

IN THE HIGH COURT OF FIJI AT SUVA
APPELLATE JURISDICTION

CIVIL ACTION No. HBC 99 of 2011

BETWEEN : **FNPF INVESTMENT LIMITED** a limited liability
company having its registered office at Level 4,
Provident Plaza 2, 33 Ellery Street, Suva, Fiji.

PLAINTIFF

AND : **VENTURE CAPITAL PARTNERS (FIJI) LTD** a
limited liability company having its registered
office at No. 14, Kimberly Street, Suva, Fiji.

FIRST DEFENDANT

AND : **DINESH SHANKAR** of 237, Ratu Sukuna Road,
Nasese, Suva, Fiji.

SECOND DEFENDANT

COUNSEL : **Mr. D. Sharma with Ms. N. Choo for the**
Plaintiff.
Ms. M. Rakai for the 2nd Defendant.

Date of Hearing : **14th March, 2016**

Date of Ruling : **29th March, 2016**

RULING

[1] The plaintiff company filed this action to recover damages from the 1st and 2nd defendants for investing in non-profitable ventures in violation of the Investment Management Agreement between the plaintiff and the 1st defendant.

- [2] The 2nd defendant did not file a statement of defence but filed summons seeking to strike out the claim against him under and in terms of Order 18 rule 18(1)(b) and (d) of the High Court Rules.
- [3] The High Court by its decision dated 22nd March 2013 dismissed the summons of the 2nd defendant to strike out the claim against him and the 2nd defendant on 04th April 2013 filed summons seeking leave to appeal against the said dismissal in terms of section 12(2)(f) of the Court of Appeal Act.
- [4] When this matter came up for hearing before this court the learned counsel for the plaintiff raised a preliminary objection to the maintainability of the application for leave to appeal in that the learned counsel submitted that since the appealable period had already lapsed the court has no jurisdiction to grant leave to appeal.
- [5] In terms of section 12(2)(f) of the Court of Appeal Act no appeal shall lie from an interlocutory order without first obtaining leave to appeal.
- [6] Rules 16 of the Court of Appeal Rules provides as follows:
- (16) Subject to the provisions of this rule, every notice of appeal shall be filed and served under paragraph (4) of rule 15 within the following period (calculated from the date on which the judgment or order of the Court below was signed, entered or otherwise perfected), that is to say-
- a) in the case of an appeal from an interlocutory order, 21 days;
- b) in any other case, 6 weeks.
- [7] Rule 27 of the Court of Appeal Rules provides as follows:
- (27) Without prejudice to the power of the Court of Appeal, under the Supreme Court Rules as applied to the Court of Appeal, to enlarge the time prescribed by any provision of these Rules, the period for filing and serving notice of appeal under rule 16 may be extended by the Court below upon application made before the expiration of that period.
- [8] It is the submission of the learned counsel for the plaintiff that since the 2nd defendant failed to obtain leave within 21 days from the order sought to be appealed against he is not in a position to comply with the provisions of Rule 16 of the Court of Appeal Rules and also that the 2nd defendant had not made an application for extension of time to file notice and grounds of appeal.

- [9] The learned counsel for the 2nd defendant submitted that in view of the decision in **Quadrant Developments Fiji Ltd v Davis [2010] FJHC 9; HBC138.2009L (22 January 2010)** this could proceed to hear and determine the application for leave to appeal.
- [10] There is nothing in that judgment which suggests that the application for leave to appeal of the defendant was objected to by the plaintiff on the same grounds as in this case. I do not see any reason why the court cannot hear and make a finding on the application for leave to appeal but it will be a futile exercise because even if the court decides to grant leave to appeal the 2nd defendant will not be able to file notice and grounds of appeal out of time without leave of the court.
- [11] In the case of **Habib Bank Limited v Mehboob Raza & Others, Civil Action No. 53 of 2005** Justice Kamal Kumar in his ruling of 01st November 2013 made the following observation in refusing the application for leave to appeal and stay of the execution of the judgment:
- Rule 16 requires notice of appeal from an interlocutory order to be filed within 21 days of the Order which obviously means that the intended appellant has to obtain leave and file notice of appeal within 21 days from the date of the order.
- In this instance even though the leave to appeal was filed within 21 day period and leave not having been granted the time for filing Notice of Appeal expired on or about 18th October 2013.
- Whilst the registry has to take some blame for not issuing and releasing the Summons for Leave to Appeal expeditiously the Solicitors for the intended appellant should take the blame for not attempting to have the Summons issued and released to enable them to obtain leave and file Notice of appeal within the time frame.
- [12] It is the submission of the learned counsel for the 2nd defendant submitted that Rule 16 of the Court of Appeal Rules requires the notice of appeal from an interlocutory order to be filed within 21 days from the date of the order obviously means that the intended appellant has to obtain leave and file the notice of appeal within 21 days from the date of the order.
- [13] From this submission what I understand is that, according to the learned counsel, the period of 21 days prescribed in Rule 16 of the Court of Appeal Rules should begin to

run from the date of the order granting leave to appeal. Rule 16 of the Court of Appeal Rules does not refer to applications for leave to appeal. On the plain reading of the said Rule it becomes clear that 21 days period commences from the date of the sealing of the order sought to be appealed against.

[14] Rule 27 of the Court of Appeal Rules conferred upon the High Court to grant an extension of time on an application made before the expiration of the period prescribed by Rule 16. There is no application from the 2nd defendant for the extension of time and the Court has no power to grant an extension *ex mero motu* without an application from the party concerned.

[15] For the reasons aforementioned I make the following orders.

ORDERS.

1. The application of the 2nd defendant for leave to appeal from the decision dated 22nd March 2013 is refused.
2. The 2nd defendant shall pay the plaintiff \$1000.00 as costs (summarily assessed).




Lyone Seneviratne

JUDGE

29th March 2016.