

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 22 OF 2018
(High Court Civil Action HBC No: 22 of 2014 at Lautoka)

BETWEEN : **PUNJAS FLOUR LIMITED** *Appellant*

AND : **FIJI ELECTRICITY AUTHORITY** *Respondent*

Coram : Basnayake JA
Lecamwasam JA
Dayaratne JA

Counsel : Mr. C. B. Young for the Appellant
Mr. A. Narayan for the Respondent

Date of Hearing : 14 May 2019

Date of Judgment : 7 June 2019

JUDGMENT

Basnayake, JA

[1] I agree that this appeal should be dismissed without costs.

Lecamwasam, JA

- [2] This is an appeal by the Appellant against the judgment of the Learned High Court Judge at Lautoka dated 19th June 2017. The learned Judge has refused to grant leave to appeal against the Master's ruling dated 16th April 2016 ordering specific discovery against the Appellant and has also dismissed the appeal against the Master's Ruling. However, when the application for leave to appeal was made before Mr. Justice Mohammed Mackie in the High Court, the learned judge has granted leave on 13th April 2018.
- [3] As Mr. Justice Mackie has comprehensively and lucidly elucidated the background to the application, I can do no better than to reproduce the relevant paragraphs as narrated by him. Hence I borrow the relevant paragraphs from his judgment *in verbatim* as follows:-

- “... a. *The Plaintiff, who is in the business of Flour Milling, distribution and selling in and out of Fiji, in or about June 2005, commissioned and commenced the operation of a brand new state of the art flour Mill at Navutu Industrial Subdivision in Lautoka , which needed additional power supply from the national grid.*
- b. *Pursuant to an agreement entered into between the Plaintiff and the Defendant for the supply of additional Electricity to the Plaintiff's Mill, the Defendant fixed and commissioned 2 Transformers within the premises, laid cables, installed main switch board and supplied required power for the purpose through the Electricity Meter supplied and fixed by the Defendant, admittedly, after due inspection. All the above fixtures were also, admittedly, under periodical inspection and maintenance by the Defendant to rule out any fault or tampering.*
- c. *Monthly bills from July, 2005 to September, 2013 were duly issued and the payments were regularly made till the Plaintiff made a complaint in October 2013 stating that its monthly Electricity bill had suddenly increased from \$23,754.86 in September, 2013 to \$196,335.29 in October, 2013.*
- d. *The Defendant in response to the above complaint informed the Plaintiff that a Metering anomaly had been identified and rectified in September, 2013.*

- e. *Being aggrieved, the Plaintiff instituted action on 20th February, 2014 for breach of contract.*
- f. *The Defendant while filing the statement of defence, made a counter claim for the recovery of charges for the, alleged, unbilled Electricity consumed by the plaintiff throughout the period of 8 years, during which period the Defendant claimed the Meter was faulty.*
- g. *After the completion of pleadings , in order to assess the average consumption throughout the disputed period and to substantiate its counter claim, the Defendant made an application for discovery of variety of documents from the possession of the Plaintiff , which the plaintiff claimed to be highly confidential, containing sensitive commercial information regarding its trade and business activities and those vital information, if the discovery is allowed, might end up in the hands of its business competitors through the Defendant's Solicitors , who are said to be acting for such a competitor.*
- h. *The application made by the Defendant for discovery, was allowed by the Master by his ruling dated 29th April, 2016.*
- i. *Being dissatisfied of the above ruling , the Plaintiff made a leave to appeal application and an appeal to a judge of this court on 10th May,2016 and my predecessor judge , having considered both the leave to appeal application and the appeal together, by his impugn judgment dated 19th June , 2017 dismissed the leave to appeal application and the appeal. It is against this judgment the Plaintiff is before this Court seeking leave to appeal to the Court of Appeal and for stay of proceedings.*

[4] Being aggrieved by the judgment of the Learned High Court Judge dated 19th June 2017, the Plaintiff/Appellant filed the instant appeal on the following grounds of appeal:-

- “1. *That the learned Master was wrong to order specific discovery of commercially sensitive documents without first determining under Order 33 the preliminary questions or issues raised by the Appellant because such course was just and equitable to avoid the real risk of causing irreparable damage to the Appellant's business if the Appellant were to succeed on those questions or issues at the substantive hearing.*
- 2. *The learned Judge was wrong to dismiss the appellant's summons for leave and the appeal on the ground that there was no formal application before the Master under Order 33 without considering and giving new weight to the following material factors:*

- (a) *The appellants written submission to the Master had raised Order 33;*
 - (b) *Order 33 was also raised in the Appellant’s counsel’s closing oral submissions to the Master;*
 - (c) *A formal application by either party was not necessary. Order 33 was applicant neutral. It could be invoked by the Court itself at any stage if justice so required and was not dependent upon an application by a party to the proceeding;*
 - (d) *The case of Steel v Steel [2001] C.P.Rep.106; and*
 - (e) *Justice of the case warranted the prior determination of the preliminary questions or issues under Order 33.*
3. *The learned Judge failed to appreciate that the Appellant had complied with the criteria for leave to appeal against an interlocutory order or judgment in **Niemann v. Eletronic Industries Ltd** [1978] V.R. 441, namely;*
- (i) *The issue raised was one of general importance and was not simply depend upon the facts of the particular case;*
 - (ii) *There were difficult questions of law as to which the Master was “sorely troubled”;*
 - (iii) *The Master’s order had the effect of altering the substantive rights of the Plaintiff and was not merely on a matter of practice and procedure; and*
 - (iv) *The presumption against granting leave to appeal from interlocutory orders or judgments was rebutted.*
4. *Having favourably considered the Appellant’s ground of appeal, the learned Judge erred in law by dismissing the Appellant’s summons for leave and the appeal instead of granting leave, allowing the appeal and determining the preliminary questions or issues under Order 33 Rules 4(2), 5(1) and 7 before dealing with, or directing the Master to deal with, the Respondent’s Summons for Specific Discovery.”*

[5] The issuance of the interlocutory order by the Master is the point of departure for the instant appeal. The issue of an interlocutory application arose in the course of the main case in regard to the discovery of certain documents. These documents were requested by the respondent in order to calculate and fix the monthly electricity usage by the Appellant during the period from 2005 to December 2014. The Respondent filed amended summons for specific discovery on 17th September 2015 requesting for the following documents as per the motion.

- “(a) **THAT** the Plaintiff do within 14 days disclose by affidavit whether copies of all feasibility reports and/or production forecasts and/or projected expenses and/or budget forecasts of profits and/or losses and/or expenses and projections of income and production commissioned and/or undertaken by or provided to the Plaintiff or any of its group or related companies prior to approving or commencing the project for a flour mill by the Plaintiff which was constructed and subsequently operated from its present site at Navutu Lautoka in or around 2003/2004/2005 pertaining to the Plaintiff are or have at any time been in their possession custody or power and if it parted with them, when it parted with any of them and what has become of them **AND FOR A FURTHER ORDER** that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant.
- (b) **THAT** the Plaintiff do within 14 days disclose by affidavit whether copies of all feasibility reports and/or production forecasts and/or projected expenses and/or budget forecasts of profits and/or losses and/or expenses and projections of income and production commissioned and/or undertaken by or provided to the Plaintiff or any of its group or related companies prior to approving or commissioning the upgrading for increase of production plant machinery mills and storage capacity for its flour mill at Navutu Lautoka in or around 2011/2012 pertaining to the Plaintiff and/or have at anytime been in their possession custody or power and if it parted with them, when it parted with any of them and what has become of them **AND FOR A FURTHER ORDER** that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant.
- (c) **THAT** the Plaintiff do within 14 days disclose by affidavit whether copies of all feasibility reports and/or production forecasts and/or projected expenses and/or budget forecasts of profits and/or losses and/or expenses and projections of income and production commissioned and/or undertaken by or provided to the Plaintiff or any of its group or related companies prior to approving or commissioning the upgrading for increase of production, plant, machinery, mills and storage capacity for its flour mill at Navutu Lautoka in or around in or around 2013 pertaining to the Plaintiff are or have at any time been in the their possession custody or power and if it parted with them, when it parted with any of them and what has become of them **AND FOR A FURTHER ORDER** that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant.
- (d) **THAT** the Plaintiff do within 14 days disclose by affidavit whether copies of all Minutes and Resolutions of the Board/Directors/Company recording the

*discussions, debates, deliberations as production forecasts and/or projected expenses and/or budget forecasts of profits and/or losses and/or expenses and projections of income and production and/or approvals leading to the initial setup and construction of the Plaintiff's flour mill at Navutu in or around 2003/2004/2005 pertaining to the Plaintiff are or have at any time been in their possession custody or power and if it parted with them, when it parted with any of them and what has become of them **AND FOR A FURTHER ORDER** that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant.*

- (e) ***THAT** the Plaintiff do within 14 days disclose by affidavit whether copies of all Minute and Resolutions of the Board/Directors/Company recording the discussions, debates and deliberations as to production forecasts and/or projected expenses and/or budget forecasts of profits and/or losses and/or expenses and projections of income and production and/or approvals leading to the decision for upgrade and increase in production capacity and request for increased electricity supply for the Plaintiff's flour mill at Navutu in or around 2011/2012 pertaining to the Plaintiff are or have at any time been in their possession, custody or power and if it parted with them, when it parted with any of them and what has become of them **AND FOR A FURTHER ORDER** that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant.*
- (f) ***THAT** the Plaintiff do within 14 days disclose by affidavit whether copies of all board papers (including, but not limited to, all information papers and reports therein) circulated or provided to or used by Board/Directors/Company for discussions, debates, deliberations as to production forecasts and/or projected expenses and/or budget forecasts of profits and/or losses and/or expenses and projections of income and production and/or approvals leading to the initial setup and construction of the Plaintiffs flour mill at Navutu in or around 2003/2004/2005 pertaining to the Plaintiff are or have at any time been in their possession, custody or power and if it parted with them, when it parted with any of them and what has become of them **AND FOR A FURTHER ORDER** that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant.*
- (g) ***THAT** the Plaintiff do within 14 days disclose by affidavit whether copies of all board papers Copies of all board papers (including, but not limited to, all information papers and reports therein) circulated or provided to or used by Board/Directors/Company for discussions , debates, deliberations*

*as to production forecasts and/or projected expenses and/or budget forecasts of profits and/or losses and/or expenses and projections of income and production and/or approvals leading to the decision to upgrade and increase in production capacity and request for increased electricity supply for the Plaintiff's flour mill at Navutu Lautoka in or around 2011/2012 pertaining to the Plaintiff are or have at any time been in their possession, custody or power and if it parted with them when it parted with any of them and what has become of them **AND FOR A FURTHER ORDER** that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant.*

- (h) ***THAT** the Plaintiff do within 14 days disclose by affidavit whether copies of all board papers Copies of all board papers (including, but not limited to, all information papers and reports therein) circulated or provided to or used by Board/Directors/Company for discussions, debates, deliberations as to production forecasts and/or projected expenses and/or budget forecasts of profits and/or losses and/or expenses and projections of income and production and/or approvals leading to the decision to upgrade and increase in production capacity and request for increased electricity supply for the Plaintiff's flour mill at Navutu Lautoka in or around 2013 pertaining to the Plaintiff are or have at any time been in their possession custody or power and if it parted with them, when it parted with any of them and what has become of them **AND FOR A FURTHER ORDER** that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant.*

- (i) ***THAT** the Plaintiff do within 14 days disclose by affidavit whether copies of records for the purchase and/or import of all wheat the Plaintiff for the years 2005 to 31st December 2014 pertaining to the Plaintiff are or have at any time been in their possession, custody or power and if it parted with them, when it parted with any of them and what has become of them **AND FOR A FURTHER ORDER** that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant.*

- (j) ***THAT** the Plaintiff do within 14 days disclose by affidavit whether copies of records of sales of flour and other manufactured items by the Plaintiff in the course of its business for the years 2005 to 31st December 2014 pertaining to the Plaintiff are or have at any time been in their possession, custody or power and if it parted with them when it parted with any of them and what has become of them **AND FOR A FURTHER ORDER** that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant.*

- (k) **THAT** the Plaintiff do within 14 days disclose by affidavit whether copies of all VAT returns filed by the Plaintiff with the Fiji Revenue & Customs Authority or its predecessor for the years 2005 to 31st December 2014 pertaining to the Plaintiff are or have at any time been in their possession, custody or power and if it parted with them, when it parted with any of them and what has become of them **AND FOR A FURTHER ORDER** that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant.
- (l) **THAT** the Plaintiff do within 14 days disclose by affidavit whether copies of all VAT assessments issued to the Plaintiff by the Fiji Revenue and Customs Authority or its predecessor for the years 2005 to 31st December 2014 pertaining to the Plaintiff are or have at any time been in their possession, custody or power and if it parted with them, when it parted with any of them and what has become of them **AND FOR A FURTHER ORDER** that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant.
- (m) **THAT** the Plaintiff do within 14 days disclose by affidavit whether copies of full financial statements including balance sheets/profits & loss/depreciation schedule filed by the plaintiff with the Fiji Revenue and Customs Authority or its predecessor for the years 2005 to 31st December 2014 pertaining to the Plaintiff are or have at any time been in their possession, custody or power and if it parted with them, when it parted with any of them and what has become of them **AND FOR A FURTHER ORDER** that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant.
- (n) **THAT** the Plaintiff do within 14 days disclose by affidavit whether copies of tax assessments issued by the Fiji Revenue and Customs Authority or its predecessor to the Plaintiff for the years 2005 to 31st December 2014 pertaining to the Plaintiff are or have at any time been in their possession, custody or power and if it parted with them, when it parted with any of them and what has become of them **AND FOR A FURTHER ORDER** that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant.
- (o) **THAT** the Plaintiff do within 14 days disclose by affidavit whether copies of all manuals, specifications, productions capacity, coefficient of electricity consumption for each of the mills initiated by the Plaintiff at Navutu Lautoka as provided by the manufacturer and/or installer/contractor for the

*initial construction and installation in or around 2003/2004/2005 and upgrades in or around 2011/2012 and 2013 pertaining to the Plaintiff are or have at any time been in their possession, custody or power and if it parted with them, when it parted with any of them and what has become of them **AND FOR A FURTHER ORDER** that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant.*

- (p) ***THAT** the Plaintiff do within 14 days disclose by affidavit whether copies of all documents containing installed loads in the Plaintiff's flour mill for 2005 to 31st December 2014 pertaining to the Plaintiff are or have at any time been in their possession, custody or power and if it parted with them, when it parted with any of them and what has become of them **AND FOR FURTHER ORDER** that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant.*
- (q) ***THAT** the Plaintiff do within 14 days disclose by affidavit whether copies of all documents containing records in any form, including but not limited to digital photographic or computer generated records of the milling of wheat and production of flour at its flour mill at Navutu-Lautoka for the years June 2005 to December 2014 pertaining to the Plaintiff are or have at any time been in their possession, custody or power and if it parted with them, when it parted with any of them and what has become of them **AND FOR A FURTHER ORDER** and the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant.*
- (r) ***THAT** the Plaintiff do within 14 days disclose by affidavit whether copies of all submissions, reports or representations made or given to the Prices and incomes Board or the Commerce Commission in respect of the fixing of prices for flour produced from its flour mill and sold or to be sold for the years June 2005 to December 2014 pertaining to the Plaintiff are or have at any time been in its possession, custody or power and if it parted with them, when it parted with any of them and what has become of them **AND FOR A FURTHER ORDER** that the Plaintiff do within 14 days thereafter make available such documents of copies of them for inspection on behalf of the Defendant.”*

[6] Against this background, the learned Master, having considered the facts of the case, had allowed the application for discovery in regard to paragraphs (n) to (r) with the exception

of (o). The Master considered the application with regards to (o) to be oppressive and declined the same as it deals with copies of manuals, specifications, production capacity, etc. The reasoning of the Master reflects his careful consideration of the application and that he was not perfunctory in dealing with the matter. It is obvious that the contents of (o) could not have contributed in any way to ascertain the electricity usage of the plaintiff and therefore I do not find the decision of the Master unjustified.

[7] In regard to (i), the respondent had requested for copies of the record for the purchase and/or import of all wheat of the plaintiff for the years 2005 to December 2014. Request (j) pertains to the sales of flour and other manufactured items in the course of its business during the same period. Whereas, (k) and (l) respectively deals with copies of all VAT returns filed by the plaintiff with the Fiji Revenue and Customs Authority and VAT assessments issued to the plaintiff for the relevant period. (m) pertains to full financial statements including balance sheets/profit and loss/depreciation schedules for the same period. Requests (n), (p), and (q) respectively refer to copies of TAX assessments issued by the Fiji Revenue and Customs Authority, documents containing installed loads in the plaintiff's flour mill, and records in any form including but not limited to digital photographic or computer generated records of the milling of wheat and production of flour during the relevant period. Lastly, request (r) deals with copies of submissions, reports or representation made or given to the Prices and Incomes Board or the Commerce Commission for the same period.

[8] I find that out of the 10 items requested, i.e. from (i) to (r), the documents requested in (k), (l), (m), and (n) are documents that are already available with the Fiji Revenue and Customs Authority or at least documents the Appellant would have furnished to the above authority. Therefore, I do not find any cogent reason to withhold an order for discovery of these documents, as those are not shrouded in any secrecy, having already ceded to the possession of the authority, nor after all these years (the request pertains to documents for the period from 2005 to December 2014) hold any current commercial sensitivity. Undoubtedly, the particulars asked for in (i) and (j) are necessary to

ascertain the correct or approximate amount of the electricity usage for the period. In the same manner, (q) and (r) are also necessary for such computation.

- [9] In regard to (r), the respondent requests for reports submitted to the Prices and Incomes Board or the Commerce Commission for the relevant period. Therefore, in the same vein as before the Appellant cannot claim either commercial sensitivity or confidentiality/secretcy of documents, those being in the public domain.
- [10] Therefore, this court does not deem it necessary to engage in any lengthy arguments or submit volumes of submissions in regard to the relevancy or need of the above documents for the calculation of an approximate figure in relation to the electricity usage. Even the most cursory of perusals will suffice to determine the justification for the request. Above all, these particulars are of a past period and requested solely for the purpose of an accurate calculation.
- [11] Even though the parties dealt at length with interlocutory matters etc. the jurisdiction of this court has only been invoked in respect of the discovery of documents. Therefore, I will confine myself to the issue of the discovery of documents and not dwell on the other issues raised by the parties subsequently.
- [12] At no stage does the respondent state that the appellant had in any manner manipulated or tampered with the electricity meter. The appellant too states that he had no access to the meter. Against this position, in August 2013, after installing a test meter, the Respondent finds that the electricity usage had gone up by almost eight fold. This prompted the Respondent to go back in time up to 2005 to ascertain the amount of electricity consumed by the Appellant.
- [13] Therefore it is nothing but correct to accurately calculate the amount of electricity used by the Appellant over the years. For this purpose, it stands to reason that the respondent needed certain documentation, and had made the application by way of counter claim for

the discovery of documents. Therefore, this Court is more than convinced that the application for the discovery of documents should be allowed in order to calculate the accurate amount of electricity that had been used by the appellant during the relevant period.

[14] By allowing the application for the discovery of documents, it will not be the end of the road for the appellant since he can assert his rights before the Master later in the substantive hearing.

[15] However, the appellant has commented that he was not given an opportunity to place facts in relation to the preliminary issues, i.e. (a) estoppels; (b) interpretation of regulations 68(2)(b), 69(3)(b) and 71 of the Electricity Regulations, before the court prior to making orders on the summons.

[16] A perusal of the High Court Record, especially the pleadings, did not reveal an application made by the appellant under Order 33. However, the appellant had in passing, mentioned and requested the court to act on Order 33 Rule 3 and inquire in to the alleged preliminary issues. These submissions had been filed on 3rd December 2015 but as per 'hearing notes' of 25 September 2015 I do not see any application made by the appellant (plaintiff) requesting an inquiry under Order 33 of High Court Rules.

[17] As per the journal entries above, it is clear that the hearing had commenced and concluded on the same day and had gone down for Ruling on 11th March 2016. Despite the claim of the appellant regarding an application under Order 33 Rule 3 it is satisfactorily evident that he had not made any application before the Court for such actions. The court cannot therefore act on mere conjecture without an application having been made in that regard. It was incumbent on the plaintiff to have made an application under Order 33 for the court to take cognizance of such matter without which the court could not have gone into an inquiry under Order 33.

- [18] I hold that the learned Master or the High Court Judge is not at fault. However, I am not unmindful of the consequences that will follow if the discovery of documents is permitted before the preliminary issues are dealt with. The alleged preliminary issues would certainly reduce or end the proceedings within a short time if they are answered in favour of the appellant. Therefore, I direct the learned Master to deal with the preliminary issues at the outset provided a proper application is made before the Master. Hence I hold that the application for the discovery of documents should be allowed. The Master is directed to carry out the orders of this court in relation to discovery of documents subsequent to determining the preliminary issues.
- [19] If the Master decides the preliminary issues raised by the plaintiff/appellant in favour of the plaintiff/appellant, it will bring this case to a conclusion. Otherwise, the lower court can thereafter carry out the orders of this court in relation to the discovery of documents. In regard to the orders of the learned Master dated 29th April 2016, in order 4 he has ordered thus “any relevant part of a document that is subject to disclosure should be covered up when the document itself is produced.” I find this order of the Master to be vague, nebulous, and cryptic which could potentially lead to confusion. To avoid such a situation I direct the learned Master to decide and for the learned Master himself to lend his mind to the matter of determining the portions to be covered of the requested documents without delegating the task to any other person.
- [20] In view of the above reasons, I affirm the judgment of the learned High Court Judge dated 19th June 2017 and the ruling of the learned Master dated 16th April 2016 and I order the parties to bear their own costs. Subject to the above reasoning, the appeal is dismissed, subject to the directions contained in paragraph 18 and I answer the grounds of appeal thus;

Ground 1

I reject this ground of appeal for want of a formal application under Order 33 for the Master to consider an inquiry.

Ground 2

Responding to 2(a),(b),(c) and (d) cumulatively, I find that the appellant failed to plead order 33 in the pleadings albeit raising the issue of order 33 in its submissions. A formal application is necessary for the court to act and in the absence of such the court cannot take cognizance of an un-pleaded issue. Even the criteria enunciated in *Steel v Steel [2001]c.p.Rep.106* requires a proper formal application. Hence I reject the 2nd ground of appeal.

Ground 3

It is redundant to answer this issue, as the learned High Court Judge by his ruling dated 13th April 2018 had allowed the application for leave to appeal the interlocutory order.

Ground 4

For the reasons stated above, I reject this ground of appeal.

Dayaratne, JA

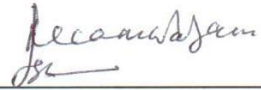
[21] I agree with the reasons given and the conclusions arrived at by Lecamwasam JA.

Orders of Court:

- 1). *Appeal dismissed.*
- 2). *Parties to bear their own costs.*



Hon. Justice E Basnayake
JUSTICE OF APPEAL



Hon. Justice S Lecamwasam
JUSTICE OF APPEAL



Hon. Justice V Dayaratne
JUSTICE OF APPEAL