

IN THE HIGH COURT OF FIJI  
WESTERN DIVISION  
AT LAUTOKA

[CIVIL JURISDICTION]

CIVIL ACTION NO. : HBC 56 OF 2014

**BETWEEN :** PANACHE INVESTMENT LIMITED AND/OR ITS  
SUBSIDIARY COMPANY a limited liability company having its  
registered office at C/- Nandha & Company, Chartered  
Accountants, Nadi.

*Plaintiff*

**AND :** THE NEW INDIA ASSURANCE COMPANY LIMITED a  
limited liability company having its registered office at New India  
Assurance Building, 87 M. G Road, Fort Mumbai – 400001 and  
having its principle place of business in Fiji at Harifam Centre, 2<sup>nd</sup>  
Floor, Cnr Renwick Road and Greig Street, Suva in Fiji.

*Defendant*

**Counsel** : Mr. Ravneet Charan for the Plaintiff  
: Mr. N. Kumar for the Defendant

**Date of Hearing** : 19<sup>th</sup> November 2015

**Date of Ruling** : 6<sup>th</sup> May 2016

**Before** : The Hon. Mr. Justice R. S. S. Sapuvida

**RULING**

[1] There are two applications currently pending before me filed by the defendant to be dealt with this ruling:

- a. Summons for leave to appeal the ruling of this court delivered [by me] on 17<sup>th</sup> July, 2015.
  - b. Summons for stay of the proceedings of all execution and proceedings pursuant to:
    - i. The interlocutory ruling delivered by the Puisne Judge in this matter sitting as the Master of the High Court, Hon. Mr. Justice M. H. Mohamed Ajmeer dated 23<sup>rd</sup> January, 2015 and;
    - ii. The judgment delivered by me in this matter on 17<sup>th</sup> July, 2015 refusing to grant leave to appeal the aforesaid ruling of Hon. Justice Ajmeer.
- [2] The issue with regard to the application 1 (b) above was settled between the two parties on 28<sup>th</sup> April, 2016 since the counsel for defendant moved the court orally to grant an interim stay until the determination of the leave application [1 (a) above] to which the plaintiff had no objections and the same was so granted on consent and with no contest.
- [3] Thus, the issue left before me now is the summons for leave to appeal the ruling of this court delivered [by me] on 17<sup>th</sup> July, 2015.
- [4] The hearing of the said summons for leave was concluded on 19<sup>th</sup> November, 2015 and lessened to the written submissions as agreed by both the counsel.
- [5] Then it was the argument advanced by both the counsel whether the ruling made on 17<sup>th</sup> July, 2015 is a final in nature or an interlocutory ruling.
- [6] Both counsel in their respective written submissions among other things, have addressed this issue and have advanced the same line of argument and say that the ruling made on 17<sup>th</sup> July, 2015 is an interlocutory ruling and that the application for leave shall be first filed and obtained from this court or from the Court of appeal before filing the appeal.
- [7] Having given the due regard to the submissions of both the counsel with regard to the above, and to cut short of the issue, I accept the fact that the ruling made on 17<sup>th</sup> July, 2015 by this court is also an interlocutory nature and that an application for leave shall first be pursued to this court as it has so done by the defendant in this instance. [Rule 26(3) of the Court of appeal Rules : “ whenever under these Rules an application may be made either to the court

below or to the Court of appeal it shall be made in the first instance to the court below”]

- [8] The defendant’s summons for leave to appeal the ruling delivered on 17<sup>th</sup> July, 2015 is supported with the affidavit in support of Mr. Ashneel Sudhakar [Mr. AS] of Veisaru, Ba, Legal Practitioner and Member of Parliament of the Republic of Fiji dated 31<sup>st</sup> July 2015.
- [9] The ruling delivered on 17<sup>th</sup> July, 2015 by me concerns with an application filed by the defendant in similar manner seeking to appeal the interlocutory ruling delivered by Master of the High Court dated 23<sup>rd</sup> January, 2015.
- [10] The defendant’s leave application so filed was dismissed with costs.
- [11] It is against that ruling the present application is again before me.
- [12] Following points are the proposed grounds of appeal relied upon by the defendant in its proposed notice and grounds of appeal shown in the annexure “AS-1” attached to the affidavit of Mr. AS.

- 1) That the learned judge erred in law and in fact when he failed to consider that the appellant’s summons for leave to appeal the decision of the Master to the judge was filed within 14 days but could not be served since the Registry of the High Court did not release the summons until after 23<sup>rd</sup> February 2015 (however the High Court Registry, accepted, stamped and issued the Affidavit in Support of the Summons on the 5<sup>th</sup> of February, 2015) awaiting a date to be allocated by the Judge.
- 2) That the learned Judge erred in law and in fact when he failed to consider the Affidavit of Sanil Kumar a law clerk in the appellant’s solicitor’s firm for reasons given by the appellant on why the summons for leave was filed in time but could not be served within time when that law clerk had the first-hand knowledge (attended to filing at High Court Registry and did follow ups himself) of the administrative issues causing the late service.
- 3) That the learned Judge erred in law and in fact when he held that the appellant is answerable as to why the summons was dated 23<sup>rd</sup> February

2015 by the High Court when the allocation of dates is the responsibility of the Court Registry.

- 4) That the learned Judge erred in law and in fact when he held that the appellants failed to serve the summons on the respondents within time.
- 5) That the learned Judge erred in law and in fact when he failed to consider the merits of the appeal (non-legal entity as a Plaintiff 'Subsidiary Company') when considering the leave application.
- 6) That the learned Judge erred in law and in fact in failing to properly consider and/or failing to properly apply the principles granting leave to appeal from a decision of the Master.
- 7) That the learned Judge erred in law and in fact in failing to consider that there were meritorious grounds of appeal with a high probability of success.
- 8) That the learned Judge failed to take into consideration relevant matters and took into account irrelevant matters when reaching his decision.

[13] I decided in my earlier ruling in this case dated 17<sup>th</sup> July, 2015 that the defendant has failed to make the application for leave to appeal the interlocutory ruling of the Master by summons with a **supportive affidavit, filed and served within 14 days of the delivery of the said ruling.**

[14] Hence, I have already addressed these grounds of appeal particularly to the grounds number (1) to (8) above impliedly when I clarified the reasons for my arrival at the findings of the aforesaid ruling within it, against which the defendant has now filed the present application to appeal.

[15] However, it is pertinent to give an audience to the arguments advanced by the respective counsel in their written submissions filed in support of the issue before this court now.

[16] The plaintiff is intensely in opposition to the present application for leave filed by the defendant.

[17] The plaintiff contends among other things that the affidavit filed in support of the defendant's summons is by one of the solicitors [Mr AS] of the defendant's law firm and that it should be disregarded as it is without the sanction of the defendant company.

[18] In the case of *Chul v Doo Won Industrial (Fiji) Ltd* [2004] FJHC 24; HBC0011R.2004S (4 October 2004) His Lordship Jitoko J (as he then was) has held:

*"Any action taken on behalf of the Company, including this present application, can only be done by a director under the seal of the Company. A director is a creature of the articles of association of the Company, as well as the Act. His duties and responsibilities are specifically set out in the Act and in the articles. In my view, a director cannot, by the instrument of a Power of Attorney, cede his legal authority, duties and responsibilities imposed by law to another except than in accordance with the provision of the Act. But even if were possible to cede the powers vested in the directorship of a Company, to a third party, through a Power of Attorney, it can only be personal, the exercise of which if purportedly on behalf of the Company, will need the sanction of the Company."*

[19] The defendant in this case is a company.

[20] The person [Mr. AS] who files the affidavit in support of the leave application is one of the solicitors/ counsel who appeared for the defendant in this case.

[21] At paragraph 1 of Mr. AS's affidavit he says:

*"That I am a legal practitioner employed by Krishna & Company who are the solicitors for the defendant in this matter and in that capacity have been duly authorized to make and swear this affidavit on behalf of the defendant"*.

And, at paragraph 7 he says:

*"That I together with the other practitioner in the firm Mr. S. Krishna prepared a summons for leave to appeal the decision of the Master and an affidavit in support and my office staff Sanil Kumar lodged them with the Lautoka....."*

And, at paragraph 12 he says:

*"That the application for leave to appeal the decision of the Master was heard before the Honourable Judge Mr. R.S.S.Sapuvinda on 8<sup>th</sup>*

*June 2015. An oral ruling was delivered on Friday 17<sup>th</sup> July 2015 to which I personally appeared". [However the ruling was not an oral ruling, it is a printed ruling dated and orally pronounced in open court on 17<sup>th</sup> July, 2015]*

- [22] That clearly and further shows the fact that Mr. AS has been the solicitor and or the counsel who prepared the legal documents on behalf of the defendant company in his own law firm and who appeared for the defendant company in this case as the counsel/solicitor at times in this court.
- [23] He then files the affidavit in support [referred to in paragraph 8 above] sworn by him on behalf of his own client in the present case.
- [24] This is an application for leave to appeal the interlocutory ruling made by this court.
- [25] The defendant in order to obtain leave must satisfy the court as to why & how the defendant is so entitled for leave and under what grounds the court ought to consider the same.
- [26] Instead of fulfilling this task what the defendant has done here is by filing the affidavit of Mr. AS, repeated and defended the same facts deposed in the affidavit of Sanil Kumar law clerk filed in support of the earlier application seeking leave to appeal the Masters interlocutory ruling.
- [27] I plainly disregarded the affidavit of Sanil Kumar, a law clerk filed in support of the application for seeking leave to appeal the interlocutory ruling of the Master with reasons emphasizing the case law on the issue of filing affidavits by law clerks in contentious matters in the High court of Fiji.
- [28] I do not wish to repeat here the sentiments I made on this issue in my previous ruling [vide paragraph 13, 14, 15 and 16 of the said ruling] dated 17<sup>th</sup> July, 2015 for one reason is that it is against the said ruling the present application for leave is canvassed before me now, and the other reason is that said ruling is part & parcel of this very case record.
- [29] Mr. AS in his affidavit in support, filed in the present application at paragraph 14 says:

*"That it could be seen from the ruling of his Lordship that he did not consider the affidavit of Sanil Kumar and held that law clerks' affidavits should be disregarded. In this particular case the said Sanil Kumar had firsthand information of what transpired at the registry between the filing of the documents to the issuing of those and service. The defendant*

*itself would not be able to make the affidavit pertaining to those facts which were privy to Shanil Kumar therefore it was essential to consider hid affidavit"*

- [30] This is where the defendant in both the present application and in the former against the ruling of the Master, has mistaken itself. Because the former application before me for leave against the ruling of the Master was not based on any irregularity of service of papers or similar issue, but what the Master in his ruling dated 23<sup>rd</sup> January, 2015 held was that the **contested points of law raised by the defendant in its summons to strike out the plaintiff's action before the Master cannot be decided at that stage. The Master decided that the allegations in the pleadings of the plaintiff are true and undisputed. Evidence will be needed to decide the point and the defendant may raise this as preliminary issue at trial.** [Vide paragraph 16 of the Master's Ruling].
- [31] It was against these findings of the Master, the law clerk Sanil Kumar had filed affidavit in support of the former application for leave to appeal the said ruling of the Master. How the law clerks can asserts to the facts in issue and the issues of law between the parties by affidavits and file in any given case?
- [32] Similarly in this present application Mr. AS in his affidavit repeatedly defends the affidavit of law clerk Sanil Kumar, and yet does not address any point of law or fact in issue relevant to the leave application before me.
- [33] Therefore, the affidavit in support filed by Mr. AS in the instance cannot be given any weight whatsoever for one reason is that Mr. AS is the solicitor/counsel for the defendant company in this case who has no basis for filing the same since the issues in the present application are not with regard to a default of his professional engagements in this case or appearance or related issue, and for the other reason is that it should have been filed by a director of the defendant company. If pleadings of litigants in cases like this can be bypassed through the affidavits of solicitor or counsel in this manner, then there need no parties in any litigation but the solicitor or the counsel can give evidence in the box on behalf of their clients.
- [34] On the above premise, I disregard the affidavit in support filed by Mr. AS dated 31<sup>st</sup> July, 2015 which contains completely irrelevant facts and thereby give it no weight whatsoever for the application for leave filed on behalf of the defendant.

[35] It is also important to look at the written submissions filed by the solicitors for the defendant in support of the instance. Though, it is a very exhaustive effort and may be a masterpiece essay on the two subjects it has discussed, it does not say anything with regard to the fact that as to why the leave should be granted, yet its entirety is on the following:

1. Whether leave of this court is required or not,
2. Whether the ruling made on 17<sup>th</sup> July, 2015 is Interlocutory or Final ruling,

And in conclusion it says: "The defendant seeks order in terms of its summons for leave to appeal the decision of His Lordship".

[36] Indeed, leave of this court is required and the ruling made on 17<sup>th</sup> July, 2015 is an interlocutory ruling. Nevertheless, none of these is the matter at issue in the present application before me.

[37] For the foregoing reasons, I can see no reasonable ground as to why I should grant leave to appeal against the ruling dated 17<sup>th</sup> July, 2015.

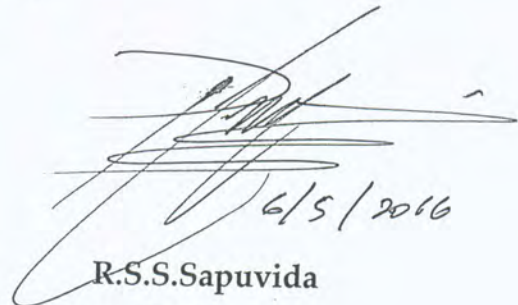
[38] Final orders of the court:

1. Application made by the defendant by way of Summons dated 14<sup>th</sup> August, 2015 for leave to appeal the ruling made on 17<sup>th</sup> July, 2015 is refused.
2. Summons for stay of the proceedings of all execution and proceedings pursuant to:
  - i. The interlocutory ruling delivered by the Puisne Judge in this matter sitting as the Master of the High Court, Hon. Mr. Justice M. H. Mohamed Ajmeer dated 23<sup>rd</sup> January, 2015 and;
  - ii. The ruling delivered by this court on 17<sup>th</sup> July, 2015 refusing to grant leave to appeal the aforesaid ruling of Hon. Justice Ajmeer, is struck out and dismissed.
3. The interim stay granted on consent dated on 28<sup>th</sup> April, 2016 is dissolved.



4. The defendant shall pay costs to the plaintiff summarily assessed at \$1,500.00 payable within 21 days from this ruling.
5. The case is referred back to the Master.



  
6/5/2016

R.S.S.Sapuvida

Judge

High Court of Fiji

On the 6<sup>th</sup> day of May 2016  
At Lautoka