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

HBC NO. 226 OF 2013

BETWEEN	:	SAFARI LODGE (FIJI) LIMITED
		PLAINTIFF
A N D	:	THE TIKI (FIJI) LIMITED
		FIRST DEFENDANT
A N D	:	MICHAEL HARVEY
		SECOND DEFENDANT
A N D	:	ATTORNEY GENERAL OF FIJI
		THIRD DEFENDANT

Before	:	A.M. Mohamed Mackie- J
Appearance	:	Mr. N. Padarath for the Plaintiff-Applicant
		Ms. M. Muir for the 1st & 2nd Defendants-Respondents
		Ms. M. Faktaufon for the 3rd Defendant-Respondent
Date of Hearing	:	16th July 2018
Written Sub.	:	On 13th April 2018 by the First and Second Defendant-Respondents & No written submissions filed by the Plaintiff-Applicant and 3rd Defendant- Respondent.
Date of Ruling	:	5th December 2018

RULING

A. INTRODUCTION

1. This ruling pertains to the Inter-Partes Summons (the application) preferred by the Plaintiff-Applicant (the plaintiff) seeking leave to appeal the Ruling of the learned Acting Master (the Master) of this court, pronounced on 26th

January 2018, after considering a Summons (an application) filed by the 1st and 2nd Defendant-Respondents (1st & 2nd defendants) under Order 24 Rule 16 of the High Court Rules 1988 (HCR).

2. By the said application dated 15th February 2018 filed before this court on 09th February 2018, the Plaintiff seeks the following orders:

    1. The leave be granted to Appeal the judgment of the Honourable Acting Master Mr. U.L. Mohamed Azhar delivered on 26th January 2018.

    2. Directions be made by this Honorable court for the conduct of the appeal and setting a hearing date in the appeal.

    3. The time for service and filing this application and any appeal be abridged if needed.

    4. That the cost in this application be cost in the cause.

3. The application states that the plaintiff intends to rely upon the annexed affidavit sworn on 8th February 2018 by Mr. **Warren Francis**, Resort Business Manager, and it is made pursuant to Order 59 rule 11, and other rules of the HCR and under the inherent jurisdiction of this court. It does not state what are the other rules of the HCR relied on by the plaintiff.

4. The application is opposed by the all three defendants. However, when the matter was mentioned on 13th March 2018, the learned counsel for the 1st and 2nd defendants informed that they are not going to file any affidavit in reply, instead would rely on the affidavits already filed before the Master.

5. Accordingly, 28 days were given for both the parties to file written submissions and only the 1st and 2nd defendants filed same on 13th April 2018. Though, several dates were given for the plaintiff to file its submission, same was not filed.

6. At the hearing held before me, the learned counsel for both parties have orally addressed the court in addition to the written submissions filed on behalf of the 1st and 2nd defendants.

B. The Background

7. The 1st and 2nd defendants on 09th December 2016 had filed a Summons before the Predecessor Master under Order 24 rule 16 of the High Court Rules and the inherent jurisdiction of the court seeking, inter-alia, for the dismissal of the plaintiff's action on account of non-compliance with his Order dated 22nd June 2016 made on an application that had been preferred before him by the 1st and 2nd defendants under Order 24 Rule 3 and 7 of the HCR for specific discovery.

8. In support of their said summons dated 9th December 2016 before the Master, the 1st and 2nd defendants had urged that the plaintiff had failed to comply with the terms of the order made on 22nd June 2016 and sealed on 26th October 2016, by failing and/or refusing to discover and/or disclose number of documents as per the Master's Order.

9. Though, the plaintiff did not file any reply affidavit for the summons under O 24 r 16, same being taken up before the present Master, he after hearing the learned counsel for the parties, the Master made the impugned ruling on 26th January 2018, whereby the plaintiff's action was dismissed and further order was made for the plaintiff to pay unto the 1st and 2nd defendants $ 1,500.00 being the summarily assessed costs. It is against this ruling; the Plaintiff's application for leave to appeal is pending before this court.

C. The Law

10. The Plaintiff seeks leave to appeal an interlocutory order dated 26th January 2018 delivered by the Master of this court.

11. An interlocutory order made by the Master may be appealed with the leave of a High Court Judge under O.59, r.11 of the HCR, which reads:-

Time for appealing an interlocutory order O.59, r.11

*O.59, r.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. (Emphasis added)*

Test for granting Leave to Appeal

12. In ***Prasad v Republic of Fiji & Attorney General (No 3) [2000] FJHC 265; [2000] 2FLR 81*** Justice Gates (as his Lordship then was) dealing with an application for leave to appeal to set aside interlocutory order stated:

> *"In an application for leave to appeal the order to be appealed from must be seen to be clearly wrong or at least attended with sufficient doubt and causing some substantial injustice before leave will be granted see Rogerson v. Law Society of the Northern Territory [1993] 88 NTR 1 at 5-33; Niemann v. Electronic Industries Ltd. [1978] VR 451; Nationwide News Pty. Ltd. (t/a Centralian Advocate) v. Bradshaw (1986) 41 NTR 1.*
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> *Fiji's legislative policy against appeals form interlocutory orders appears to be similar inter alia to that of the State of Victoria, Perry v Smith (1901) 27 VLR 66 at 68; and also with appeals to the High Court of Australia, see Ex parte Bucknell [1936] HCA 67; [1976] 56 CLR 221 at 223. If it is necessary for instance to expose a patent mistake of law in the judgment or to show that the result of the decision is so unreasonable or unjust as to demonstrate error, then leave will be given Niemann (supra) at 432. If is not sufficient for an appeal court to gauge, that when faced with the same material or situation. It would have decided the matter different. The court must be satisfied that the decision is clearly wrong (Niemann at 436).*
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> *Leave could be given for an exceptional circumstance such as if the order has the effect of determining the rights of the parties Bucknell (supra) at 225; Dunstan v Simmie & Co. Pty Ltd [1978] VR 669 at 670. This is not the case here. Leave could also be given if "substantial injustice would result from allowing the order, which it is sought to impugn to stand," Dunstan (supra) at 670; Darrel lea (Vic.) Pty Ltd v Union Assurance Society of Austria Ltd [1969] VR 401 at 408."*

13. I am also guided by the decision in ***Ali v. Radruita [2011] FJHC 302 (26 May 2011***. This was an application for leave to appeal an order made by the Master that the defendant should pay $10,000.00 as interim damages to the plaintiff within 28 days.

Calanchini J (as His Lordship then was) said that *"It is well settled that only in exceptional circumstances will leave be granted to appeal an interlocutory order.*

Leave will not normally be granted unless some injustice would be caused (page 4). Then at page 6 he said "The exceptional circumstances that the Defendant is required to establish in the present application are that the Master has acted upon a wrong principle, or has neglected to take into account something relevant, or has taken into account something irrelevant or that the amount awarded in so much out of all reasonable proportion to the facts proved in evidence. In my judgment the Defendant must also establish that it is necessary in the interests of justice for the Master's award to be reviewed".

D. Discussion

The preliminary issue on leave.

14. The ruling of the Master dated 26th January 2018, which dismissed the plaintiff's action together with an order for costs, is an interlocutory order. There is no issue or dispute on this point.

15. The summons in hand, filed on 9th February 2018, seeking leave to appeal the ruling dated 26th January 2018 made by the Master, was not issued till 15th February 2018 and was served only on 16th February 2018. This summons, being filed only on the last date, was not served within the prescribed time period of 14 days from the date of the impugned ruling of the Master, as provided in O.59, r.11 of the HCR.

16. Counsel for the 1st and 2nd defendants, raising a preliminary issue, submits that the application is out of time and cannot be entertained and therefore should be dismissed.

17. I find, inter-alia, following case law authorities too in support of the above position.

    i. Panache Investments Ltd v New India Assurance [2015] FJHC 523,
    ii. Deo v Metal Works & Joinery Ltd [2015] FJHC
    iii. Hawkes Bay Hide Processors v CIR (1990) 3 NZLR 313 at 315.

18. In **Panache and Deo** (above), the High Court held the failure to comply with the service requirement is fatal.

19. Justice Cooke in 'Hawkes' case (above) said:

"The statute is unambiguous as to the time requirement. I can see no basis on which the Court could hold that the requirement is not mandatory. It does not seem to be legitimate to read into such provision any such words as "or within a reasonable time thereafter" and the doctrine of substantial compliance cannot apply to fixed time limit."

20. O.59, r.11 of the HCR dictates specific time limit within which an application for leave to appeal any interlocutory order with a supporting affidavit must be filed and served. The word "shall" in rule 11 denotes that the time limit prescribed therein is mandatory and must be complied with.

21. The affidavit in support filed on behalf of the plaintiff does not give any justifiable reason for not having the application for leave to appeal served on the defendants within the prescribed time period.

22. As was held in Hawkes (above) the doctrine of substantial compliance cannot apply to the fixed time limit.

23. The Master made the impugned ruling on 26th January 2018. The plaintiff should have filed and served his application for leave to appeal on or before 9th February 2018. The application was filed on 9th February 2018, issued on 15th February 2018 and served on 16th February 2018. The plaintiff has failed to comply with the requirement of O.59, r.11. Non-compliance as to the specific time limit prescribed by rule 11 is fatal and cannot be cured by invoking O.2, r.1 (1) or other Orders/rules of the HCR.

24. In view of the provisions under Order 59 rule 11, there is no proper application for leave to appeal the Master's ruling dated 26th January 2018. The application for leave to appeal filed by the plaintiff is out of time because though it was **filed within 14 days, the requirement of service was not fulfilled** within the said 14 days and therefore should be dismissed.

25. The plaintiff waited till 9th February 2018, being the last date to file and serve the application and filed it at 3:00 pm without showing interest in having it sealed and served before the closure of the business on that day. It was sealed on 15th February 2018 and served only on 16th February 2018.

This shows the lackadaisical attitude of the Plaintiff shown in pursuing with the application for leave to appeal.

26. In the supporting affidavit of the plaintiff, nothing has been averred for the obvious failure to serve in time. No allegation leveled against the registry for not sealing and issuing on the date it was filed. Instead , what the deponent mainly states is that the plaintiff has sufficiently complied with the orders of the Master for further discovery, which is an argument could have been duly taken up before the Master, had the plaintiff made an application before the Master under Order 24 rule 17 of the HCR.

27. The application for leave to appeal filed by the Plaintiff could be dismissed for non-compliance with the provision of O.59, r.11 of the HCR. However, without prejudice to what I have observed on the preliminary issue, for the sake of completeness, I would consider the merits of the application as well.

Merits of the Application

28. Even if the plaintiff is guilty of delay, the court is not precluded from granting leave, provided that the applicant has adduced compelling and convincing grounds to show that the order intended to appeal against is manifestly wrong and the Master has acted upon a wrong principle, or has neglected to take into account something relevant, or has taken into account something irrelevant as pointed out by His Lordship Calanchini –J in ***Ali v. Radruita*** (supra).

29. The court may grant leave to appeal an interlocutory order if the order to be appealed from: (i) is clearly wrong or at least attended with sufficient doubt and causing some substantial injustice or (ii) has the effect of determining the rights of the parties.

E. Grounds of Appeal

30. **The plaintiff adduced 3 grounds of appeal to the following effect.**

    1. *That the Master erred in determining that the discovery that had been made in terms of the order was **not sufficient** and the plaintiff should have resorted to Order 24 Rule 17, when the Plaintiff had filed AVLD and explained that as to*

what had befallen on the required documents to be discovered, which were no longer in its possession and impossible to discover.

2. *That the Master erred in fact at paragraph 14 by failing to consider that the affidavit which the plaintiff relied on at the hearing of the specific discovery application was sworn on 14th August 2015 and filed on 17th August 2015 and the plaintiff was not required to discover or disclose nor compile any document until the orders of 22nd June 2016.*

3. *That the Master erred in law and in fact at paragraph 19 in coming to the conclusion that the plaintiff's action of not filing an affidavit in response to that of the defendants sworn on 31st August 2015 implied that the plaintiff was guilty of contumacious conduct when:*

   3.1. *The affidavit contains facts which were part of the court record and the record revealed that the Master had extended the time for the compliance of the orders.*
   3.2. *The defendants did not identify nor provide evidence of how the plaintiff was deliberately suppressing the documents.*
   3.3. *The plaintiff in its AVLD outlined the facts of when and how the plaintiff parted with the possession of the documents which was part of the order dated 22nd June 2016.*

31. I have carefully gone through the impugned ruling of the Master, which is under attack before me and the chronology of events that led to the making of the above ruling by the Master on 26th of January 2018.

32. This is an action commenced by the plaintiff in the year 2013, for the recovery of over $ 2.5 million from the 1st and 2nd defendants as the loss and damages, allegedly, caused to it due to an excavation carried out by the 1st and 2nd defendants in the year 2007 on the Lomanisue Beach, causing pollution thereto, which, allegedly, affected the plaintiff's business activities.

33. The acting Master has profusely addressed the subject of discovery in his impugned ruling. The only question before me is whether he was correct in

dismissing the plaintiff's action for not discovering the specific documents as per the Order made by the predecessor Master on 22nd June 2016.

34. The claim being for a substantial amount, with a Mareva Injunction hanging over their head, the 1st and 2nd defendants have an irrefutable right to know as to on what specific evidence , documentary or otherwise , the claim is made , before they face the trial in the action exhausting their resources and time.

35. The record shows that there was an unexplained initial delay of 4 months on the part of the plaintiff for the inspection, examination and discovery, which made the 1st and 2nd defendants to take out Summons on **30th June 2015** pursuant to Order 24 Rule 3 and 7 for the specific discovery of certain documents, which were considered to be crucial for the adjudication of the dispute before the court.

36. After considering the said application , the predecessor Master made his order dated 22nd June 2016 requiring the plaintiff to discover , not all the documents asked for, but only number of documents the Master considered necessary, for the defendants to have access , however subject to a written undertaking from the defendants to preserve the confidentiality of those documents to be discovered.

37. The above order was observed in breach by not discovering certain documents and this breach led the 1st and 2nd defendants to file the summons on **09th December 2016** under Order 24, rule 16 of HCR, on which the present Master made the impugned ruling on 26th January 2018.

38. The stance taken up on behalf of the plaintiff at the hearing before the present Master for the failure of the plaintiff to discover the documents in question was that those documents were destroyed during the Cyclone Winston that made landfall in this part of Fiji on 20th February 2016.

39. Strangely, the above position had not been taken up in the reply affidavit of the plaintiff to the initial application of the defendants for discovery under O 24 r 3 & 7 or at the hearing before the predecessor Master. Instead, the

plaintiff before the predecessor Master had chosen to take up the position that those documents were confidential and not relevant to this proceeding.

40. If those documents were confidential and not needed for the resolution of the issue before the court, the plaintiff should have made an application for relaxation of the Order dated 22nd June 2016 made by the predecessor Master, as provided under O24 r17 of the HCR. The Plaintiff for the reason/s best known to it did not resort to this relief and continued to hold the 1st and 2nd defendants in an unwarranted situation with the Mareva injunction against them in hand.

41. It is interesting to learn that the Cyclone Winston, which had the landfall on 20th February 2016 in Fiji, had been so picky and choosy, to destroy only few documents that were material for the case and to leave behind some other documents. There was no tangible evidence before the acting Master to substantiate the claim of alleged destruction of the documents.

42. In my view , the documents called for by the 1st and 2nd defendants by way of order for discovery are core documents that would assist the defendants in preparation of their defence and for the court to arrive at a justifiable final decision in the dispute placed before it.

43. The decision arrived at by the Master in paragraphs 14 and 19 are not blameworthy. Perusal of the record clearly shows that the plaintiff had been neglectful in complying with the orders and directions made by the Master for the disposal of the matter expeditiously.

44. The Master had a full-scale hearing before him, before he made the impugned ruling to strike out the action. The evidence adduced by the 2nd defendant in his supporting affidavit filed on 13th December 2016, was not challenged by a reply affidavit of the Plaintiff, despite ample time being given to do so.

45. At least in the supporting affidavit filed along with the application for leave to appeal, the deponent has not adduced any reason as to why the plaintiff could not produce the financial statements and tax returns for the given years. Plaintiff could have satisfy either of the Masters by acceptable

evidence that those documents in question were in fact non-existent or were not in the possession of the plaintiff or they are not needed for the adjudication of the matter.

46. The plaintiff is in an unsuccessful attempt to avoid those documents being produced in compliance of the order for discovery made by the predecessor Master. The plaintiff **having** taken up one position before the predecessor Master for not discovering the documents concerned, subsequently, takes up a contradictory position before the actin Master for not discovering them. The plaintiff having taken a long time to comply with the order, deliberately failed to do so. The afterthought defence of the Plaintiff that only those crucial documents were destroyed and not available for discovery appear to be unlikely to succeed in the appeal. The acting Master's ruling dated 26th January 2018 does not appear to be wrong. He has acted under O.24, r.16 (1) (b) of the HCR. Under that rule the Master/Court is empowered to make such an order for dismissal, if the plaintiff fails to comply with the requirement of discovery or an order made in that regard.

47. When there is specific provision in the HCR (O.59) dealing with the appeal from the Master's Court, the plaintiff is not entitle to invoke inherent jurisdiction to seek leave to appeal an interlocutory order given by the Master. Presumably, even if I exercise my inherent jurisdiction, I would not grant leave because the plaintiff failed to demonstrate any exceptional circumstances that warrant the hearing of the appeal.

48. The predicament, in which the plaintiff has fallen, is its own creation resulted due to its failure to comply with the order for specific discovery made by the predecessor Master on 22nd June 2016. The defendants need not be allowed to suffer further in the hands of the plaintiff.

F. Conclusion

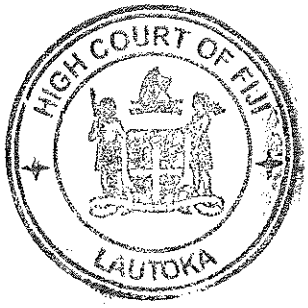
49. The Plaintiff failed to file and serve the application for leave to appeal within the prescribed time period under Order 59 rule 11 of the HCR. However, for reasons stated above, I do not find the intended appeal would have real prospect of success on the proposed grounds of appeal, since they are devoid of merits. I could not find any compelling reason why the leave

should be granted and appeal be heard. I have no option other than to refuse leave to appeal the interlocutory ruling of the Master dated 26th January 2018. I also find it is justifiable for this court to order the plaintiff to pay summarily assessed costs of $500.00 to the 1st and 2nd defendants.

G. Final outcome

a. Application of the Plaintiff for leave to appeal the Master's ruling dated 26th January 2018 is hereby refused.

b. Plaintiff shall pay summarily assessed costs of $500.00 to the 1st and 2nd defendants, being the cost at this forum.



A. M. Mohammed Mackie
Judge

At Lautoka
5th December, 2018