IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 534 of 2006

BETWEEN	:	**VIJAY SHARMA**
		1st Plaintiff
		SHARMA DESIGN GROUP LIMITED
		2ND Plaintiff
A N D	:	**MARK HALABE**
		1st Defendant
		SUN (FIJI) NEWS LIMITED
		2ND Defendant
		RUSSELL DOUGLAS HUNTER
		3RD Defendant

COUNSEL : **Mr. T. Tuitoga for the Plaintiffs.**
Mr. J. Savou for the Defendants.

Date of Hearing : **26th October, 2015**

Date of Ruling : **15th December, 2015**

RULING

[01] The Plaintiffs filed this action claiming $ 19150.00 being the loss caused to them by the issuance of an injunction and general damages.

[02] The 1st defendant on 19th August 2010 filed a motion seeking to strike out the amended statement of claim filed on 08th October 2010. After hearing the parties the learned High Court Judge on 25th June 2013 made the following orders;

a. The notice of Motion dated 27th November 2008 is struck off.

b. The Plaintiff is ordered to pay a cost of $ 500 to the 1st Defendant as costs for this application within 21 days from today.

c. **The Plaintiff is directed to file summons to further amend the amended statement of claim to include the cause of action (including how 2nd Plaintiff is affected by the statement) against the 1st Defendant within 21 days from today and if not the claim against the 1st Defendant will be struck off.** (Emphasis is mine).

d. Normal Cause.

[03] In compliance of the order "c" above the plaintiffs filed amended statement of claim on 17th July 2013. The 1st defendant opposed the summons and the amended statement claim and on 17th October 2014 the plaintiffs withdrew the summons. The learned Master then struck out the claim against the 1st defendant.

[04] The present application for leave to appeal is from the said order of the learned Master under **Order 59 rule 11** of the High Court Rules which provides that any application for leave to appeal an interlocutory order or judgment shall be made by summons with a supporting affidavit, filed and served within 14 days of the delivery of the order or judgment.

[05] There is no dispute between the parties that the order sought to be appealed against is an interlocutory order and the proper course for a party dissatisfied is to come by way of an application for leave to appeal.

[06] It is the submission of the learned counsel for the 1st defendant that the plaintiffs failed to comply with the order of the learned High Court Judge in that they did not disclose a cause of action in the amended statement of claim filed on 17th July 2013 and that the plaintiffs have not shown in the affidavit filed in support of the

application for leave to appeal that the order of the learned Master was wrong and that substantial injustice would be caused to the plaintiffs if the leave to appeal is not granted.

[07] The learned counsel in this regard cited the decision in **Niemann v. Electronic Industries Ltd. [1978] V.R. 431 at page 441** where Supreme Court of Victoria (Full Court) held as follows:

> ".....leave should only be granted to appeal from an interlocutory judgment or order, in cases where substantial injustice is done by the judgment or order itself. If the order was correct then it follows that substantial injustice could not follow. If the order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to affect a substantial injustice by its operation.
>
> It appears to me that greater emphasis is therefore must be on the issue of substantial injustice directly consequent on the order. Accordingly if the effect of the order is to change substantive rights, or finally to put an end to the action, so as to effect a substantial injustice if the order was wrong, it may be more easily seen that leave to appeal should be given.

[08] In the case of **Khan v Suva City Council [2011] FJHC 272; HBC406.2008** (13th May 2011) the following observations were made in regard to applications for leave to appeal;

> It is trite law that leave will not generally be granted from an interlocutory order unless the Court sees that substantial injustice will be done to the applicant.
>
> Further in an application for leave to appeal, it is incumbent on the applicant to show that the intended appeal will have some realistic prospect of succeeding.

[9] In **Kelton Investment Ltd & Tapoo Ltd v Civil Aviation Authority of Fiji and Motibhai and Company Limited Civil Appeal No. ABU 0034 of 1995** the Court of Appeal observed as follows;

The Courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence leave to appeal are not readily given. Having read the affidavits filed and considered the submissions made I am not persuaded that this application should be treated as an exception. In my view the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted.

[10] Although the learned counsel for the 1st defendant submitted that the plaintiffs have failed to disclose a cause of action against the 1st defendant, they in fact have disclosed a cause of action against the 1st defendant. Paragraphs 12 and 13 (paragraph 13 is identical to paragraph 11 of the supporting affidavit of the 1st plaintiff) the amended statement of claim reads as follows:

12. The 1st defendant began to defame the plaintiffs in that they were constructing an illegal building structure and colluded with Suva City Council in order to do such illegal construction which lowered the reputation of the plaintiffs within the business community in Fiji as they were questioned by their respective clients that they were carrying out architectural and building works which were illegal.

13. THAT as a result of the 1st defendant's mis-statements and allegations, the plaintiffs suffered loss in acting prospective business in obtaining further architectural works for development around Fiji, lost reputation of being honest and was questioned due to the 1st defendant purposely making statements which caused the plaintiff's reputation being tarnished in that they were asked questions of their alleged activities and as such their good reputation as an architect and company was damaged and suffered emotional stress.

[11] These averments are sufficient for the Court to conclude that the plaintiffs have disclosed a cause of action against the 1st defendant in their statement of claim filed on 13th July 2013.

[12] The next matter raised on behalf of the 1st defendant is that the plaintiffs have failed to indicate where the learned master went wrong in striking out the summons against the 1st defendant.

[13] By his order of 25th June 2015 the learned High Court Judge ordered the plaintiffs to amend the summons by disclosing a cause of action against the 1st defendant which the plaintiff complied with. It is the submission of the learned counsel for the plaintiff that once the order of the learned High Court Judge is complied with it becomes redundant and the subsequent withdrawal of the amended summons cannot be construed as a violation of that order.

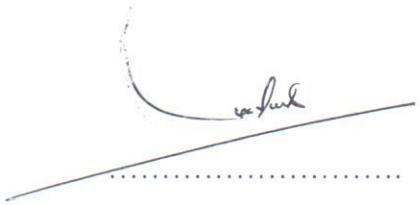
[14] After striking out the claim against the 1st defendant there is no case pending before the Court against him. If the application for leave to appeal is not granted, grave injustice will be caused to the plaintiffs.

[15] I am therefore of the view that there are matters to be looked into by the Court of Appeal.

[16] For the reasons set out above I make the following order.

ORDER

1. Leave is granted to appeal against the order of the learned Master dated 04th November 2014, striking out the claim against the 1st defendant.



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Lyone Seneviratne

JUDGE