

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. 112 of 2017

BETWEEN : CORPORATE MANAGEMENT SERVICES LIMITED t/a THE
HOT BREAD KITCHEN

FIRST PLAINTIFF

AND : SAMISONI ENTERPRISES LIMITED

SECOND PLAINTIFF

AND : SOUTH PACIFIC AGRICULTURE DEVELOPMENT LIMITED

DEFENDANT

Coram : The Hon. Mr Justice David Alfred

Counsel : Ms S. Narayan for the First and Second Plaintiffs.

Date of Hearing : 2 August 2018

Date of Ruling : 13 September 2018

RULING

1. This is the Summons by the Defendants (sic, Plaintiffs) applying for an order that any pleadings or application filed by the Defendant be struck out for abuse of process. It is made pursuant to Order 5 rule 6(2) and Order 18 rule 18(1)(d) of the High Court Rules (HCR).
2. The application is supported by the affidavit of Sepeti Tagilala, the Group Chief Executive Officer of the First and Second Plaintiffs, who deposed that the Defendant is a limited liability company and ought to be represented by a Barrister or Solicitor and it has abused the process by sending one of its directors to appear in person to defend the Company.
3. The affidavit in response is deposed by one, Young Na Kang who stated she is the managing director of the Defendant and is duly authorized to swear this affidavit on its behalf, and prays that the Plaintiffs' Summons be dismissed.
4. The Plaintiffs filed an affidavit in reply to the Defendant's affidavit in response.
5. The Court heard the oral submission of Ms Narayan on 12 July 2018 who said the Defendant had not made an application under section 180 of the Companies Act 2015 (Act).
6. The Court heard the oral submission of Ms Young on 2 August 2018 who referred to ss 176 and 180 of the Act and also provided a written submission.
7. At the conclusion of the arguments I informed I would take time to consider my decision and having done so I shall now deliver my Ruling.

8. I shall start with the HCR O.5 r.6(2). This states quite explicitly that "Except as expressly provided by or under any enactment, a body corporate may not begin or carry on any such proceedings otherwise than by a barrister and solicitor".
9. An enactment is defined by Osborn's Concise Law Dictionary as "An Act of Parliament, or part of an Act of Parliament".
10. So it is to the Act that I shall now turn. Part 16 of the Act is entitled "Members' Rights And Remedies" and Division 1 thereof is entitled "Oppressive Conduct of Affairs". Section 178 thereunder allows a member of the company to make an application to the Court under s.176 in relation to the Company. But this does not avail Ms Young here because she is not making an application for an order in relation to the Defendant.
11. So, I turn to consider s. 180(1) of the Act. This provides that subject to subsection (3) the Court may on the application of a member or director of a company grant leave to that member or director to (b) intervene in proceedings to which the Company is a party "for the purpose of continuing, defending or discontinuing the proceedings on behalf of the Company...."
Subsection 3 provides that "Leave to bring proceedings or intervene in proceedings may be granted under subsection (1), only if the Court is satisfied that either -
 - (a) the Company or Related Body Corporate does not intend to bring, diligently continue or defend, or discontinue the proceedings , as the case may be; or
 - (b) it is in the interests of the Company or Related Body Corporate that the conduct of the proceedings should not be left to the Directors or to the determination of the Members as a whole".
12. I have perused very carefully everything in the Court file emanating from Ms Young and nowhere do I discern a trace of what the legislature required of a member or a director (like Ms Young) to satisfy the Court that an order under s.180 should be granted to her.

13. In short she had not satisfied the Court that the Defendant will not diligently continue or defend the proceedings. Consequently there is no reason for the Court to exclude the Defendant from abiding by the requirement of O.5 r 6(2).
14. In the result I make the following orders:
- (1) The Defendant's appearance and any applications and pleadings filed by Ms Young on its behalf are struck out as being improperly filed.
 - (2) The Defendant is to retain a barrister and solicitor to represent it and to carry on these proceedings by entering appearance for the Defendant by or before 27 September 2018.
 - (3) Each party is to bear their own costs of this Summons.

Delivered at Suva this 13th day of September 2018.



David Alfred

JUDGE

High Court of Fiji