

Affidavit

- 1) At the outset, the Respondents raise as a preliminary objection, a legal issue which goes to the root of this case – i.e. the Petitioners, by failing to annex an affidavit in terms of the law have failed to present any evidence acceptable in law as required in terms of the Evidence Ordinance, the Civil Procedure Code and the Oaths and Affirmations Ordinance.
- 2) The Court of Appeal (Appellate Procedure) Rules 1990 (the Rules) have time and again been interpreted by Your Lordship's Court and the Supreme Court in a manner that ensures that justice is done to all parties. In terms of Rule 3 of the said Rules, an application to Your Lordship's Court for the exercise of the powers vested in this Court by Article 140 of the Constitution shall be by way of petition together with an **affidavit in support of the averments in the petition**. The Rule goes on to state that, "Where a Petitioner fails to comply with the provisions of this Rule, the Court may, **ex mero motu or at the instance of any party, dismiss such application**". (Please see Annexure 1)

- 3) Section 181 of the Civil Procedure Code reads as follows:

"Affidavits shall be confined to the statement of facts as the declarant is able **of his own knowledge and observations** testify."

- 4) Section 182 of the Civil Procedure Code reads as follows:

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

- 5) Section 183A(b) of the Civil Procedure Code reads as follows:

"Where the action is brought by or against a corporation, board, public body or company, any **secretary, director or other principal officer** of such corporation, board, public body or **company**;....may make an affidavit in respect of these matters, instead of the party to the action:

Provided that in each of the foregoing cases, the person who makes the affidavit instead of the party to the action, 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 personal knowledge of the matters therein contained**" (emphasis added)

- 6) Rule 3(1(a) mandatorily requires all matters of fact in the petition to be supported by an affidavit. The law relating to affidavits requires that the person who swears an affidavit must do so based on **personal knowledge of the facts referred to therein**. Since there is no provision for oral evidence to be led in an application for discretionary relief under Article 140 of the Constitution, an affidavit is the only mode by which a Court can be satisfied with the **truth and veracity** of a witness' testimony.
- 7) Thus, it is paramount that :-(a) the affidavit conforms to the requirements of the Law of Evidence,(b) is confined to matters that the declarant is personally aware of, and (c) does not contain any hearsay, thus ensuring that the evidential burden that he who asserts must prove, *will not be displaced* merely because there is no provision for oral evidence to be led in an application under Article 140 of the Constitution. In other words, the affidavit must contain the matters of fact which the affirmant is able of his own personal knowledge to advert to , or must set out the grounds on which such belief is based. And, if the grounds on which such belief is based are doubtful, then the affidavit must be rejected.
- 8) For the reasons set out below, it is the position of the Respondents that the two affidavits annexed to the petition do not satisfy the law relating to affidavits, is in violation of the requirements of the said Rule and does not conform with the provisions of the Evidence Ordinance and therefore, the interim relief should be vacated and this petition is liable to be dismissed.

The affidavits filed by the 1st Petitioner

- 9) The purported joint affidavit filed on behalf of the 1st Petitioner has been allegedly affirmed by persons named "....." who state that they are the "legal Counsel of the 1st Petitioner". The purported affidavit states thus:

'We, and of being Christians, do hereby make oath and jointly state the following:-

1. *We are the deponents within named and **legal counsel** of the 1st Petitioner above named. We have joint signing authority and have been authorized to jointly depose to this affidavit on behalf of the Petition of the Petitioners filed in the above styled application.*
2. *We affirm to the matters of fact herein stated from our **personal knowledge, verily believing them to be true and accurate**. Where this affidavit contains any statements of law we state those as we are advised".*

- 10) Several important matters arise from the above statement. **Firstly**, the Respondents respectfully draw the attention of Your Lordships' Court to the fact that there is no document to establish that the two deponents have been authorised to depose to this affidavit.
- 11) **Secondly**, the deponents does not set out the basis of or the manner in which they acquired a personal knowledge in respect of the matters set out in the Affidavit purportedly signed and filed by them. Therefore, the primary burden of the deponents to satisfy Court of the basis on which they acquired the personal knowledge has not been satisfied and therefore, there is no evidence that can be reasonably regarded as existing. Thus, in this case, there is no basis on which Your Lordships' Court could draw the inference that the deponents have personal knowledge of the contents thereof. Therefore, all matters of fact pleaded in the affidavit are mere hear say.
- 12) **Thirdly and more importantly**, the deponents are at best, mere "legal counsel" of the 1st Petitioner company and, in the absence of any evidence of the basis of their knowledge in either Pharmacology, Medicine or Pharmacy, there is no material on which the court could draw a presumption or attribute knowledge to them in respect of the factual and clearly scientific matters urged in the petition. To cite a simple example, the evidence before Your Lordship's Court at present is similar to the Legal Officer or Counsel of a party to an action, simply adverting to factual matters before the District Court on matters of Pharmacy and Pharmacology, (without having demonstrated the basis of such knowledge) , and using that evidence as the basis to demonstrate to the Court that the 5th Respondent's product is inferior or dangerous to human health, and that therefore, the administration of the 5th Respondent's drug must be stayed by an enjoining order or interim injunction.
- 13) Thus, the fundamental basis of the Petitioners case (and the basis on which the Petitioners sought the interim relief) that the drug 'Herticad' registered in the name of the 5th Respondent is not a bio-similar of the Petitioners drug 'Herceptin', and that for that reason, the registration of the 5th Respondent's product on the basis that it *is* a 'bio-similar' of the 1st Petitioner's product is erroneous, has *not been supported* by the evidence of a person who has personal knowledge in matters relating to Pharmacology, Medicine and Pharmacy, and as it stands today, is based on hearsay.
- 14) The aforementioned infirmities exist also in respect of the affidavit filed on behalf of the 2nd Petitioner, the agent /registrant of the 1st Petitioner. This affidavit has been affirmed by one who states that he is "the Director Healthcare of the 2nd Petitioner Company". He does not set out his qualifications or special knowledge to speak to the obviously and highly technical matters set out in the Petition.

- 15) In paragraph 2 of his affidavit he states he, “affirm to the matters of fact herein stated from my **personal** knowledge believing them to be true and accurate. Where this affidavit contains any statements of law we state those as I am advised”. In this instance too, the basis for his personal knowledge has not been set out and therefore this affidavit too has no evidentiary value and therefore, should be rejected
- 16) The importance of the value of the affidavits and the rationale for Courts insisting on knowing the basis of the declarants personal knowledge have been discussed in several judgments of the apex courts of our country, and are re-produced below in support of the preliminary objection, in order to assist Your Lordships’ Court
- 17) In Damayanthi Abeywardene and another v Hemalatha Abeywardene and another [1993] 1 SLR 272(CA) annexed hereto marked “A”, Sarath Silva J(as he then was) observed as follows:

*“The two respondent-petitioners and the 2nd respondent-respondent (being a daughter of the said Abraham Abeywardena) filed objections to the Order Nisi. Learned President's Counsel appearing for the two respondent-petitioners raised a preliminary objection that the application is bad since it is not supported by affidavits and other documentary evidence as required by law. It was submitted that the affidavit which was not of the petitioner-respondent but **her attorney**, one T. Nadeson, contains matters not within the knowledge and observation of that person and that the documents filed with the affidavit (other than the Power of Attorney) are not originals and are not admissible as evidence.*

Learned District Judge rejected this objection by the order appealed from on the basis that the affidavit has been filed in an interlocutory application and that the deponent being the attorney of the petitioner-respondent has duly affirmed to its contents. He has also observed that the affidavit confirms the averments of the petition and that the contents are supported by documents some of which are originals. (emphasis added).

At the hearing of this appeal the argument related mainly to the validity of the affidavit of Mr. Nadeson. Learned President's Counsel for the respondent-petitioners submitted thatthe affidavit does not conform to the requirements of sections 181 and 376 of the Civil Procedure Code. In relation to the provisions of sections 210 and 211 of the Companies Act, it was submitted that in considering the nature of the application and the relief sought, there should be strict compliance with the requirements of the Civil Procedure Code as to the contents of the affidavit. Sections 210 and 211 of the Companies Act

provide a statutory scheme for the intervention by court in the management of a Company and prescribes the applicable procedure. In terms of that section every application has to be made by way of summary procedure. This leads us to a consideration of the provisions of the Civil Procedure Code relating to summary procedure.

Section 376 states as follows:

"With the petition, and so far as conveniently can be attached thereto, shall be exhibited such affidavits, authenticated copy records, processes, or other documentary evidence as may be requisite to furnish prima facie proof of the material facts set out or alleged in the petition, or the court may in its discretion permit or direct the petitioner to adduce oral evidence before the court for this purpose, which shall be taken down by the court in writing ".

*It is to be seen from this section that a petition filed by way of summary procedure **should be supported by affidavits** and other documentary evidence necessary" **to furnish prima facie proof of the material facts set out or alleged in the petition** ". In regard to the person who may depose to an affidavit and its contents, reference should be made to sections 437 and 181 of the Code.*

Section 181 is as follows: - "Affidavits shall be confined to the statement of such facts as the declarant is able of his own knowledge and observation to testify to, except on interlocutory applications, in which statement of his belief may be admitted, provided that reasonable grounds for such belief be set forth in the affidavit."

*The rule in section 181 which confines an affidavit to "a statement of such facts as the declarant is able of his own knowledge and observation to testify to " **is intended to restrict the contents of affidavits to direct evidence as prescribed in section 60 of the Evidence Ordinance. By necessary implication it excludes hearsay from such affidavits.** The only exception is that in interlocutory applications a statement of what is believed, as to the relevant facts, may be included. This exception is subject to a proviso that reasonable grounds for such belief should also be set forth in the affidavit. The significance of the constituent elements of section 181, the rule, the exception and the proviso to the exception, are made clear in the judgments of the Supreme Court in the cases of Samarakoon v Ponniah, Simeon Fernando v Goonesekera and Kanagasabai v Kirupamoorthy.*

*The interlocutory applications referred to in section 181 are those in which relief is sought in the course of a proceeding and incidental to the final relief sought in the case. They are distinct from cases where the final relief is sought either by way of plaint or petition. Where the application is for final relief it cannot be characterised an interlocutory application merely because it is made by way of petition. Section 212 of the Companies Act provides that every application under the provisions of sections 210 and 211 shall be made by way of summary procedure. In terms of section 373 read with section 376 of the Civil Procedure Code an application by way of summary procedure is instituted by petition supported by affidavits and documentary evidence required to furnish prima facie proof of the material facts set out or alleged in the petition. Therefore an affidavit filed with a petition under section 212 of the Companies Act is not one filed in an interlocutory application. **Such an affidavit will be governed by the rule in section 181 of the Civil Procedure Code referred above and should contain only direct evidence. That is, a statement of such facts as the declarant is able of his own knowledge and observation to testify to,** in relation to the matters set out or alleged in the petition. It would not be open to include in such affidavit, matters which the declarant believes to exist as provided in the exception to section 181. **It certainly cannot include hearsay or other evidence or matters not admissible as direct evidence.***

Learned President's Counsel for the respondent-petitioners, 'relied on two judgments of the High Court of Calcutta in relation to the corresponding provisions of sections 397 and 398 of the Indian Companies Act 1956 and Order 19, rule 3 sub-rule (1) of the Indian Civil Procedure Code. In re Clive Mills Co. Ltd. (4) Mitra, J observed as follows:

*"An application under sections 397 and 398 of the Act is not an interlocutory application. The matter is finally disposed of by the order made on the application itself. Nothing remains outstanding, unless orders are made keeping certain matters outstanding. The application is disposed of on the basis of the averments in the pleadings, unless the matter is directed to be tried on evidence. **The pleadings in the matter, including the petition and the affidavits are to be treated as evidence, and that being so, the rules of evidence must be strictly adhered to.** The averments in the petition and in the affidavits which are verified as based on information, are by their very nature, hearsay evidence. **And if such averments are the foundation of the case made out by the petitioner, or the foundation of the defence made out by the respondents, the court should not rely or act upon the same. To do otherwise, would be to ignore the fundamental principles of the rules' of evidence.** If the averments in the pleadings are such that, but for them, an order cannot be made, persons who*

have personal knowledge of the facts stated must come forward and put what they have to say on affidavits. If other persons, having no personal knowledge of the facts, are set up to verify facts stated in petitions or affidavits, as being based on information supplied and believed to be true, the averments so verified cannot be relied on by the court.

*In a later case In re Benqal Luxmi Cotton Mills Ltd the same Judge repeated the foregoing observations and held that rules of evidence must be strictly adhered to in relation to the applications that are made for intervention by court under the corresponding sections. We are of the view that these observations are useful in relation to the application of the corresponding provisions of our law, referred to above that the affidavits filed in an application to court in terms of section 212 of the Companies Act for intervention by court in respect of alleged oppression or mismanagement as stated in sections 210 and 212 have to strictly comply with the provisions of sections 376, 437 and 181 of the Civil Procedure Code. **They have to furnish prima facie proof of the material facts set out or alleged in the petition and as such should contain only direct evidence**, that is, statements of such facts as the declarant is able of his own knowledge and observation to testify to. They cannot contain matters resting in the belief of the declarant or hearsay or other matters that may be inadmissible as evidence.*

*Learned District Judge has observed that the affidavit confirms to 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.***

*Learned President's Counsel for the petitioner-respondent submitted that the said T. Nadeson holds a power of attorney of the petitioner-respondent and he is a recognized agent of the petitioner respondent in terms of section 25 (b) of the Civil Procedure Code. This submission in our view, pertains to the **capacity of T. Nadeson to file an affidavit in these proceedings on behalf of the petitioner-respondent. However, the fact that he is a recognized agent of the petitioner-respondent does not lend any extra credence to the affidavit. The affidavit,***

whether it be of the recognized agent or of any other person should satisfy the requirements of the Civil Procedure Code referred above.

Learned President's Counsel also submitted that the grounds urged on behalf of the respondent-petitioners in effect seek to apply the provisions of section 183(a) of the Civil Procedure Code introduced by Civil Procedure Code (Amendment) Act No. 79 of 1988, which was not in operation, to this case. 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". In fact there is no such statement in the affidavit of T. Nadeson and if this amendment was in operation the matter would have been beyond argument. However, section 181 of the Civil Procedure Code has always been in operation and as found above this section requires only direct evidence to be contained in an affidavit filed in proceedings of this nature."

- 18) The dicta in the case of **Damayanthi Abeywardene v Hemalatha Abewardene** was reproduced in order to assist court in regard to the nature of the submissions made and the significance of the veracity of the evidence that was laid down by the judgment. A copy of the said judgment is annexed hereto marked "A".
- 19) In **Pushpadeva v Senok Trading Combine Ltd. (SC/LA 02/2014,SCM 04.09.2014)** (annexed hereto marked "B") his Lordship Justice Aluwihare P.C., in considering objections relating to infirmities in an affidavit, and after having considered a line of authorities observed that in order for technical objections to an affidavit to be upheld, they should be such or be so grave as to impact on the *validity* of the affidavit. Accordingly, in this case, the Respondents respectfully state that the objections to the affidavits filed on behalf of the Petitioners do not hinge on mere technicalities, but are based on the Law of Evidence and the evidential burden of the person swearing an affidavit to speak to only matters based on personal knowledge. The validity of an affidavit then, touches both substance and form.
- 20) In **Kobbakaduwa v Jayawardene (1983 1 SLR 419) 9** (annexed hereto marked "C") Sharvananda J observed as follows-

"The function of an affidavit is to verify the facts alleged in the petition. The affidavit furnishes prima facie evidence of the facts deposed to in the affidavit. Section 13 of the Oaths and Affirmations Ordinance (Cap 17) furnishes the sanction against a false affidavit by making the deponent guilty of the offence of giving false

evidence. In an affidavit a person can depose only to facts which a person is able of his own knowledge and observations to testify” (emphasis added).

- 21) In **Simeon Fernando v Goonasekera (47 NLR 512)** it was held that an affidavit must be confined to such statements of fact as the declarant is able of his own language and observation to testify to.
- 22) **N David & Co. v Albert Silva 31 NLR 316,** (annexed hereto marked “D”) the application was for a mandate under section 653 of the Civil Procedure Code for sequestration before judgment. Fisher C.J. held as follows:

*“The only point for our decision is whether this mandate was rightly issued. Such mandates are issued under section 653 of the Civil Procedure Code. In my opinion the provisions of that section must be strictly complied with inasmuch as the section deals with very special procedure invoked at the outset of the action before the merits of the action or the legal rights of the parties have been dealt with on the basis of fraudulent conduct on the part of a defendant, involving interference with the proprietary rights of a defendant. Special procedure, such as this, can only be invoked if the provisions of section 653 are complied with. **The affidavit in this case merely says that the plaintiff “has good reason to believe “certain things. There is no statement of any facts in the affidavit as required by section 653 of the Civil Procedure Code, and moreover, being an affidavit based on belief, section 181 is also applicable and must be complied with. That section requires reasonable grounds for the belief to be set forth in the affidavit. The affidavit in this case did not comply with section 181 in this respect and there was therefore no proper affidavit before the Judge. It is impossible .to give effect to the contention that the insufficiency of the material on which this mandate was granted can be made good, if it is shown that the state of things, in fact existing at the time the application was made, had it been brought to the notice of the Judge would have justified him in acting as he did. In my opinion there is no proper material upon which a mandate could be issued and it must therefore be dissolved and the appeal must be allowed, with costs in both Courts.”** (emphasis added).*

- 23) In **Singhaputhra Finance Co Ltd v Appuhamy and Others 2005 (1) SLR 55,** (annexed hereto marked “E”) Justice Wimalachandra observed and held as follows:

“The learned District Judge in his order expressed, that a mere averment in the affidavit of the petitioner that the applicant verily believes that the defendant is about to alienate the vehicle is not sufficient, and the learned Judge cited the cases of David & Co. Vs. Albert Silva(11) and Samarakoon Vs. Ponniah 12)’ in support of his opinion.

*Admittedly, the petitioner's application is an interlocutory application incidental to the final relief sought in this case. Accordingly in terms of Section 181 of the Civil Procedure Code, with regard to interlocutory applications, the affidavit containing statements regarding **its belief may be admitted provided reasonable grounds for such belief is set out in the affidavit** (see-Simon Fernando vs. Goonasekera (3)*

The interlocutory applications referred to in Section 181 of the Civil Procedure Code are those in which relief is sought in the course of a proceeding and incidental to the final relief sought in the case.

Chetaley and Rao in their AIR Commentaries on the Indian Code of Civil Procedure, 6th edition (1957), volume II, at page 2683 have this observation to make on the Indian section on "matters to which affidavits shall be confined" which is identical to our Section 181 ;

The ground of belief must be stated with sufficient clearness to enable a Court to judge whether it would be safe to act on the deponent's belief. Unless the affidavits are properly verified and are in conformity with the rule, they will be rejected by the Court. Thus where in an interlocutory application for injunction to restrain the publication of a libel the affidavit in support of the application stated that the documents complained of were to the best of his knowledge, information and belief, utterly untrue but no grounds for his belief were shown, it was held insufficient an affidavit is defective if the deponent does not say which part is based on information and which on belief or if he does not state the grounds of his belief.

*In the circumstances it is my considered view that the affidavit filed by the Petitioner to seek relief incidental to the final relief is not in conformity with Section 181 of the Civil Procedure Code. **The Court cannot rely on the affidavit filed by the petitioner for the reason that the grounds of belief are not stated in the affidavit to enable the Court to come to a conclusion whether it would be safe to act on the petitioner's affidavit to grant the relief sought by the petitioner in its petition.** The petitioner's affidavit is not an affidavit prepared in accordance with Section 181 of the Civil Procedure Code"*

- 24) In **Gunasinghe Banda v Navinna and Others (2000 (3) SLR 207)**, (annexed hereto marked "F") the Petitioner had alleged two grounds of corrupt practice based on two different interviews, said to have been given to the "Lakbima" newspaper by the 1st and 2nd Respondents. No affidavit from either of the journalists had been tendered.

The Respondent raised a preliminary objection that, in respect of the grounds of corrupt practice pleaded as Charges 1 and 2 the Petitioner failed to support same by any acceptable prima facie material and as such it is not competent for the Petitioner to maintain/prosecute the Petition. It was contended that the affidavit annexed in support of the allegation of corrupt practice which is the foundation of the Petition contains hearsay and as such is not an affidavit as contemplated by Law.

- 25) The Petitioner contended that the Petition is not required to contain the evidence, conversely that it could contain hearsay evidence, the affidavit in support of the allegations in the Petition will not necessarily be required to contain evidence and could contain hearsay evidence as well, and that in setting out an allegation of corrupt practice the Petitioner is not bound by rules of evidence and could include in and as part of the allegation of corrupt practice, statements which are hearsay in the Petition.

It was held as follows:

“Wording in S.98 (d) of the Provincial Councils Election Act 2 of 1988 regarding the filing of an affidavit in supportive of the allegation of such corrupt or illegal practice is different from S.80(B)d of the Ceylon Parliamentary Elections Order in Council. In S.80(B) (d) an affidavit in the prescribed form has to be filed In S.98(d) of the Parliamentary Elections act 10 of 1978 and Provincial Councils, Elections Act 2 of 1988 the words ‘in the prescribed form’ are not included.’ In the subsequent amendment to these Acts, those words have been deleted. Although S. 80B(d) refers to a prescribed form, no form has been prescribed by law. Whatever the form may be, an affidavit must conform to the provisions of the Oaths and Affirmations Ordinance No. 9 of 1895 as amended by Act 22 of 1915, and Act 13 of 1954 and Act 23 of 1953 and Sections 181, 182, 437 of the Civil Procedure Code. (Emphasis added).

It is very clear that an affidavit **could contain only such facts as a declarant is able of his own knowledge and observation to testify to**. Therefore hearsay could not be included as contents of an affidavit.

- (ii) 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.

Justice Jayawickrema went on to state as follows:

"If one is to base legal action on news items appearing in newspapers no one will be safe in this country. Present day media are hell- bent only as on exposure rather than keeping the nation informed of the news. The truth or otherwise of news items depends on the integrity, impartiality, consistency and credibility of a journalist. The present day print and electronic media make very serious allegations or statements bordering on defamation against persons in every strata of society including religious leaders and Judges just to demean such persons standing in society."

(iii) It would be a very dangerous precedent to allow a person to file an affidavit entirely depending on publications in the media, without being able of his own knowledge and observation to testify to the truth or otherwise of the facts stated therein.

(iv) A Petition cannot be supported by an affidavit which is based on hearsay even if the names of persons to whom the alleged statements have been made are named as witnesses. Even if the Journalists vouch for the fact that the Respondents did make such statements the Petitioners cannot base affidavits on that basis, for the simple fact that the facts are not of their own knowledge and observations.

Whatever the form may be, an affidavit must conform to the provisions of the Oaths and Affirmations Act No.9 of 1895 as amended by Act No 13 of 1954 and Act No. 23 of 1953 and sections 181, 182, 437 of the Civil Procedure Code.