IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

HBC NO. 225 OF 2013

(On an appeal from the Decision of R.S. S. Sapuvida J delivered on 15th October 2015 at the High Court at Lautoka in Civil Action HBC No. 225 of 2013)

BETWEEN	:	**DORSAMI NAIDU** of Kennedy Avenue, Nadi, Barrister & Solicitor. **APPLICANT** **(Original Plaintiff)**
AND	:	**DAMENDRA AMAS GOUNDER** of Martintar, Nadi, Company Director. **RESPONDENT** **(Original Defendant)**

Hearing	:	By way of written submissions.
Written submissions on behalf of Plaintiff/Applicant	:	Not filed – except for few case authorities.
Written submissions on behalf of Defendant/Resp.	:	16th October, 2017.
Date of Ruling	:	17th November, 2017.
Ruling by	:	Justice Mr. Mohamed Mackie

RULING

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1. Before me is a Summons dated 5th November, 2015, filed on behalf of the Plaintiff-Applicant (Plaintiff) praying for Leave to Appeal an Interlocutory Ruling pronounced by my learned predecessor Judge on 15th Day of October, 2015, dismissing the Summons dated 14th July, 2015, that had been filed seeking amendments to the Statement of Claim, pursuant to Order 20 Rule 5 of the High Court Rules 1988.

2. Plaintiff is a Barrister & Solicitor by profession practicing under the Name and Style of "Pillai Naidu & Associates- Barristers & Solicitors" – at No-17, Sagayam Road Nadi Town- Fiji, and throughout the proceedings has appeared in person.

3. Unfortunately, the Affidavit supporting the Summons for the proposed amendment of the Statement of Claim was from one **Krishneel Kunal Kumar (KKK), a** Clerk in the Plaintiff's said law firm and, according to the impugned ruling, it is the very Affidavit that has stood against the Plaintiff in his bid to amend the Statement of Claim, in his own legal battle, waged against the Defendant – Respondent (Defendant) on account of certain statements alleged to have been made by the Defendant, which the Plaintiff claims as defamatory.

Law governing the granting of the leave to appeal

4. Section 12(2) of the Court of Appeal Act Cap 12 requires that leave be obtained from a judge of the High Court or of the Court of Appeal, if an appeal is going to be filed against any interlocutory order or judgment of the High Court except in certain circumstances.

5. It is settled law and practices that when an application for leave to appeal is made, the party so applying must show that the appeal has a good prospect of success, and if leave is not granted a substantial injustice and prejudice would be caused to the applicant.

6. As a general rule there is a strong presumption against the granting leave to appeal from interlocutory orders, which do not finally determine any substantive rights of either party.

7. In ***Ex parte Bucknell [1936] HCA 67; 56 CLR 221 at 224, the Court said:***

> *"At the same time it must be remembered that the prima facie presumption is against appeals from interlocutory orders, and therefore, an application for leave to appeal under section 35(1)(a) should not be granted as of course without consideration of the nature and circumstances of the particular case. It would be unwise to attempt an exhaustive statements of the considerations which should be regarded as a justification for granting leave to appeal in the case of an interlocutory order, but it is desirable that, without doing this, an indication should be given of the matters which the court regards as relevant upon an application for leave to appeal from an interlocutory judgment."*

8. 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.

9. The Court's approach to interfere with interlocutory orders is succinctly stated by ***Tikaram J in Kelton Investments Ltd & Tapoo Ltd and ...Civil Appeal No. ABU 0034 of 1995*** 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.'

10. Again in ***Totis Inc. Sport (Fiji) Ltd & Another v. John Leonard Clark & Another, FCA No. 35 of 1996 Tikaram J*** stated as follows:

'It has been long settled law and practice that interlocutory orders and decisions will seldom be amenable to appeal. Courts have repeatedly emphasized that appeals against interlocutory orders and decisions will only rarely succeed. The Fiji Court of Appeal has consistently observed the above principles by granting leave only in the most exceptional circumstances.'

11. I am mindful of the aforesaid strong presumption against granting leave to appeal from interlocutory orders or judgments, which do not either directly or by their practical effect finally, determine any substantive rights of either party: **Hussein v National Bank of Fiji (1995) FJHC 188. In NBF Asset Management Bank –vs-Taveuni Estates Ltd (HBC 543S of 2004),** His *Lordship Calanchini J stated:*

"It is trite law to say that only in exceptional circumstances will leave be granted to appeal an interlocutory order".

12. It is to be observed that the impugned ruling pronounced by the learned Judge is, admittedly, an interlocutory ruling and same has not either directly or by its practical effect finally determined the substantive rights of the Plaintiff.

13. Apart from the above, I have carefully perused the contents of the impugned ruling of my predecessor Judge and the Grounds of Appeal as filed with the plaintiff's affidavit in support. The Plaintiff's Grounds of Appeal are mainly concerned with the merits of the application for the proposed amendment of statement of claim.

14. The learned Judge in paragraph 27 of his impugned ruling states as follows;

27. "On the above premises, I am not committed to discuss the merits or demerits of the application of basic principles pertaining to the subject of amendments to pleadings with reference to the instance case and the Plaintiff's written submissions"

15. I have also perused the paragraphs 7 and 8 of the affidavit dated 14th August, 2015 sworn by the Defendant and filed before the learned Judge, according to which the Defendant has tacitly admitted that the proposed amendments are not inimical or detrimental to his defence, except for further and unnecessary legal costs.

16. Since the learned Judge has decided to dismiss the Summons for the amendment purely on the propriety of the Affidavit of the law Clerk, and not on the merits of the application for amendment, I am of the view that the plaintiff is not absolutely barred from remaking the application supported by a proper affidavit, however, subject to valid objection/s (if any) by the Defendant.

17. Order 20 Rule 5 of the High Court Rules 1988, is very liberal on the question of amendment of writs or pleadings, subject to Order 15, rule 6, 8 & 9 and the other provisions of rule 5 under Order 20.

18. The case authorities tendered by the Plaintiff before this Court, devoid of written submissions, are worthy of scrutiny, only when the merits of the application for amendments are to be considered and since the learned judge has dismissed the application for the amendment purely on a technical ground and not on merits of the application, the necessity to consider same would not arise.

19. Further, the plaintiff will not be prejudiced by refusal of leave by this Court. He still has the opportunity to move for amended Statement of claim supported by his affidavit justifying the proposed amendments and present his case fully before the Court during the hearing of the substantive action and he will also have an opportunity to make his final appeal if unsuccessful.

Accordingly, I make the following orders:

1] The Summons for leave to appeal against the ruling pronounced by the learned Judge on 15th October, 2015, is hereby dismissed.

2] Cost of this application to be cost in the cause.

3] Case will take its normal course.

HIGH COURT OF FIJI LAUTOKA

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A.M.Mohammed Mackie

Judge

At Lautoka

17th November, 2017