

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

**CIVIL ACTION No. HBC 215 of 2012**

**BETWEEN :** **ANN ELIZABETH HAWORTH** of Lexington, Texas.

**PLAINTIFF/APPLICANT**

**AND :** **STARWOOD PROPERTIES LIMITED**

**1<sup>ST</sup> DEFENDANT/1<sup>ST</sup> RESPONDENT**

**AND :** **DUBBO LIMITED** trading as **WESTIN RESORT & SPA LIMITED**

**2<sup>ND</sup> DEFENDANT/2<sup>ND</sup> RESPONDENT**

**AND :** **SHANE CUNNING** of **WESTIN RESORT & SPA**, Nadi, Fiji Island,  
General Manager of Westin Resort & Spa

**3<sup>RD</sup> DEFENDANT/3<sup>RD</sup> RESPONDENT**

**Appearances** : Ms R. Varasikete for plaintiff/applicant  
Mr Ronal Singh for 2<sup>nd</sup> & 3<sup>rd</sup> defendants/respondents  
**Date of Hearing** : 14 September 2017  
**Date of Ruling** : 14 September 2017

## **R U L I N G**

### **Introduction**

[01] This is an application filed by the plaintiff/applicant (“the plaintiff”) for leave of the court to refile the supplementary affidavit verifying the list of documents where the plaintiff is seeking to disclose the following documents:

- (a) *Copy of invoices/receipts and electrocution related medical expenses;*
  - (b) *Copy of summary of loss of income;*
  - (c) *Copy of report from Little River Health Care dated 9 April 2012;*
  - (d) *Copy of functional capacity evaluation report from Dr Stephen Rose dated 3 June 2012,*
  - (e) *Copy of report from Austin Radiological Association dated 5 November 2012,*
  - (f) *Copy of Medical Report from Dr Ronald Devera dated 16 April 2014, and*
  - (g) *Copy of Medical Report from Marci A Roy dated 3 September 2015.*
- [02] The plaintiff relies on Order 24, rule 3 and Order 25, rule 8 (3) of the High Court Rules 1988 (“the HCR”) in support of her application.
- [03] The second and third defendants/respondents (“the defendants”) oppose the application on three grounds namely:
- (a) *the High Court has already ruled against discovery of the majority of the documents (see Ruling dated 30 January 2017) and*
  - (b) *the rules that the application relies on does not respond and/or*
  - (c) *the reasons for leave to be granted are inadequate.*
- [04] Previously, the plaintiff made same application before Sapuvida, J who ruled on the application after considering the merits of that application. He, disallowing the previous application, said at paragraph 93 of his judgment:

*“The plaintiff failed to comply properly with the order made on 17 March 2014 to serve on the defendants a list of documents relating to the matters raised in the pleadings herein and filed an affidavit verifying the same in accordance with the requirements of the Rules and practice. When she filed her affidavit verifying the list of documents on 17 April 2014, she deliberately withheld a large number of documents from the defendants until 2 working days before the date of trial. The reasons that have been advanced for the late discovery of the documents are unconvincing. The affidavit has*

*also been improperly sworn and was filed without leave of the Court by a Law Clerk.”*

## **Background**

[05] On 4 October 2012 the plaintiff filed a claim against the defendants alleging that she was electrocuted while being a guest of the second defendant.

[06] After completion of the pre-trial steps, the matter was fixed for trial on 17 and 18 of November 2015.

[07] On 6 November 2015 the plaintiff, without leave of the court, filed an affidavit verifying the list of documents. On the day of the trial, the defendants raised a preliminary objection in relation to the supplementary affidavit filed without leave of the court.

[08] The court vacated the trial and granted time to file their respective submissions. Based on these submissions Sapuvida, J delivered his ruling on 30 January 2017 and ordered that:

- 1. Plaintiff's supplementary affidavit verifying the list of documents dated 6 November 2015 is struck out and dismissed.*
- 2. The documents listed in the said affidavit shall not be produced in evidence.*
- 3. Costs shall be in the cause.*

[09] In the current application filed on 13 March 2017, the plaintiff is seeking the leave of the court to refile the supplementary affidavit verifying the list of documents.

## **Law**

[10] The application is made pursuant to O. 24, r.3 and O.25, r. 8 (3) of the HCR.

[11] O.24, r.3 states:

### **Order for discovery (0.24, r.3)**

*3.-(1) Subject to the provisions of this rule and of rules 4 and 8, the Court may order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to make and serve on any other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter, and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.*

*(2) Where a party who is required by rule 2 to make discovery of documents fails to comply with any provision of that rule, the Court, on the application of any party to whom the discovery was required to be made, may make an order against the first-mentioned party under paragraph (1) of this rule or, as the case may be, may order him to make and file an affidavit verifying the list of documents he is required to make under rule 2 and to serve a copy thereof on the applicant.*

*(3) An order under this rule may be limited to such documents or classes of document only, or to such only of the matters in question in the cause or matter, as may be specified in the order.*

[12] O.25, r.8 (3) states:

*(3) Nothing in paragraph (1) shall prevent any party to an action to which this rule applies from applying to the Court for such further or different directions or orders as may, in the circumstances, be appropriate.*

### **Discussion**

*1. Whether the rules cited support the relief sought*

[13] The question arises whether the rules cited by the plaintiff in support of the application are relevant to the relief sought. The plaintiff is seeking leave to file a supplementary affidavit verifying the list of documents that

the plaintiff has been in her possession. In essence, the application is not an application for specific discovery of documents. According to O. 24, r.1, the Court may order any party to a cause or matter to make and serve on any other party a list of documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter.

- [14] In this application, the plaintiff does not seek an order for discovery of documents against the defendants. Instead, she seeks leave of the court to file a supplementary list of documents she failed to disclose at the pre-trial stage. It is my considered view that O. 24 does not support the relief the plaintiff seeks in this application and therefore irrelevant to the plaintiff's application.
- [15] The plaintiff also rely upon O. 25, r.8 in support of the application. Rule 8 deals with the automatic direction in personal injury actions. The question of automatic direction does not arise here. Therefore, rule 8 also does not support the relief sought in this application.

## *2. Functus Officio*

- [16] The defendants submit that the court does not have jurisdiction to hear the matter because the same matter had already been decided by Sapuvida, J.
- [17] In the earlier application made before Sapuvida, J, the plaintiff sought to file a supplementary affidavit verifying the list of documents. The documents the plaintiff sought to disclose and lead in evidence at the trial included:

*"1. Copy of invoices/receipts and electrocution related medical expenses.*

*2. Copy of report from Little River Health Care dated 9<sup>th</sup> April 2012.*

3. *Copy of report from Austin Radiological Association dated 5<sup>th</sup> November 2012.*

4. *Copy of Medical Report from Dr. Ronal Devera dated 16 April 2014.*

5. *Copy of Medical Report from Marci A. Roy dated 3<sup>rd</sup> September 2015."*

[18] In the current application made before me, the plaintiff listed the same documents except for (b) and (d) listed in paragraph 1 above.

[19] Basically, the plaintiff is seeking leave to file the supplementary affidavit verifying the list of the same document, except for documents listed as "(b)" and "(d)", listed in the previous application.

[20] It appears that the plaintiff is attempting to re-litigate a matter which the court has already decided upon merits.

[21] *Functus* means the court had expended its jurisdiction in respect of the same cause between the same parties (see *Merchant Finance & Investment Co. Ltd v Lata* [2016] FJCA 151; ABU0034.2013 (29 November 2013)).

[22] Admittedly, the previous application was also made against the same defendants as in this application. On that application, both parties filed their respective written submission. Supavida, J, after considering the submissions made by both parties, ruled and ordered that the plaintiff's supplementary affidavit verifying the list of documents is to be struck out and dismissed. The plaintiff did not appeal that ruling. There is a binding judgment between the parties in relation to the supplementary affidavit verifying the list of documents. In the current application, the plaintiff is attempting to re-litigate the matter that had already been decided by the court. Unfortunately, the current application filed by the plaintiff is unnecessary and unwarranted. I am not convinced by the submissions and the reasons adduced by the plaintiff for filing the supplementary

affidavit verifying the list of documents. The inherent jurisdiction of the court cannot be exercised to curing a mistake which a party had made in complying with the rules of the court. The documents the plaintiff is attempting were in the control and custody of the plaintiff well ahead of the application. Some of the documents date from April 2012 to November 2015. These documents are not new documents. I would, therefore, refuse to grant leave to file the supplementary affidavit verifying the list of documents and dismiss the application with costs of \$800.00 payable by the plaintiff to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants within 3 weeks. I now adjourn the matter for mention to fix hearing at 9.30am on 12 October 2017.

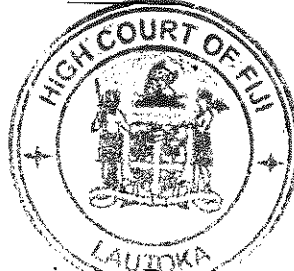
**Final Outcome**

1. Leave refused.
2. Plaintiff's application dismissed with costs of \$800.00 payable by the plaintiff to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in three weeks from today.
3. Matter is adjourned for mention to fix hearing at 9.30am on 12 October 2017.

*M. H. Mohamed Ajmeer*  
14/9/17

**M. H. Mohamed Ajmeer**

**JUDGE**



**At Lautoka  
14 September 2017**

**Solicitors:**

For plaintiff: M/s Babu Singh & Associates, Barristers & Solicitors

For defendants: M/s Munro leys, Solicitors