

**INTERNATIONAL DRESSES (PVT.) LTD  
VS.  
MUNICIPAL COUNCIL OF MORATUWA**

COURT OF APPEAL.  
SOMAWANSA, J. (P/CA).  
WIMALACHANDRA, J.  
CALA 357/2004.  
DC MORATUWA 173/SPL.  
FEBRUARY 10, 2006.

*Civil Procedure Code, sections 182, 183, 183A - Affidavit on behalf of a company - Should he have personal knowledge of the facts?-If the affidavit is bad in law should the petition be dismissed ?*

**HELD:**

- (1) A Director is a person who may in terms of section 183A make affidavit in lieu of company. However in terms of section 183 it is mandatory that in such a case the person who makes the affidavit instead of the company must be a person having personal knowledge of the facts of the cause of action and must in his affidavit swear/affirm that he deposes from his own personal knowledge of the matter therein contained.

*Per Somawansa, J. (P/CA) :*

“The supporting affidavit tendered in support of the petitioner is a statement of fact stated by the plaintiff company converted to an affidavit by the addition of a verifying clause which is a violation of the provisions in section 182”. I am not at all satisfied that he is a person who has testified to the averments in the petition on his own personal knowledge nor has he pleaded so.

- (2) The plaintiff–petitioner has failed to tender a valid supporting affidavit in law and in the circumstances the plaintiff–petitioner cannot maintain this application.

**APPLICATION** for leave to appeal from an order of the District Court of Moratuwa.

**Cases referred to :**

1. *Abeywardane vs. Abeywardane* 1993 1 Sri LR 272
2. *Simon Fernando vs. Goonasekera* 47 NLR 512

*Colin A. Amarasinghe* for plaintiff–petitioner.  
*Lasitha Kanuwanaarachchi* for defendant–respondents.

*cur. adv.vult.*

February 02, 2006.

**ANDREW SOMAWANSA, J. (P/CA)**

This is an application seeking leave to appeal from the order of the learned District Judge of Moratuwa dated 14.09.2004 whereby the learned District Judge came to a finding that there were no sufficient reasons to issue an enjoining order as prayed for by the plaintiff-petitioner, but however issued notice of injunction and summons on the defendants-respondents and if leave is granted to set aside the aforesaid impugned order dated 14.09.2004 and issue an enjoining order or direct the learned District Judge to issue an enjoining order as prayed for in the prayer to the plaint or in the alternative make an interim order issuing an injunction or stay order restraining the defendants-respondents from giving effect to the seizure notice marked X and seizing the movable property of the petitioner. Counsel for the petitioner having supported has obtained an interim order as per paragraph 'D' to the prayer of the petition and the same has been extended from time to time.

When this application was taken up for inquiry counsel for the defendants-respondents took up three preliminary objections to the maintainability of this application.

The first preliminary objection taken by the defendants-respondents is that the plaintiff-petitioner is guilty of suppression of material facts in that in tendering the Additional Solicitor-General's determination purportedly marked X6 has suppressed the most important and material part of the aforesaid determination contained in page 02 and has submitted only the first page which is beneficial to the plaintiff-petitioner with the ulterior motive of misleading Court and obtaining undue advantage which he has done by obtaining an *ex-parte* stay order from this Court. I am not at all impressed with the aforesaid submission for the reason that the opinion of the Additional Solicitor-General has been tendered in its entirety in two pages 1 and 2 marked X6 though both pages have been certified as true copies separately. Accordingly there is no suppression of material facts nor has the Court being misled.

The second objection taken by the defendants-respondents is to the supporting affidavit filed along with the petition which he submits is contrary to provisions contained in section 183 of the Civil Procedure Code which

provides that where the action is brought by or against a company any Secretary Director or other principal officer of such company may make an affidavit in respect of the matters instead of the party to the action. In the instant application the petition for leave to appeal is supported by one Chandana Punchihewa who claims to be a Director of the petitioner company. Being a Director of the company he is a person who may in terms of section 183A make affidavit in lieu of the company. However in terms of the proviso to section 183A of the Civil Procedure Code it is mandatory that in such a case the person who makes the affidavit instead of the company must be a person having personal knowledge of the facts of the cause of action and must in his affidavit swear or affirm that he deposes from his own personal knowledge of the matters therein contained.

*In the case of Damayanthi Abeyawardena vs. Hemalatha Abeyawardena*<sup>(1)</sup>:

“The fact that T. Nadesan holds a power of attorney and is a recognized agent pertains to his capacity to file an affidavit on behalf of the petitioner respondent and does not lend any extra credence to the affidavit. His affidavit must comply with the requirements of the Civil Procedure Code. Even if the provisions of section 183(a) of the Civil Procedure Code brought in by the Civil Procedure Code (Amendment) Act, No. 79 of 1988 (not yet in operation at the time of this case) are applied, the relevant amendment permits an attorney to file an affidavit instead of the party to the action where such party is absent from Sri Lanka. The proviso to this section states that in such situation the person making the affidavit must be one having personal knowledge of the facts of the cause of action and must in his affidavit swear or affirm that he deposes from his own personal knowledge”.

However on an examination of the affidavit tendered in support of the petition, it is apparent that it does not comply with the mandatory provisions contained in section 183A of the Civil Procedure Code for nowhere in the affidavit is it stated that declarant has personal knowledge of the facts affirmed by him nor does he swear or affirm that he deposes from his own personal knowledge of the matters therein contained. Facts are stated by the plaintiff-petitioner company and not by the declarant as averred in paragraphs 4, 9 and 10 of the affidavit. In effect the supporting affidavit is a statement of fact stated by the plaintiff-petitioner company converted to an affidavit by the addition of a verifying clause which is a violation of the

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provisions contained in section 182 of the Civil Procedure Code which reads as follows :

“A petition stating facts of observation and belief is not converted into an affidavit by the addition of a verifying clause, an affirmation or oath, to the effect that the statements in the petition are true”.

In the case of *Simon Fernando vs. Goonasekera* <sup>(2)</sup> it was held :

“An affidavit must be confined to a statement of such facts as the declarant is able of his own knowledge and observation to testify to. An exception is made in the case of an interlocutory affidavit in which statement regarding his belief may be admitted provided reasonable grounds for such belief be set forth in the affidavit”

For the foregoing reasons, my considered view is that the plaintiff-petitioner has failed to tender a valid supporting affidavit in law and in the circumstances the plaintiff-petitioner cannot maintain this instant application for leave.

In this respect, I would like to refer to certain observations made by S. N. Silva, J (as he then was) in the case of *Damayanthi Abeywardena vs. Hemalatha Abewardena* (*supra*) at 281 :

“Learned District Judge has observed that the affidavit confirms the averments in the petition. Indeed, on a comparison it is revealed that the affidavit is a verbatim repetition of the averments of the petition. However, the correct test is not to consider whether one confirms the other upon a comparison of this nature. Repetition of the averments of a petition in the affidavit is an evil that we often note in affidavits that are filed. Learned Judge has regrettably seen a virtue in this evil. The correct test is to ascertain whether the affidavit contains direct evidence, that is, statements of such facts as the declarant is able of his own knowledge and observation to testify to and whether this evidence together with the documentary evidence furnishes *prima facie* proof of the matters of fact set out or alleged in the petition”.

I might also refer to paragraph 1 of the affidavit tendered in support of the petition wherein it is stated :

“I am the Managing Director of International Dresses Private Company Limited and do hereby swear to the correctness of the averments herein contained in this affidavit”.

If the declarant is the Managing Director of the plaintiff-petitioner Company I am at a loss as to why he is unable to testify to the facts in the affidavit rather than stating company states this and that and thereby disassociating himself with the averments stated in the affidavit. There is no indication as to when he became the Managing Director.

In the circumstances, I am not at all satisfied that he is a person who has testified to the averments in the petition on his own personal knowledge nor has he pleaded so.

For the foregoing reasons, I would uphold the objection taken by the defendants-respondents and reject the application for leave to appeal. I might also say that there is no prejudice caused as the plaintiff-petitioner is also seeking for an interim injunction and for reasons known to him he did not wish to proceed with his application for an interim injunction and has in fact prevented the defendants-respondents from tendering their objections to the application for an interim injunction by informing Court as follows :

පැමිණිල්ල වෙනුවෙන් පෙනී සිටින නීතිඥ මහතා දන්වා සිටින්නේ දැනට එම වාරණ නියෝගය සම්බන්ධයෙන් අභියාචනාධිකරණය විසින් 3 ආයාචනයේ ඉල්ලා ඇති අන්දමට නිකුත් කර ඇති වාරණ නියෝගය සහ අතුරු තහනම නියෝගයට විරෝධතා ඉදිරිපත් කිරීම අර්ථ විරහිත බවයි.

Accordingly the learned District Judge has made the following order dated 24.02.2005 which reads as follows :

“නියෝගය

පැමිණිල්ලේ ආයාචනයේ 3 ජේදයේ සඳහන් කරුණු සම්බන්ධයෙන් දැනට අභියාචනාධිකරණය විසින් නියෝගයක් දී ඇති අතර, වාරණ නියෝගය සහ අතුරු තහනම නියෝගය සම්බන්ධයෙන් අභියාචනාධිකරණයේදී කරුණු ඉදිරිපත් කරන බැවින් මේ අවස්ථාවේදී එම ඉල්ලීම සම්බන්ධයෙන් මෙම අධිකරණයෙන් එම සහන ඉල්ලා නොසිටින බව පැමිණිල්ල මේ අවස්ථාවේදී දන්වා සිටින බැවින් කරුණු සලකා බලා මේ

අවස්ථාවේදී විත්තිකරුට ඒ සම්බන්ධයෙන් මෙම අධිකරණයේ විරෝධතා ඉදිරිපත් කිරීම අවශ්‍ය නොවන බව දන්වා සිටිමි.

උත්තරය 2005.03.31”.

අත්සන කළේ-  
(එම්. එන්. බුරත්)  
දිසා විනිසුරු - මොරටුව  
2005.02.24

For the foregoing reasons, I would up-hold the objection taken by the defendants-respondents to the maintainability of this application and reject the application for leave with costs fixed at Rs. 20,000.

**WIMALACHANDRA, J.—** *I agree.*

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