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**IN THE COURT OF APPEAL, FIJI ISLANDS**  
**AT SUVA**

*Appellate Jurisdiction*

**CIVIL APPEAL NO. ABU0071 OF 2006**

**BETWEEN** : **SUN INSURANCE COMPANY LIMITED**  
*known as NMBF Insurance (Fiji) Company Limited* *Appellant*

**AND** : **BANK OF BARODA** *1<sup>st</sup> Respondent*

**AND** : **NATIONAL MBF Finance (Fiji) Limited** *2<sup>nd</sup> Respondent*

**Before the Honourable Judge of Appeal, Mr Justice John E Byrne**

**Counsel** : S. Maharaj for the Appellant  
 V. P. Mishra for the 1<sup>st</sup> Respondent  
 No Appearance for the 2<sup>nd</sup> Respondent

**Dates of Hearing & Submissions** : 26<sup>th</sup>, 30<sup>th</sup> June 2008  
**Date of Ruling** : 22<sup>nd</sup> October 2008

***RULING***

[1] I have before me a Notice of Motion dated the 16<sup>th</sup> of February 2008 which seeks leave to join nine persons as parties to this appeal. The motion is made pursuant to Section 20(1)(c)(k) of the Court of Appeal Amendment Act No.13 of 1998. That section enables a Judge of the Court of Appeal to give leave to amend a Notice of Appeal (c)(k), generally to hear any application, make any order or give any direction that is incidental to an appeal or intended appeal.

- [2] The history of this appeal goes back to a judgment in the High Court in Lautoka by Connors J. in Civil Appeal No. HBC191 of 1998L in which the *1<sup>st</sup> Respondent as Plaintiff* obtained judgment against the *2<sup>nd</sup> Respondent as Defendant* in the sum of \$774,423.66.
- [3] The Statement of Claim in the High Court alleged that the *Defendant* had seized goods from Bubble Up Investments Limited which were the security with respect to various security documents between Bubble Up Investments Limited and the *Plaintiff (1<sup>st</sup> Respondent)*. The action was uncontested, apparently because counsel who appeared for the *Defendant* had not been able to get any response from the receiver of Bubble Up Investments Limited and thus to get instructions for the defence.
- [4] On the 3<sup>rd</sup> of March 2006 Finnigan J. made an order ex-parte that the Nine Hundred and Ninety-Nine Thousand Nine Hundred and Ninety-Four (999,994) shares in Sun Insurance Company Limited (formerly NMBF Insurance (Fiji) Company Limited) the present *Appellant* held in the name of NMBF Insurance (Fiji) Company Limited be charged and attached to answer the judgment recovered by the *1<sup>st</sup> Respondent* against National MBF Finance (Fiji) Limited. The Order further directed National NBF Finance (Fiji) Limited to attend before a Judge in Chambers to show cause why its interest in the shares should not be applied to satisfy the debt to the *Plaintiff (1<sup>st</sup> Respondent)* on the 12<sup>th</sup> of May 2006.
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- [5] On that day there was no appearance for NMBF Insurance Limited and on the application of counsel for the *1<sup>st</sup> Respondent* the Judge made the Charging Order of the 3<sup>rd</sup> of March 2006 absolute against NMBF Insurance (Fiji) Company Limited. On the 7<sup>th</sup> of July 2006 the present *Appellant* filed a Notice of Appeal against the orders of Finnigan J. on the following grounds:

- i) That the learned Judge erred in law in making the orders mentioned above when the *Appellant* was neither served with any of the applications or orders made thereon or heard in the matter at all.
- ii) That the learned Judge erred in law in making the subject orders having been misled by the *1<sup>st</sup> Respondent* which failed to produce and disclose all relevant materials and information pertaining to the Nine Thousand Nine Hundred and Ninety-Nine, Nine Hundred and Ninety-Four shares held by National MBF Finance (Fiji) Limited.
- iii) That the orders were made irregularly and in breach of the rules of natural justice in that the Appellant was not heard by the Court at all.
- iv) That the learned Judge erred in law in not realising that the joining of the *Appellant* in the action was not done according to the rules of the High Court and in particular with the leave of the Court and that therefore there has been a miscarriage of justice in the particular circumstances of the case.
- v) That the Charging Order made on the 3<sup>rd</sup> of March 2006 ought not to have been made on an ex-parte basis and therefore it should be set aside in the interest of justice.
- vi) That the Charging Order made on the 3<sup>rd</sup> of March 2006 was not served on the registered office of the Sun Insurance Company Limited (formerly known as NMBF Insurance (Fiji) Company Limited) or to its correct postal box address and therefore should be set aside in the interest of justice.
- vii) That the Charging Order Absolute made without the *Appellant* having been heard in the matter, cannot be sustained or maintained or upheld in law when the *1<sup>st</sup> Respondent* has sold

all its Nine Hundred and Ninety-Nine Thousand Nine Hundred and Ninety-Four shares for valuable consideration to Veritatem Nominees (Fiji) Limited which subsequently were transferred to the new shareholders of the *Appellant*.

[6] On the 16<sup>th</sup> of November 2007 Phillips J. in the High Court at Lautoka granted a Stay of enforcement of the Order Absolute of the 12<sup>th</sup> of May 2006 until the final determination of this appeal on condition that the *Appellant (Applicant)* paid costs of \$2,000.00 to the *1<sup>st</sup> Respondent's* solicitors within seven days. The second order was that the status quo is to be preserved until this appeal is determined. The Nine Hundred and Ninety-Nine Thousand, Nine Hundred and Ninety-Four shares were ordered not to be sold, transferred or otherwise assigned in any manner whatsoever until determination of the appeal. The *1<sup>st</sup> Respondent* opposed the application for stay on the ground that the *Appellant* had no standing to bring the application. The learned Judge disagreed. She said that Order 50 Rule 7 permits any other person, aside the judgment debtor, having an interest in the property charged, whether before or after the order is made absolute, to apply for discharge or variation of the order. She held, and I agree, that the *Appellant* was clearly a party having an interest in the property charged and was therefore allowed under the rules to make the application.

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[7] Following the order of Phillips J., the present motion was issued and was supported by an Affidavit of Dewan Chand Maharaj a shareholder and director of the *Appellant* who deposed that the *Appellant* was formerly known as NMBF Insurance (Fiji) Company Limited, a limited liability company whose shareholders were:

i) National MBF Finance (Fiji) Company Limited.

- ii) Lionel Ding Sun Yee – 1 Share.
- iii) Francis Chung – 1 Share.
- iv) Akulla Savu – 1 Share.
- v) Kenneth John Clemens – 1 Share.
- vi) Priyaraj Lakmal Munasinghe – 1 Share.
- vii) Daniel Elisha – 1 Share.

[8] The total shareholding of NMBF was 1,000,000 shares. Paragraph 6 of the Affidavit sets out the value of each shareholder's shares in the *Appellant*.

[9] In paragraph 13 of her judgment of the 16<sup>th</sup> of November 2007 the Judge said:

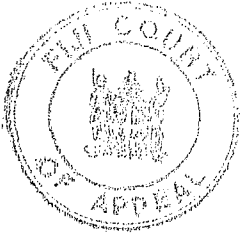
*"In this case, the property sought to be charged were 999, 994 Sun shares. Sun and/or its shareholders were clearly interested parties entitled to attend and to be heard on the hearing of the further consideration of the matter, when the Court considered whether or not to make the order absolute. Rule 4(2)(b) above required service of the order nisi on Sun. The order nisi related to Sun shares. The company, Sun, was required to be served, as soon as practicable after the making of the order nisi. The rule is stated in mandatory terms. However determination of the issue of whether the order absolute be discharged for want of compliance with the Rules, in this application, may encroach on the subject matter of the pending appeal. Any further comment would be inappropriate. Under the*

*Rules, Sun was entitled to bring the application for discharge. However an Appeal against the granting of the orders nisi and absolute was also filed. Given the pendency of the Appeal, it would be inappropriate to vary or discharge the orders until the Fiji Court of Appeal has determined the Appeal respecting the grant of those orders”.*

[10] I have no hesitation in agreeing with the learned Judge’s remarks in paragraph 13. Clearly the shareholders were interested parties entitled to attend and to be heard on the application for the Charging Order. They were not, and I therefore consider that there was a breach of natural justice which must be remedied.

[11] The only question before me now is whether those shareholders should be joined as parties to the appeal. In my judgment they have no right to be joined but they have a right to apply to the High Court for redress if they claim to have suffered any damage as a result of being denied audience before the High Court. I accept the submission of the *1<sup>st</sup> Respondent* that a company cannot sue about its own shares. Any cause of action relating to the shares rests only in the shareholders. This is in accordance with the well known principle first stated in the Privy Council decision of **Salomon –v- Salomon and Co. Ltd.** [1897] AC 22 and reaffirmed more recently also in a Privy Council decision of **Lee –v- Lee Air Farming Ltd.** [1961] AC 12.

[12] There is nothing that I can usefully add to what I have said and I therefore dismiss the *Appellant’s* motion for leave to join the persons mentioned therein as *Appellants*. The appeal will now take its normal course. Costs will be in the cause.



*John E. Byrne*  
.....  
[ John E Byrne ]  
**JUDGE OF APPEAL**

At Suva  
22<sup>nd</sup> October 2008