

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 26 of 2022

BETWEEN: **SOFTWARE FACTORY PTE LIMITED** a limited liability company with its
registered offices at 371 Victoria Parade, Suva.

PLAINTIFF

AND: **PARMESH DAYAL** of 95 Kaunitoni Street, Vatuwaqa, Suva, Director.

DEFENDANT

Before: **Hon. Mr. Justice Vishwa Datt Sharma**

Counsel: **Ms Vaurasi L.** for the Plaintiff/Applicant
Mr Singh R. for the Defendant/Respondent

Date of Decision: 03rd November, 2025

DECISION

[Summons to Vacate Trail]

Introduction

- [1] The Plaintiff by Summons filed on 1st October 2025 sought to vacate the trial date of this action, which stood fixed for 3rd November 2025. The Defendant's substantive matter was also fixed for hearing with HBC 26 of 2022 on the same day.
- [2] The Defendant strongly opposed the Plaintiff's application and filed and served its affidavit in opposition. The Defendant was all ready to proceed with the trial in both matters.
- [3] Both Counsels made oral submissions with regards to the vacation of the trial date, and the Plaintiff also furnished Court with its written submissions.
- [4] It was noted that the Plaintiff wanted to file its reply affidavit to the Defendant's opposition, which was opposed by the Defendant but was refused by this Court, although the details of the Plaintiff's reply affidavit was drawn to the attention of the defence Counsel by an email.
- [5] The Plaintiff made this application pursuant to Order 3 Rule 4, Order 20 Rule 5, Order 24 Rule 7 and Order 35 Rule 3 of the High Court Rules 1988.
- [6] *Order 35 Rule 3* of the High Court Rules gives a judge the discretion to adjourn a trial in the interest of justice which states:
- "The Judge may, if he thinks it expedient in the interest of justice, adjourn a trial for such time, and to such place, upon such terms, if any, as he thinks fit."*
- [7] The Plaintiff is relying on the Affidavit of 'Semi Tukana,' Director and shareholder of the Plaintiff company:
- 'That I have received notice from my business associated abroad regarding a critical business meeting scheduled to take place outside of Fiji in Dubai, United Emirates during the same period as the scheduled hearing.'
 - This meeting is of substantial importance to my business operations and involves multiple stakeholders whose availability was confirmed well in advance. The meeting was arranged several months ago, and I am required to attend in person as a key representative of the business.
 - The international travel arrangements, including the booking of my airfare and accommodation had had been made well in advance and were beyond my control to alter. Based on this, I am due to depart Fiji on the 2nd of October, 2025 and return on the 9th November, 2025. Annexed hereto and marked as annexure "ST1" are copies of the relevant air tickets.
 - Due to the timing and nature of this professional commitment, I will be out of the country and unable to attend the hearing on the scheduled date.
 - This application is made in good faith and without any intention of causing unnecessary delay to the proceedings. I remain committed to attending and

fully participating in the trial, and I sincerely apologies for any inconvenience this application may occasion.

- [8] At the hearing, both Counsels representing the parties to the proceedings relied on the respective affidavits filed herein and argued the application '**for vacation of the trial date**'.

Determination

- [9] The power to adjourn, vacate and/or refuse to adjourn a trial is within the discretion of this Court hearing the matter. This discretion has to be exercised judicially and in the interest of justice.
- [10] The Plaintiff is seeking for an adjournment and/or vacation of scheduled trial since the 'critical' witness 'Semi Tukana', Director and Shareholder of the Plaintiff's company is away from the Fijian shores and presently in Baltimore Washington D.C. [Refer to Annexure 'ST1'] attending a critical business meeting.
- [11] However, the submissions of the defence revealed to Court that the defence was 'all ready' to proceed' to proceed with the scheduled trial on both impending cases.
- [12] It is also noted that 'Summons to enter Action for Trial' was also filed by the Plaintiff and on 24th May 2025 the Counsel for the Plaintiff moved this Court for a trial date which was accordingly fixed for the 3rd November 2025 to 7th November 2025 some six (06) months ago.
- [13] The Plaintiff when questioned on the number of witnesses who will give evidence at, the trial, drew Court's attention that the Plaintiff's case is heavily reliant on the evidence of 'Semi Tukana' and a key critical witness in his capacity as the Director and the Shareholder of the Plaintiff's company.
- [14] The strong position of the Plaintiff's Counsel is that she requires 'Semi Tukana' critical key witness to give evidence to the substantive claim and successfully substantiate its claim.
- [15] In **Goldenwest Enterprises Limited v Timoci Pautogo**, Civil Appeal Number ABU 0038 of 2005 at paragraph 37 in particular:

"Generally, this is the principle covering Court's discretion to adjourn or not to adjourn. If refused to grant an adjournment amounts to a denial of a fair hearing and hence denial of natural justice or procedural fairness, or where a refusal to adjourn would cause definite and irreparable harm to the party seeking it adjournment should be granted...."

- [16] The test of adjournment of trial dates can be summed up as follows -
- a. Will refusal to grant an adjournment amount to a denial of a fair hearing and hence denial of natural justice or procedural fairness; or

- b. Whether a refusal to adjourn would cause definite and irreparable harm to the party seeking it; and
- c. Is there any 'fault' on the part of the party seeking the adjournment?

[17] The Plaintiff's submission was that if the hearing date is not vacated, it will cause the Plaintiff a deprivation of a fair hearing and hence a denial of natural justice and procedural fairness because the critical and key witness 'Semi Tukana' in his capacity as the Director and shareholder of the Company will not be able to testify its case on merits.

[18] If the adjournment is refused, the Plaintiff's critical and key witness will not be able to testify its case on merits against the Defendant and will go unproved and may be dismissed per se.

[19] No doubt 'Semi Tukana' is a key and critical witness and needs to be heard since he is a crucial witness who plays an important role in the Plaintiff's company.

[20] The impending claim is also a substantial one revolving on 'Source Codes' and 'Damages' if any, yet to be heard and determined by this Court.

[21] I am satisfied and convinced that the refusal of the adjournment of trial can leave the claim of the Plaintiff unproved and eventually result in definite and irreparable harm would probably be caused to the Plaintiff.

[22] In **Goldenwest Enterprise Limited** (supra) at paragraph 42, the Court said:

"There is, however, a requirement that there is no 'fault' on the part of the party seeking the adjournment: **Piggot Construction v United Brotherhood** [1974] 39 DLR (3d) 311 (Sask. C.A)"

[23] The Plaintiff filed this application on 1st October 2025 about a month prior to scheduled trial and served onto the Defendant. The Defendant has filed his affidavit in opposition and strongly opposes the Plaintiff's application.

[24] The witness for the Plaintiff 'Semi Tukana' is away overseas attending a crucial business meeting which was beyond his control as deposed in his affidavit and return on 9th November 2025.

[25] I do not find any 'serious fault' on the part of the Plaintiff, Semi Tukana and/or his Counsel representing for the blame on them for the predicament resulted owing to the absence of the Plaintiff's crucial and key witness.

In Conclusion

[26] I have carefully considered the evidence and the submissions put before this Court.

- [27] I am satisfied that the Court should exercise its discretion in acceding to the Plaintiff application for adjournment and/or vacation of the scheduled trial of this case. In the interest of justice, I am also satisfied that the grant of an 'adjournment' is warranted in the given circumstances of this case.
- [28] It is only fair that the Plaintiff be given an opportunity to put her case against the Defendant before this Court through the critical and key witness, to allow Court to reach a fair determination accordingly.
- [29] Further, no serious prejudice and/or damages would be caused to the Defendant on the rational of the 'adjournment'.
- [30] However, the circumstances calls for the Defendant to be compensated by the Plaintiff for a wastage hearing of payment costs, which is now assessed summarily at Plaintiff paying the Defendant a sum of \$6,500 before the next scheduled hearing date.
- [31] The substantive action on both matters are adjourned for trial on 13th November 2025 and to be continued on 14th November 2025 and finish of the trial on 25th November 2025.

Orders

- (i) The application for adjournment and/or vacation of the scheduled hearing date is hereby granted.
- (ii) The Plaintiff to pay the Defendant a summarily assessed costs of \$6,500 before the next scheduled trial date.
- (iii) The substantive matter HBC 26 of 2022 and HBC 65 of 2021 stands adjourned for trial on 13th November 2025, 14th November 2025 and 25th November 2025 accordingly at 9.30 am.

Dated at **Suva** this **03rd** day of **November, 2025**.




VISHWA D'ATT SHARMA
PUISNE JUDGE

cc: *Shekinah Law, Suva.*
Parshotam Lawyers, Suva.