THE COURT OF APPEAL, FIJI

[ON APPEAL FROM THE HIGH COURT]

Civil Appeal No. ABU 012 of 2020

(HBC 025.2008)

BETWEEN	:	**ESAVA CAKAUNITAVUKI**
		Appellant
AND	:	**COLONIAL FIJI LIFE LIMITED and COLONIAL HEALTH CARE (Fiji) LIMITED**
		Respondents
Coram	:	**Almeida Guneratne, JA**
Counsel	:	**Ms. L. Vaurasi for the Appellant**
	:	**Mr. J. Apted for the Respondents**
Dates of Hearing	:	**20th November, 2020**
Date of Ruling	:	**7th January, 2021**

RULING

The Nature of the present Application

[1] This is an application by the Respondents to "strike out" the Notice and Grounds of Appeal filed by the Appellant on 6th March 2020, on the basis that, the impugned judgment of the High Court dated 27th January, 2020 is interlocutory in nature and

accordingly the Appellant cannot have and maintain the purported appeal in as much as he has failed to obtain leave to appeal in the first instance.

A fundamental issue of jurisdiction that needed to be addressed

[2] At the outset, I posed the question as to whether, a single Judge, in pursuance of the powers vested under section 20(1) of the Court of Appeal Act (Cap 12) ("the Act") has jurisdiction to "strike out" an appeal that is pending before the full Court.

[3] Learned Counsel for the Respondents (Mr. Apted) in response submitted that, on past precedents of this Court (including some rulings of my own, all of which I noted are single Judge matters) where "striking out applications" pending appeal had been entertained.

[4] In Andrew Skerelec etal v. Charles Draight etal, ABU 063/2014, 3rd December 2015; His Lordship Calanchini, P had entertained a "striking out application" (pending appeal before the final court) and made order "Striking it Out".

[5] In Gary Stephens et.al v. Aren Joseph Nunnik & Ors ; ABU 75/2014, 26 February, 2016, I had entertained a striking out application though dismissing the same on the basis that the impugned Order of the High Court was not interlocutory.

[6] In view of Mr. Apted's submission and in fairness to learned Counsel (given also the fact that the Appellant's Counsel had not raised the question of jurisdiction of a single Judge having power to strike out an appeal pending in the full Court). I decided to make my determination on Mr. Apted's contention as to whether the impugned Judgment of the High Court is interlocutory.

Is the impugned Judgment of the High Court interlocutory in nature?

[7] To answer that question I looked at the Orders made by the High Court, the grounds of appeal urged against them and finally gave my mind to the rival contentions before proceeding to make my determination.

Orders of the High Court

"1. The appeal of the appellants is allowed.

2. The ruling of the learned Master of the High Court made on 22nd March 2019 is set aside.

3. The writ of summons and the statement of claim is struck out.

4. The respondent is ordered to pay the appellants $7,500.00 as costs".

The Grounds of Appeal

[8] *"The grounds of appeal are as follows:-*

1. *"THAT the Learned Judge erred in law in failing to exercise his discretion judicially and in accordance with established principles in striking out the claim of the Appellant on the basis that the Appellant was in breach of the court orders of 26th July 2016 and 12 June 2018.*
2. *THAT the Learned Judge erred in law in striking out the Appellant's claim when there was no deliberate and persistent non-compliance of the court orders of 26th July and 12 June 2018 on the part of the Appellant.*
3. *THAT His Lordship erred in law in failing to consider and apply the law for striking out for non-disclosure without addressing:*

    (i) Whether there was contumacious conduct by the Appellant/Plaintiff to justify striking out.

    (ii) Whether fair trial was possible with five affidavits verifying list of documents addition to the documents discovered.

(iii) *Whether the documents discovered were sufficient discovery for the Respondent/Defendant to mitigate damages.*

(iv) *Whether existence of a real or substantial risk for fair trial.*

(v) *Whether the suppression of documents in his personal custody was solely sufficient to strike out the Writ and Statement of Claim.*

4. *THAT the learned Judge erred in law in failing to accept that the 5th Affidavit verifying List of documents filed on 21st June 2018 was in compliance with court orders of the predecessor master 26th July 2018.*

5. *THAT His Lordship erred in law when he found that the Master did not have the jurisdiction to deviate from the ruling made by the predecessor and make a different ruling when:*

(i) *The Master was hearing a second application for striking out and need not refer to the predecessor Master's decision nor was she bound by the predecessor Master's decision.*

(ii) *The Master was hearing a second application for striking out and considering documents that the predecessor Master did not consider namely:*

(a) *Bundle of Documents as there is no evidence in the predecessor Master's ruling that he had perused through the BOD.*

(b) *5th Affidavit verifying List of Documents.*

(iii) *The Master was a discretionary power to extend time or impose an unless order under Order 24 rule 16 (1) High Court Rules 1988.*

(iv) *An injustice would be caused as the merits of the Appellant's claim been heard.*

6. *THAT the Learned Judge erred in law in failing to consider the law on Unless Order and making orders that were harsh, unjust with consequences that were disproportionate to the default in question.*

7. *THAT the Learned Judge erred in law in allowing the Respondent's application for leave to appeal the Master Vandhana Lal's delivered on the 22nd March 2019.*

8. *THAT His Lordship erred in law in awarding the Defendants costs in the sum of $7,500.00 summarily assessed".*

Submissions made on behalf of the Respondents

[9] Reiterating what he has urged in his written submissions Mr. Apted on behalf of the Respondents submitted in his oral submissions (which I summarize) as follows:

(i) Relying on the English Court of Appeal decision in White v. Brunton [1984] QB 570 and the Fiji Court of Appeal judgment in Gounder v. Minister of Health [2008] FJCA 40 (among others), Mr. Apted submitted that, the correct test (or approach) being the "Application Test" (as opposed to the "Order approach), the impugned Orders of the High Court were interlocutory in nature.

(ii) Drawing attention of Court to the aforesaid cases and the Fiji Court of Appeal judgment in Fai Insurance (Fiji) Limited v. Rajendra Prasad Brothers Ltd; ABU 0039/2002S, 15 November 2002, learned Counsel submitted that, the instant case, (on the background facts), "fell on all fours" with the approach in those cases.

(iii) By way of illustration, Mr. Apted submitted :

(a) To begin with, what "the Master" considered and determined was in the nature of a striking out application and therefore by definition it was an interlocutory matter where "the Master" did not address the substantive matter.

(b) Not resting his case at that, learned Counsel adverted to the single Judge decision of Calanchini, P in Skerelec v Tompkins [2015] FJCA 159 where His Lordship had dismissed an appeal against a High Court Judge's order striking out a claim for want of leave, and then adverting to the decisions in Shankar v FNPF Investments Ltd [2017] FJCA 26, and Lakshan v Estates Management Services Ltd (full court) decision

which had dismissed a strike out application while allowing the claim to continue [2015] FJCA 26.

[10] I also took note of the Respondents Reply submissions dated 20th November, 2020 (date of hearing) where Mr. Apted in reference to Gary Stephens & Others (supra) submitted thus:

> *2.12. This case does not assist the Appellant. It was an entirely correct interpretation of the application approach. The appeal concerned the interpretation of certain documents which were matters in litigation. It constituted a "split hearing. Although it was expressed to be "pre-trial". the decision concerned substantive issues that would otherwise form part of the final judgment."*

[11] In the said submissions it was also submitted (in reference to the ruling in Orisi Vukinavanua & Others v Ilaisa Vunamotu & Others; ABU 003 of 2020 that (which I reproduce as follows:-

> *"2.19 It is submitted with the greatest respect that this judgment was decided per incuriam. The Court accepted that the established approach in the Court of Appeal to section 12 (2) (f) of the Court of Appeal Act 1949 is the application approach.*
>
> *2.20 However, the approach actually adopted by the court which looked at solely at the actual outcome of the case, and did not look at the application was the order approach. The Court did not consider the nature of the application and what would have happened if the application had been decided the other way.*
>
> *2.21 The Court referred to the words "as if made at the end of the complete hearing or trial" in the English IHigh Court Rule 0.59 R1A(4) discussed in Fai Insurances (Fiji) Ltd v Rajendra Prasad Brothers Ltd out of context.*

2.22 *However, the complete text of the English rule is as follows:-*

> *"Where the trial of a cause or matter is divided into parts a Judgment or Order made at the end of any part shall be treated as if made at the end of the complete hearing or trial".*

2.23 *This phrase is therefore relevant only if the substantive trial is being heard in parts.*

2.24 *The Court correctly recalled Lord Denning's remark in Salter Rex & Co. Ghosh [1971] 2 QB 597, but did not apply it in full. In that case, Lord Denning said at p.601-*

> *"I look to the application for a new trial and not to the order made. If the application for a new trial were granted, it would clearly be interlocutory. So equally, when it is refused, it is interlocutory." (Our emphasis)*

2.25 *Lord Denning said that when applying the application approach one is to look to the application, and not the order made. Further that if it is the case that a decision on that application if made one way were to be interlocutory, it must still be interlocutory if decided the other way. Thus, if a strike out application, gives rise to an interlocutory order if it were to be refused, it must remain an interlocutory order if the application is granted.*

2.26 *In that case, Lord Denning also emphasized the need to follow and apply past decisions on particular kinds of applications. In Fiji and England, the "practice" is that applications to strike out are to be treated as interlocutory applications under the application approach regardless of*

whether the ensuing order ends the proceedings or not. Practitioners are required to follow that practice.

2.27 *Ironically, if the Court was correct in Orisi Vukinavanua that strike out applications lead to final orders, this would meant that an order* ***refusing*** *to strike out an action* ***would also be a final order*** *– even though the substantive proceedings were continuing.*

Submissions made on behalf of the Appellant

[12] Ms. Vaurasi on behalf of the Appellant in response to Mr. Apted's submissions submitted that she is relying on her written submissions dated 18th September, 2020 and the authorities referred to therein. She submitted, the factual situations that arose in those authorities are comparable with the orders made by the High Court in the instant case and that, therefore the impugned Orders were "final" in nature and "not interlocutory" for which reason "leave to appeal" was not required to appeal against the same.

[13] Apart from the above, and in addition thereto, Learned Counsel highlighted the following aspects in the impugned orders of the High Court viz:

(i) Drawing attention of Court to the pleadings (the Amended statement of claim of December, 2010), the learned High Court in essence "struck out" every cause of action pleaded.

(ii) In the Amended Statement of Defence there was not even a Counter claim.

(iii) Indeed, as per Order 2 of the High Court the Appellant's Writ of Summons and the Statement of Claim were struck out.

(iv) Consequently, adverting to the factual situations which she had referred to in the list of authorities, she submitted that, as far as her client's grievance was concerned, there was nothing left in her suit but to appeal against the High Court Orders as being "final in nature" and "not interlocutory".

(v) Finally, Ms. Vaurasi submitted that, the submissions of Mr. Apted that, the orders of the High Court could have gone either way and therefore were interlocutory are not entitled to merit.

Counter Submissions on behalf of the Respondent

[13] Mr. Apted in his rejoinder came out strongly in launching a frontal attack on the submissions made by Ms. Vaurasi in submitting that,

(i) Ms. Vaurasi was looking at the effect of the Judgment (Orders) of the High Court which is based on "the Application approach".

(ii) The Gary Stephen's ruling (supra) was a different situation which involved a "split trial" matter.

(iii) The genesis of the matter in the instant case lay in the Application before the High Court and that accordingly why he says that, the Orisi Vukinavanua (supra) ruling was decided *per incuriam*, where the Court in that ruling had looked at the outcome and not at the initial nature of "the application".

(iv) Therefore, "practitioners must follow what has been decided before" (quoting as Mr. Apted did) Lord Dening in Salter Rex v. Ghosh [1971] 2QB 597.

(v) If Orisi's case (supra) is to be regarded (a striking out) being "final then a refusal to strike out would also have to be regarded as final which cannot, be correct".

(vi) Accordingly, Mr. Apted concluded in submitting that:-

(a) while some of the authorities cited by the Appellant may be justified in the factual contents of those cases;

(b) the ruling in Orisi's case (supra) is *per incuriam*,

(c) which submission learned Counsel endeavored to substantiate in saying that, the High Court's impugned Orders had the resulting effecting of them being "lost or won" and therefore were interlocutory, in which regard, learned counsel relied on the

full Court decision in Gounder v. Minister for Health (Supra) and Fai Insurances (Fiji) Ltd v Rajendra Prasad Brothers Ltd (Supra).

Consideration of the rival contentions and their application to the instant case

[14] I shall take the distilled essence of the rival contentions and deal with them *seriatim* as follows:

Reliance on the Orisi decision (supra) by Ms Vaurasi and Mr. Apted's submissions that it was decided *per incuriam*

[15] When could it be said that a decision has been made per incuriam?

Rupert Cross on Judicial Precedent

[16] In his celebrated work on the doctrine of Judicial precedent, (Clarendon, 1991, Revised), the learned Professor sums up and says, it is when a Court has given a ruling (decision) in :

(i) ignorance of a statute
(ii) disregard of an authoritative judicial precedent
(iii) non-consideration of a fundamental rule of law.

[17] While appreciating Mr. Apted's forensic efforts, however, I did not see how the Orisi decision could be said to have been decided *per incuriam* having regard to the said doctrine as articulated above. With all due respect to Mr. Apted, I prefer to read his submission on the Orisi decision as "the Application test" had been employed and applied wrongly in looking at the "end result".

[18] If that approach is not acceptable then, I would welcome the day that the Supreme Court of Fiji would say so at some point of time. I say that for the following reasons.

The End Result Criterion

[19] Consequently, for my part, writing as a Single Judge of the Court of Appeal, while in several rulings which the Appellant's counsel has referred to in her written submissions where I myself have invoked the "end result" criterion, both in a qualitative and a quantitative sense, for the reason that (in the instant case) to look at the initial application" (before the Master being a "Striking out" application and the order made by him being interlocutory and then to regard the High Court Judgment also as being therefore interlocutory, to my mind does not seem to be logical, apart from it leading to artificial consequences.

[20] As recapped at paragraph [13] (vi) (a) of this Ruling, Mr. Apted submitted that some of the authorities cited by the Appellant may be justified in the factual contents of those cases. Learned counsel also agreed with the Ruling in Gary Stephens & Others while submitting that the Orisi Ruling is *per incuriam*.

[21] Learned Counsel however, referred to the Full Court decision in Lakshan v Estate Management Services Ltd (Supra) which had dismissed a strike out application but allowing the claim to continue.

[22] While I could not see the difference on the respective factual situations between Gary Stephens and some of the authorities cited by the Appellant and Orisi's case, in so far as Lakshan v Estate Management Services Ltd, unlike in that case, what is the claim in the instant case that was allowed by the learned High Court to continue?

[23] As recounted at paragraph [7] of this Ruling, "the ruling of the learned Master was set aside and the writ of summons and the Statement of Claim was struck out".

[24] If one were to look at the grounds of appeal taken in their totality, the Appellant's claim was done and dusted. There was nothing left in that claim to continue as was the case in Lakshan v Estate Management Ltd.

Determination

[25] While appreciating Mr. Apted's forensic efforts, with all due respect, I am not inclined to agree with his contentions. I agree with Ms. Vaurasi position that.

"Although the Court made the ruling on an interlocutory application, this cannot be considered an interlocutory order as the above ruling stalled any further steps being taken and in short put an end to the proceedings. Therefore it is a final order in which the question of leave does not arise. This is consistent with the decision of the Court of Appeal in Extreme Business Solutions (Fiji) Ltd v Formscaff (Fiji) Ltd [2018] FJCA 059; ABU 0080.2016 (1 June2018) and the Supreme Court in Railumu & Others v Commander Republic of Fiji Military Forces & 2 Others; [2004] FLR 418 (CBV 0008 of 2003S)." (Vide: paragraph 9 of the Appellant's written submissions dated 18th September, 2020).

[26] Then again I concur with Ms. Vaurasi's concluding submission that:

> *"In the present case, the Respondent's application for striking out of the Appellant's claim for failure to comply with orders to make discovery was upheld by Judge Seneviratne on appeal. He proceeded to strike out the Writ and the Claim which put an end to that part of the cause. Pursuant to Fai Insurances (Fiji) Ltd v Rajendra Prasad Brother Ltd; ABU 32 of 2004 that order shall be treated as if made at the end of the complete hearing or trial and thus is a Final Order."*

[27] In arriving at my conclusion, I gave my mind to the following precedents as well, (viz:

(i) Gaya Prasad (etal) v Jivaratnam & Another; ABU 116 of 2016, 28 February, 2020 (FC)

(ii) Sunil Gupta Sen v Krishna & Naidu: ABU 042 of 2020, 26 October, 2020 (Single Judge)

(iii) Mohammed Shafiq v Valentine & Valentine: ABU 051 of 2019, 8th December 2020 (Single Judge)

Some Reflections before I proceed to make my Orders

[28] In their written submissions dated 3rd August, 2020, the Respondents submitted thus:

> *"In Salaman v Warner [1891] 1 Q.B. 734... A Court of Appeal consisting Lord Esher M.R., Fry L.J. and Lopes L.J. held that* ***a final order is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation.*** *Thus, the issue of final or interlocutory depended upon the nature of the application or proceedings giving rise to the order and not upon the order itself.* ***I refer to this as the application approach"....***
>
> ***The Court is clearly now committed to the application approach".***
>
> *"The "application approach" was adopted by the Fiji Court of Appeal in Suresh Charan v Shah. Although there was a decision that subsequently adopted the order approach", the law in Fiji was settled by the full Court of Appeal in what is now the leading authority of Gounder v Minister of Health. The full Court emphasized the importance of legal certainty about what the correct test should be. There the Court (Byrne, Powell and Khan JJA) at [35]-[38] held-*
>
> > ***"It seems to this Court that the "application approach" is the correct approach for the reasons stated in Suresh Charan v Shah and for the additional reason of legal certainty."***
>
> *As a matter of fundamental principle a court ought not overrule itself unless there are compelling grounds for doing so but this is what the Court in Jetpacker (supra) did. In overruling Jetpacker supra) the Court is restating the law as it was, but more importantly it is doing so to return legal certainty to the law of Fiji. This is especially important in 2008 where it has been some years since the Fiji Law Reports were published where decisions of this Court cannot always be readily accessed by practitioners. Practitioners and litigants need to know with*

certainty whether a decision is interlocutory and therefore whether an appeal from that decision needs leave

This is the position. Where proceedings are commenced in the High Court in the Court's original jurisdiction and the matter proceeds to hearing and judgment and the judge proceeds to make final orders or declarations, the judgment and orders are not interlocutory.

Every other application to the High Court should be considered interlocutory and a litigant dissatisfied with the ruling or order or declaration of the Court needs leave to appeal to that ruling order or declaration. The following are examples of interlocutory applications:

...

2. an application to strike out a pleading" (our emphasis)"

[29] Taking on the merits of that very submission while I say that I have faithfully followed the "Application Approach" (and my only addition) thereto being "the end result" criterion (a view I have consistently held in my past rulings (vide: above at paragraph [27] of this Ruling), which I feel, a view I have pursued still within the corners of the said approach. I proceed to say and I say that the issue whether final or interlocutory depends on, as the first consideration, the nature of the initial proceedings but the next consideration is, the effect of the orders eventually made flowing from those proceedings as affecting the parties.

[30] On that view of the matter which I take, when the learned High Court Judge made his Orders, the Appellant's case stood at an end, his entire claim was "struck out" in my view, "dismissed". It would thus be doing violence to language to say that, merely because the expression "struck out" was employed that, the said orders of the High Court "were interlocutory on the argument that the said orders were made in review of the Master's decision so made on an application which was out of a interlocutory nature and therefore the impugned orders of the High Court were also needed to be considered as interlocutory".

[31] When the learned High Court Judge "Struck out" the Appellant's claim (in fact, his entire claim) there was nothing left in the suit for him to continue and accordingly he was invested with his statutory (cum Constitutional) right to appeal which he invoked.

[32] In my view, to take a contrary stand would not only amount to defying logical reasoning but also would be going against legal practitioners experience from the Appellant's perspective which the Appellant's lawyers had pursued in the instant case going on a plethora of decisions which I have recounted in this Ruling.

[33] It is to be borne in mind also that before the Master, the issue was in regard to "discovery of documents". The Master's Order in that regard was set aside by His Lordship, the learned High Court Judge, resulting in the Appellant's entire substantive claim being "struck out"(to my mind, his action in its entirety being "dismissed"). In that perspective of the matter there arose no reason for consideration of "a split trial" concept either. (Contra: Lakshan v Estate Management (Supra).

As to the matter of Costs – Indemnity Costs

[34] The Appellant has moved for "indemnity costs" against the Respondents should he be successful in this application.

[35] In that regard, on the principle I have adverted to earlier in re: the practitioners experience on the basis of past precedents, I took note of the decision in Andrew Skerelec etal (supra) (vide: paragraph [4] above in this Ruling).

The Merchant of Venice – that extra pound of flesh?

[36] Indeed, I am reminded of William Shakespeare in this context which strikes me as being reminiscent of the Appellant's said application for indemnity costs, which I am not inclined to grant for the reason adduced at paragraph [35] above, although I myself in

several of my Rulings (respectfully) had taken a distanced view, which the Appellant's Counsel was not ready to pursue. (Vide: paragraph [2] to [6] above).

[37] Thus, leave alone "indemnity costs", I was not inclined to order any costs in this application given the legal nature of the matter involved.

[38] Accordingly, for the reasons adduced above, I proceed to make my Orders as follows:

Orders of Court:

1. The Application of the Respondents to strike out the Appellant's Appeal is refused and/or dismissed.
2. I make no order as to costs and costs shall await the final cause and determination in Appeal by the Full Court.
3. The Appellant may advise himself, as to what further steps he is required in law to take to pursue his Appeal.

.....

Almeida Guneratne

JUSTICE OF APPEAL