directions was filed on the same date. The affidavit verifying the list of documents was filed on behalf of the plaintiffs on 13 September 2017 and on behalf of the defendant on 4 October 2017. Pre-trial conference minutes was filed on 1 May 2018, copy pleadings on 12 June 2018 and summons to enter the action was filed on 12 June 2018. Subpoenas were served on several witnesses and corresponding affidavits of service were filed by October 2018.
4. On 15 November 2018, Amrit Chand Lawyers, the solicitors for the defendant, filed a summons for withdrawal as solicitors, supported by an affidavit from Divneel Divkash Chand, a legal executive of the law firm. This was followed by an *ex-parte* notice of motion filed on 26 February 2019 by Amrit Chand Lawyers seeking an order for substituted service on the defendant of the summons for withdrawal by placing an advertisement in a daily newspaper. After court allowed the solicitors' application by order made on 28 February 2019, a notice was published on 29 March 2019. The notice stated that Amrit Chand Lawyers have ceased to act for the defendant.

5. Thereafter, a notice of change of lawyers was filed on 2 April 2019 by MIQ Lawyers on behalf of the defendant. The summons to substitute the first plaintiff was filed on 2 February 2022, following the death of the first plaintiff. An order for substitution of the first plaintiff was made on 1 April 2022. A notice of change of solicitors was filed on 13 June 2022 on behalf of the defendant by Sunil Kumar Esq. The new solicitors were appointed in place of MIQ Lawyers. The plaintiff filed an amended writ of summons together with the statement of claim on 5 August 2022.
6. The defendant filed a summons to strike out through his new solicitors on 10 August 2022, with a supporting affidavit from Aitul Bi Hussein. She is the sister of Sabir Hussein aka Sabir Khaiyum Hussein of 19 Ophelia, Oakhurst NSW, Australia. She holds a power of attorney on behalf of the defendant. The application to strike out was made in terms of Order 6 rule 6 (1) and Order 18 rule 18 (1) (a), (b), (c) & (d) of the High Court Rules 1988 and under the inherent jurisdiction of the court. The plaintiff filed its affidavit in opposition on 27 January 2023. An affidavit was also filed on 30 January 2023 on behalf of the plaintiff by Amrit Harshil Chand, the defendant's first solicitor.
7. Aitul Bi Hussein's affidavit stated that she was advised by the donor of the power of attorney that he is a victim of impersonation and/or professional misconduct and/or unsatisfactory professional conduct. Her brother was unaware that the present action was filed against him by the plaintiff. The donor was informed of the action by his new solicitors, Sunil Kumar Esq., on or around June 2022. The solicitors became aware of the action while randomly going through the High Court civil cause list. Thereafter, Mr. Sunil Kumar, upon instruction, filed a notice of change of solicitors and obtained copies of court documents.
8. The deponent stated that she was advised by the donor that he neither knows the plaintiffs nor signed the building contract, and that the contract was signed by an impersonator. The person who signed the contract used a stamp containing the name "Sabir Builders". She stated that the writ of summons and the statement of claim were not personally served on the defendant or his representative as the

defendant was resident out of jurisdiction. She stated that the plaintiffs did not obtain the leave of court to serve the writ of summons and statement of claim out of jurisdiction. The writ of summons and statement of claim were received not by the defendant, but by an impersonator. She denied that the donor signed any court document or the contract. The donor did not engage the services of a lawyer as he was unaware of the action. She stated that the donor denied instructing Amrit Chand Lawyers and MIQ Lawyers to act for him. She was later advised by the donor and his solicitors that their father Khalil Hussein (deceased) was representing himself to be the defendant, Sabir Hussein. She stated that documents in the plaintiff's bundle of documents was signed by the impersonator, Khalil Hussein, who entered into a building contract with the plaintiffs. She stated that it was not the first time that Khalil Hussein impersonated the defendant and referred to the ruling of the Supreme Court dated 3 March 2022. She stated that the service of the writ of summons and statement of claim are defective as these were served to the impersonator instead of to the donor. She stated that she is advised by the defendant's solicitors that there is no cause of action against the defendant. She stated that the action is scandalous, frivolous and vexatious as the plaintiffs knew they were dealing with Khalil Hussein, but sued Sabir Hussein. She stated that it is an abuse of the process of court to seek damages from Sabir Hussein for the wrongs committed by Khalil Hussein. The defendant has advised her that even though he sympathises with the plaintiffs, he cannot be held accountable for the damages that have accrued as a result of the actions of Khalil Hussein.

9. An affidavit was filed on 27 January 2023 by Pauline Stephen Morris in opposition to the strike out application. She stated that the deponent did not have any personal knowledge of the matter. She stated that the defendant was at all times aware of the proceedings filed against him. She stated that the defendant had contacted Mr. Immanuel Kumar of Parshotam Lawyers via telephone to know the status of the proceedings. Mr. Kumar had informed the defendant to contact either MIQ lawyers or Amrit Chand Lawyers, the previous solicitors on record for the defendant. She said that the defendant and his father, Khalil Hussein had met with her and her deceased husband (Sebastian Morris) before and during the construction of their residential dwelling. She stated that

she and her solicitors were unaware that the defendant was residing out of jurisdiction at the relevant time. If not, the solicitors would have made the necessary application to the High Court for service out of jurisdiction. She stated that Amrit Chand Lawyers had acted for the defendant and filed all the pleadings and documents on behalf of the defendant. She stated that she was unaware of any steps taken by the defendant against his father.

10. An affidavit in opposition to Aitul Bi Hussein's affidavit was also filed by Amrit Harshil Chand, a former solicitor of the defendant, on 30 January 2023. He stated that the matters stated in her affidavit are hearsay and that the deponent should have given his own affidavit in support of his strike out application. He stated that he knew Khalil Hussein and Sabir Hussein from the time he worked as a clerk in a law firm in 2009 / 2010. Later, he opened his own law firm. He said he continued to be in contact with the defendant and his father. In April 2017, the defendant's father came to see him regarding the case filed against the defendant. The defendant's father, he stated, had accepted the writ of summons and the statement of claim. He stated that the defendant called him from New Zealand, in the presence of his father, and asked him to defend the action. He said the defendant gave him instructions by mobile phone in the presence of his father. He said that the defendant has instructed him in other matters as well. He said he ceased acting for the defendant when he stopped getting instructions and did not receive legal fees. Mr. Chand denied that there was any impersonation of the defendant. He said the defendant visited his office when he was in Fiji between 2017 and 2018.
11. In reply, Aitul Bi Hussain stated, in an affidavit filed on 15 February 2023, that the power of attorney holder has read and understood the contents of the affidavits given by Amrit Harshil Chand and Pauline Stephen Morris, and that he disputed the matters stated in those affidavits. She stated that the reply was that of the donor of the power of attorney alone and that she is just a signatory to the affidavit on his behalf. She stated that she is advised by her donor's solicitor that Mr. Chand is a legal practitioner who is not a party to these proceedings, and, therefore, his affidavit should be disregarded. She made several averments concerning the validity of Mr. Chand's affidavit and stated that her brother

denied the claims made in the solicitor's affidavit. She said that her brother denied signing the building contract and court documents, and that this would be evident by comparing his signature with the signature in the contract documents.

12. It is clear that the parties are sharply at variance concerning the execution of the building contract and in the instructions that were given or received to defend the action. The claims made in the respective affidavits are of a serious nature. The defendant says he has nothing to with the building contract. He claims to have been impersonated by his father. A similar claim is made concerning the defence lodged in this action. The defendant denies having instructed Amrit Chand Lawyers to represent him. The defendant resides in New Zealand. He states that he was never served with the writ and statement of claim. This is because the defendant's father, Khalil Hussein, accepted the documents and acknowledged their service through solicitors appointed by him. Mr. Amrit Chand says he has met the defendant previously and received telephone instructions to defend this action in the presence of his father, Khalil Hussein. The positions taken by the defendant are not by an affidavit given by him. His application is supported by his sister. No doubt she has been authorised to take steps in the case on behalf of the defendant. But the matters on which she has deposed are of a very serious and factual nature on which his personal testimony becomes crucial. She makes it clear that the matters on which she deposes were conveyed to her by the defendant.

13. Order 18 rule 18 (1) of the High Court Rules states:

"The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be”.

14. It is apt to bear in mind that a court will be slow to strike out an action unless it falls within the narrow and accepted grounds on which courts have exercised their discretion in favour of an applicant. It has been held that striking out an action is a summary power that courts will exercise only in plain and obvious cases. The matters in controversy between the parties must be tested by the rules of evidence in a trial. The question of the defendant’s impersonation by his father, in particular, cannot be determined by affidavit evidence in an application for strike out of the action. Moreover, the factual inconsistencies in the respective affidavits render it impossible to strike out the action on the stated grounds. The defendant’s application is weakened by the fact that he did not himself give an affidavit attesting to the impersonation claim. His case is that he did not sign the contract or court documents, and that he did not retain or give instructions to solicitors. These are matters of a nature that will be known only to the defendant. Those matters, however, have been averred in an affidavit given by the defendant’s sister, in which she makes it clear that she is merely the signatory and has no personal knowledge of the matters stated in the affidavit. The defendant has not explained the reason for not filing his own affidavit in support of his application to the strike out the action. The parties were given adequate time to file their respective affidavits.
15. The defendant has complained that the writ was not duly served upon him in terms of Order 6 rule 6 (1) of the High Court Rules. Orders will be made to serve the amended writ and the statement of claim to the defendant in terms of the rules.

## ORDER

- A. The defendant's summons dated 10 August 2022 to strike out the writ of summons and statement of claim is struck out.
- B. The plaintiff is to take steps to serve the amended writ of summons and statement of claim to the defendant.
- C. Leave is granted to the plaintiff to serve the amended writ and statement of claim out of jurisdiction.
- D. The defendant is directed to pay the plaintiff costs summarily assessed in a sum of \$1,500.00 within 21 days of this decision.

Delivered at **Suva** on this **24<sup>th</sup>** day of **May, 2023**



A handwritten signature in blue ink, appearing to read "M. Javed Mansoor".

M. Javed Mansoor  
Judge