

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

CIVIL APPEAL NO. ABU 0106 of 2018
(High Court Action No: HBTC 1 of 2013)

BETWEEN : **GENERAL MACHINERY HIRE LIMITED**

Appellant

AND : **THE CHIEF EXECUTIVE OFFICER OF FIJI REVENUE
AND CUSTOMS AUTHORITY**

Respondent

Coram : **Chandra, RJA**

Counsel : **Ms V Lidise for Appellant
Mr F Haniff with Mr C Yee for the Respondent**

Date of Hearing : **21 January, 2019**

Date of Ruling : **12 April, 2019**

RULING

- [1] This is a renewed application seeking leave to appeal the interlocutory order made by the learned High Court Judge on 13 September 2018.

- [2] The Applicant filed proceedings by way of a Writ of Summons and statement of claim against the Respondent in The Tax Court (High Court) at Suva. The Respondent had filed a statement of defence and the Pre-Trial conference minutes had been filed on 5 July 2017.
- [3] The Appellant had brought the action against the Respondent pursuant to section 91(1)(b) of the Tax Administration Decree 2009 regarding its claims arising from the decision of the Respondent dated 31 October 2013 in respect of its objections to the Amended Assessment of Value Added Tax for the years ended 31 December 2006 to 2010 and amended assessment of Income Tax for the years ended 2001 to 2010 and the Respondent's actions in issuing and collecting its monies from third parties under several garnishees which the Appellant claimed to be unwarranted, unjustified and unlawful.
- [4] The trial had commenced on 4 July 2018 with the Company Director being sworn in to give evidence and a Bundle of documents admitted in evidence. While the witness was being examined by Counsel for the Applicant, Counsel for the Defendant had objected to the leading of evidence related to development cost on land which the Applicant had purchased.
- [5] The learned High Court Judge had upheld the objection and an adjournment had been sought by Counsel for the Applicant which was objected to by Counsel for the Defendant. However, the learned High Court Judge had allowed the adjournment to allow the Applicant to file its application to amend the Statement of Claim.
- [6] The application to amend the statement of claim had been filed on 13 July 2018 and it had been opposed by the Defendant. The Application to amend was heard by the learned High Court Judge and on 13th September 2018 the learned Judge dismissed the application to amend.

[7] The Applicant filed an application seeking leave to appeal from the said High Court which application was dismissed by the learned High Court Judge on 17 October 2018.

[8] The Applicant has renewed its application for leave to appeal the interlocutory order of 13th September 2018 proposing the following grounds of appeal:

- “1. *The learned Judge erred in law in holding that the Appellant was bound by the grounds of objection filed with the Chief Executive Officer of the Respondent pursuant to Section 21(2) of the Tax Administration Act when the Appellant had not filed a review before the Tax Tribunal but had invoked the jurisdiction of section 91(1)(b) of the Tax Administration Act.*
2. *The learned Judge erred in law when he applied the maxim of public policy, generalia specialibus no derogant when it was not applicable in the interpretation of the Appellant’s rights to file an action directly with the Tax High Court pursuant to section 91(1)(b) of the Tax Administration.*
3. *The learned judge erred in law and was in breach of the duty of fairness when he applied the maxim of public policy, generalia specialibus non derogant but did not give an opportunity to the Appellant to respond to or make any submissions on the maxim of public policy, generalia specialibus no derogant but did not give an opportunity to the Appellant to respond to or make any submissions on the maxim.*
4. *The judge erred in law in following the decision of the South African case of HR Computek (Pty) Ltd and the Commissioner for the South African Revenue Service: Case No. 830/2011 delivered on 29 November 2012 when the legislation in the South African case differed in substance to that of the relevant provisions of the Tax Administration Act.*
5. *The judge erred in law in not considering the Appellant’s written submissions including those set out in paragraphs 2.6 to 2.10.*
6. *The judge erred in law in not considering the case law in Fiji for the Amendment of the Statement of Claim pursuant to High Court Rules Order 20 Rule 5.”*

- [9] Having filed an application for leave to appeal the Appellant also filed an application for a stay of the proceedings in the High Court which application had been heard by the President of the Court of Appeal and had been allowed by a Ruling dated 25th October 2018.
- [10] As regards the present application seeking leave to appeal, what has to be considered is whether the Appellant has demonstrated that the appeal is at least arguable.
- [11] The learned High Court Judge refused the application to amend the statement of claim on the basis that no cogent reasons had been given for the delay in seeking to amend the statement of claim, that all that was sought to be raised in its amended statement of claim could just as well have been raised in the initial statement of claim and that section 21(2) of the Tax Administration Act 2009 applied to the proceedings before the Court.
- [12] In the first ground of appeal the Appellant has raised the issue regarding the scope of his action before the High Court. The Appellant's submission is that it had invoked the jurisdiction of section 91(1)(b) of the Tax Administration Act and not Section 21(2) of the Act as held by the learned High Court Judge.
- [13] It was submitted on behalf of the Appellant, the material included in the amended statement of claim as claimed by the Appellant were necessary for his case and would otherwise necessitate the filing of a separate action to obtain the necessary relief.
- [14] It was submitted that the material included in paragraphs 16, 19, 20 to 23, 25 and 26 of the amendment that was sought related to substantive rights of the Appellant which would have a bearing on its liabilities in relation to value added tax.

- [15] It was submitted by the Appellant that proceeding in this action with the amendment sought would avoid further litigation in a separate action between the parties.
- [16] Although there is a general reluctance to grant leave to appeal against interlocutory orders where substantive rights are involved and where some injustice may be caused leave would be granted. See In re the Will of F.B.Gilbert (deceased) (1946) 46 S.R.N.S.W.318 at 323 and Kelton Investments Limited and Tappoo Limited v Civil Aviation Authority of Fiji and Another (ABU 34 of 1995; 18 July 1995).
- [17] The Respondents relied heavily on the authorities where leave to appeal was not granted against interlocutory order where granting of leave would result in delays in concluding the proceedings, whereas in the present case, the substantive rights of the Appellant appears to be affected which may bring about injustice to them.
- [18] In the present case although the learned High Court Judge has considered the action of the Appellant as one where Section 21(2) of the Tax Administration Act has been invoked it has been submitted by the Appellant that it is not so and that it is one where section 91(1)(b) has been invoked. The scope of these two sections have to be considered. Therefore it become arguable as to which jurisdiction had been invoked by the Appellant.
- [19] In Denarau Corporation Ltd v Slatter and Gutherine Company Ltd [2013] FJCA, Justice Calanchini (as Acting President as he then was) granted leave where the appeal raised issues regarding the scope of section 13 of the State Lands Act. Though the present case is a matter coming under the Tax Administration Act, the principle regarding the consideration of the scope of a particular provision in a legislative enactment as was ruled in Denarau Corporation case, in my view is a matter which would be arguable.

[20] It is also of note that matters raised by the Appellant in its amendment if allowed to be dealt with in the same action of the Appellant would avoid further litigation in relation to the dispute between the parties.

[21] Apart from these matters that have been considered, the appeal also raises a number of important issues and legal questions which have been raised by the Appellant in grounds 3, 4, 5 and 6 of the proposed grounds of appeal which would require the Court of Appeal to consider the issues that are raised by the Appellant.

[22] Taking into account all these matters leave to appeal is granted.

Orders of Court

1. *Leave to appeal is granted.*
2. *Appellant to file and serve notice and grounds of appeal within 14 days.*
3. *Thereafter the appeal is to take its normal course in accordance with Rules 17 and 18 of the Court of Appeal Rules.*



A handwritten signature in blue ink, appearing to read "Suresh Chandra".

Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL