

IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA

Civil Appeal No. 67 of 2015

(On appeal from the High Court of Fiji at Lautoka in the matter of Civil Action No. HBC 67 of 2015)

BETWEEN : **ANANTH AVIRAM REDDY** of Lautoka, Engineer/Law Graduate and Businessman.
APPLICANT
(ORIGINAL DEFENDANT)

A N D : **DEO CONSTRUCTION DEVELOPMENT COMPANY LIMITED**
a duly registered limited liability company having its registered office at Lot 11, Industrial Sub Division, Denarau Island, Nadi.
RESPONDENT
(ORIGINAL PLAINTIFF)

Appearances : Mr R. Singh for Applicant
: Mr A. K. Narayan for Respondent

Date of Hearing : 05 May 2017

Date of Ruling : 10 July 2017

R U L I N G

Introduction

[01] This is an application for leave to appeal.

[02] By summons dated 1 April 2016 and filed in conjunction with an affidavit of the Applicant ("*the Application*"), the Applicant seeks leave to

appeal the decision of the Learned Master of High Court (“the Master”) delivered on 18 March 2016.

[03] The application is opposed and the Respondent has filed the affidavit of Vimal Deo in opposition.

[04] The Application is made pursuant to Order 59, Rule 11 of the High Court Rules 1988, as amended (“the HCR”). Rule 11 provides:

“11. 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] Pending determination of the Application, the Court has granted a couple of stays: (i) on 11 April 2016, execution of the judgment stayed and (ii) on 21 June 2016, an application filed by the Respondent for indemnity costs stayed.

[06] At the hearing, the matter was orally argued. Additionally, both parties have filed their respective written submissions.

Background

[07] Deo Construction Development Company Limited (“DCDCL”), the Plaintiff (“the Respondent in these proceedings”) instituted an action by way of Writ of Summons with statement of claim endorsed seeking judgment against Ananth Aviram Reddy, the Defendant (“the Applicant in these proceedings”) for Value Added Tax (“VAT”) purportedly payable by the Applicant on a sale and purchase agreement between the parties.

[08] The Applicant filed his statement of defence and disputed the claim stating that the Respondent advised the Applicant that VAT will not be applicable to the dealing.

- [09] The Respondent by its claim seeks the refund of VAT and penalties levied by the Fiji Revenue and Customs Authority (“FRCA”) in the sum of \$130,434.00.
- [10] By the sale and purchase agreement the Respondent agreed to sell and the Applicant agreed to purchase the property in the sum of \$1,000,000.00. The dealing between the parties is now settled and performed the property was transferred to the Applicant in 2012. At the time of settlement, no tax invoice was raised for the payment of VAT by the Respondent.
- [11] The Respondent on 9 July 2015 made an application before the Master for summary judgment. The Applicant filed his affidavit in opposition. The Master by his ruling dated 18 March 2016 granted summary judgment in favour of the Respondent in the sum of \$130,434.00 (VAT sum claimed). The Applicant seeks leave to appeal this order.

The Law

- [12] O.59, r.8 (2), HCR is relevant to this application. Rule 8 (2) provides:

*“(2) No appeal shall lie from an interlocutory order or judgment of the Master to a single judge of the High Court without the **leave** of a single judge of the High Court which **may be granted or refused upon the papers filed.**”* (Emphasis provided)

The Grounds of Appeal

- [14] The Applicant intends to appeal the Master’s ruling on the following grounds:
- 1) *The Learned Master of the High Court erred in law and in fact in allowing the Affidavit of Krishneel Patel sworn on the 2nd of July 2015 to be read in evidence in support of the application for Summary Judgment when the contents of the affidavit amounted to Legal Submissions.*

- 2) *The Learned Master of the High Court erred in law and in fact in deciding that the Honourable Court could not consider the Statement of Defence filed by the Appellant whilst the Master of the High Court considered the application for Summary Judgment filed by the Respondent.*
- 3) *The Learned Master of the High Court erred in law and in fact in holding that the Appellant in defence and opposition to an application for Summary Judgment had to show a real or a genuine or an arguable defence.*
- 4) *The Learned Master of the High Court erred in law and in fact in not considering that there were triable issues when Fiji Revenue and Customs Authority (FRCA) decided to levy Value Added Tax (VAT) on the basis that the Appellant was not VAT registered, when the Appellant was in fact registered for VAT which raised a question to be tried at trial whether VAT should be payable at all.*
- 5) *The Learned Master of the High Court erred in law and in fact when the Master of the High Court failed to consider that FRCA in its assessment of the dealing by way of its letter dated 14 October 2014 found that the sale was VAT inclusive and not exclusive which raised a question to be tried at trial.*
- 6) *The Learned Master of the High Court erred in law and in fact when the Master of the High Court failed to consider that an application was made by the Respondent for VAT exemption with FRCA and that the Respondent had not adduced the said application in evidence to support its application for summary judgment.*
- 7) *The Learned Master of the High Court erred in law and in fact in awarding indemnity costs against the Appellant.*

- 8) *The Learned Master of the High Court erred in law and in fact in holding that even if the issues raised by the Respondent goes to trial, the defence will not succeed.*
- 9) *The Learned Master of the High Court erred in law and in fact into considering that extrinsic evidence, that the Appellant's claim that it was represented to the Appellant that VAT will not be applicable to the dealing, could not be raised by the Appellant to establish what the Appellant understood at the time he entered into the Sale and Purchase Agreement.*
10. *The Appellant reserves the right to include or amend the ground of appeal appearing hereinabove on the receipt of the records of the proceedings before the Learned Master of the High Court.*

Discussion

- [15] An interlocutory order or judgment of the Master is to be appealed to the High Court with the leave of the High Court. The High Court may grant or refuse such leave upon the papers filed (See O.59, r.8 (2)). Any application for leave to appeal an interlocutory order or judgment must be filed and served within 14 days of the delivery of the order or judgment (See O.59, r. 11).
- [16] In compliance with r.11, the Applicant has filed and served his Application within 14 days of the Master impugned ruling. There is no dispute on this point.
- [17] Basically, the Master's ruling granting summary judgment in favour of the Respondent has finally determined substantive rights of the parties leaving nothing to be decided thereafter.

- [18] As a general rule there is a strong presumption against granting leave to appeal from interlocutory orders or judgment which do not either directly or by their practical effect finally determine any substantive rights of either party (See *Neimann v Electronic Industries Ltd* [1978] VR 431).
- [19] The application for summary judgment is made following the writ of summons. Generally, an application for summary judgment stems from a writ action if there is no reasonable defence for the claim.
- [20] Any order made on an application for summary judgment is interlocutory (See *The White Book* (under the new (amended) rules) Order 59, Rule 1A).
- [21] The Master delivered his ruling on the Application for summary judgment filed by the Respondent. Therefore, leave of the Court is required to appeal that ruling.
- [22] I have carefully considered the defence raised by the Applicant and his proposed grounds of appeal. The Applicant has raised defence that the Respondent had represented that the sale was a going concern and VAT would not be applicable. Whether VAT was applicable to the dealing when the parties entered into the sale and purchase agreement, in my view, is a triable issue.

Conclusion

- [23] The Master's ruling on the application for summary judgment finally decides the rights of the parties. By his ruling, the Master has granted final judgment in favour of the Respondent. The defence filed by the Applicant discloses a triable issue at least in regards to VAT. The proposed ground of appeal, in my opinion, has a real prospect of success. I would, therefore, grant leave to appeal the Master's ruling dated 18

This would mean the Applicant will file and serve his appeal within seven (7) days of the date of this ruling.

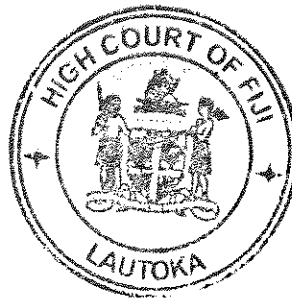
The outcome

1. Leave to appeal granted.
2. The Applicant will file and serve his appeal within seven (7) days from the date of this ruling.
3. Costs of this application shall be in the cause.

M.H. Mohamed Ajmeer 10/7/17
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M.H. Mohamed Ajmeer

JUDGE



**At Lautoka
10 July 2017**