

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

HBC NO. 22 OF 2014

BETWEEN : **PUNJAS FLOUR LIMITED**, a limited liability company having its registered office at 63 Vitogo Parade, Lautoka.
Plaintiff/Applicant

AND : **FIJI ELECTRICITY AUTHORITY**, a statutory body incorporated under the provisions of Electricity Cap 180 having its registered office at 2 Marlow Street, Suva, Fiji.
Defendant/Respondent

Counsel : Mr. C. B. Young for the Plaintiff/Applicant
Mr. A. K. Narayan for the Defendant/Respondent

Date of Hearing : 5th December, 2017

Written Submissions
by : Plaintiff on 05/12/2017
Defendant on 06/02/2018
Plaintiff (in response) on 01/03/18

Date of Ruling : 10th April, 2018

Ruling Pronounced on : 13th April, 2018

Ruling by : Justice Mr. Mohamed Mackie

R U L I N G

A] Introduction:-

1. This ruling concerns an application dated 27th June, 2017 made by the Plaintiff-Applicant (Plaintiff) against the interlocutory judgment of my predecessor judge delivered on 19th June, 2017.
2. By the said application (the summons), supported before me inter-partes on 29th June 2017, the plaintiff seeks following orders:

- a. *“That leave be granted to the Plaintiff to appeal against the interlocutory judgment of Justice Sapuvida delivered on 19th June, 2017 refusing the Plaintiff’s leave to appeal against learned Master’s decision dated 29th April 2016, upon the grounds appearing in the Affidavit of Rajesh Punja.*
 - b. *That the decision and Orders made by the learned Master on 29th April, 2016 be stayed pending the determination of the appeal.*
 - c. *That the time for service of this Summons be abridged and there be speedy hearing and determination of this Summons.*
 - d. *That the cost in this application be cost in the cause.*
 - e. *Such further or other Orders as may deem just to this Honorable Court.”*
3. In support of the Application, the plaintiff relies on an affidavit of one **RAJESH PUNJA**, a Director of the Plaintiff Company, sworn and filed on 27th June, 2017.
 4. The Defendant opposing the application has tendered an affidavit of one **HAMSUKH PATEL** sworn on 19th July, 2017, a copy of which was initially tendered along with the affidavit of one **Elizabeth Yvonne Saverio**, and the original thereof was subsequently filed on 24th July, 2017.
 5. At the hearing before me on 05th December, 2018 both the learned counsel (Counsel) made short oral submissions. In addition to their oral submissions they tendered respective written submissions which, along with their previous submissions, were of great assistance in drawing up this ruling. I am grateful for both the counsel for their efforts.
 6. The Application is made under to section 12(2) (f) of the Court of Appeal Act [Cap 12], Rule 26(3), of the Court of Appeal Rules and the Inherent Jurisdiction of the High Court.
 7. Though, the Plaintiff has, subsequently, made another application on 4th July, 2017, by way of Summons seeking **enlargement of time**, when the matter was mentioned before me to fix the hearing date, Counsel for the Defendant was generous enough to indicate his consent for the enlargement of time. Accordingly, relevant application was not subjected to the hearing before me.

A. BACKGROUND TO THE APPLICATION

8. For the purpose of lucidity and easy comprehension, I shall give below a brief detail as

to what prompted the institution of this action and what has made the parties to engage in these ancillary proceedings.

9. Perusal of the record reveals that it is over an interlocutory ruling made by the learned Master (Master) on 29th April, 2016 against the Plaintiff, ordering the discovery of certain documents, and the subsequent interlocutory ruling dated 19th June, 2017 made by my predecessor judge dismissing the leave to appeal application and the appeal preferred by the plaintiff against the said ruling for discovery, parties are now in tussle and I have been called upon to decide on the question of leave to appeal to the Court of Appeal.

The chronology of events is, briefly, as follows.

- a. The Plaintiff, who is in the business of Flour Milling, distribution and selling in and out of Fiji, in or about June 2005, commissioned and commenced the operation of a brand new state of the art flour Mill at Navutu Industrial Subdivision in Lautoka , which needed additional power supply from the national grid.
- b. Pursuant to an agreement entered into between the Plaintiff and the Defendant for the supply of additional Electricity to the Plaintiff's Mill, the Defendant fixed and commissioned 2 Transformers within the premises, laid cables, installed main switch board and supplied required power for the purpose through the Electricity Meter supplied and fixed by the Defendant, admittedly, after due inspection. All the above fixtures were also, admittedly, under periodical inspection and maintenance by the Defendant to rule out any fault or tampering.
- c. Monthly bills from July, 2005 to September, 2013 were duly issued and the payments were regularly made till the Plaintiff made a complaint in October 2013 stating that its monthly Electricity bill had suddenly increased from \$23,754.86 in September, 2013 to \$196,335.29 in October, 2013.
- d. The Defendant in response to the above complaint informed the Plaintiff that a Metering anomaly had been identified and rectified in September, 2013.
- e. Being aggrieved, the Plaintiff instituted action on 20th February, 2014 for breach of contract.
- f. The Defendant while filing the statement of defence, made a counter claim for the recovery of charges for the, alleged, unbilled Electricity consumed by the plaintiff throughout the period of 8 years, during which period the Defendant claimed the Meter was faulty.

- g. After the completion of pleadings , in order to assess the average consumption throughout the disputed period and to substantiate its counter claim, the Defendant made an application for discovery of variety of documents from the possession of the Plaintiff , which the plaintiff claimed to be highly confidential, containing sensitive commercial information regarding its trade and business activities and those vital information, if the discovery is allowed, might end up in the hands of its business competitors through the Defendant's Solicitors , who are said to be acting for such a competitor.
- h. The application made by the Defendant for discovery, was allowed by the Master by his ruling dated 29th April, 2016.
- i. Being dissatisfied of the above ruling , the Plaintiff made a leave to appeal application and an appeal to a judge of this court on 10th May,2016 and my predecessor judge , having considered both the leave to appeal application and the appeal together, by his impinged judgment dated 19th June , 2017 dismissed the leave to appeal application and the appeal. It is against this judgment the Plaintiff is before this Court seeking leave to appeal to the Court of Appeal and for stay of proceedings.

B. ISSUES:-

10. The issues before the Court are:

- a. Whether the plaintiff ought to be granted leave to appeal the judgment of the judge dated 19th June, 2017?
- b. Whether there ought to be a stay pending the appeal of the ruling dated 19th June, 2017?

C. Relevant Law:

(a) Leave to Appeal

11. Leave to appeal an interlocutory order may be given by the judge or by the Court of Appeal (see CAA, 12 (2) (f)). Furthermore, an application may be made either to this court (the court that made the order) or to the Court of Appeal. The application must be made in the first instance to the Court below (see CAR, 26 (3)).

D. Discussion & Relevant Principles:-

(a) Leave to Appeal

12. The primary issue raised in this application is that whether the plaintiff ought to be given leave to appeal the judgment delivered by my learned predecessor judge on 19th June, 2017?
13. By the impugned judgment dated 19th June, 2017 the Plaintiff's application for leave to appeal the interlocutory ruling of the Master dated 29th April, 2016 and the appeal on it were dismissed by the learned Judge of this Court reserving the costs to be in cause.
14. As a result of the above dismissal, the ruling of the Master for the discovery of varieties of documents, from the Plaintiff's possession, remains intact compelling the plaintiff to comply with it.
15. The Plaintiff's firm position is that those documents are commercially sensitive and the order for discovery of such documents poses a threat to their business activities and it would suffer irreparable damages as there is likelihood for those documents to fall into the hands of their market competitor. Plaintiff's Counsel makes submission to the effect that instead of making an order for discovery of such kind of sensitive documents, hearing of preliminary issues would have disposed the whole proceedings once and for all.
16. The Plaintiff's Counsel draws the attention of Court towards the impugned judgment of my predecessor delivered on 19th June, 2017, dismissing the leave to appeal and the appeal, in order to highlight as to what has gone wrong.
17. The Counsel for the Plaintiff makes submissions to the effect that the order of this nature for discovery violates Plaintiff's substantive rights to protect its commercially sensitive documents from being divulged, which will be inimical, detrimental and a threat to its business activities. It is also submitted that the Master's failure to deal with the Plaintiff's Counsel's argument on the deficiency of credible evidence adduced by the Defendant in support of its application for discovery, by giving an opportunity to plaintiff's counsel to make submissions on it, is denial of natural justice and amounts to the violation of substantive right.
18. The Plaintiff's Counsel submits that the learned Judge of this Court, when dealing with the Plaintiff's application for leave to appeal the Master's decision, was also dealing with the rights of a litigant to withhold commercially sensitive documents from specific discovery, which according to the counsel, was accepted by the judge and both the Plaintiff and the Defendant to be so, needs to be decided by a higher forum as there has not been previous decisions on this point in Fiji.

19. I agree with the above stance of the Counsel for the Plaintiff and hold a view that it is prudent to have a guiding decision by a higher forum in Fiji as to what extent and under what circumstances the weapon of specific discovery provided under Order 24 of the HCR could be or allowed to be made used.
20. It is to be noted that the grounds of appeal adduced by the Plaintiff and the questions of law to be raised in the intended appeal by the plaintiff's counsel are of paramount importance, in view of the approach the learned judge alleged to have adopted to arrive at his findings in paragraphs 46, 47 and 48 of the impugned judgment, after, apparently, holding a view in favour of the plaintiff's counsel's submissions throughout the judgment and particularly in paragraph 45 thereof.
21. The paragraph 45 of the impugned judgment, where the learned judge, seemingly, formed a view in favour of the plaintiff, after reproducing in his judgment paragraphs from 24 to 44 of the written submission of the Plaintiff, without explicitly disagreeing with any of the arguments therein and paragraph 47, where the learned judge adduced his main reason for the dismissal of the action, being the crucial parts of the impugned judgment, are reproduced for easy perusal and comprehension.

"[45] Plaintiff by very lengthy and exhaustive submissions has tried to convince this Court by establishing the three grounds of appeal above with absolute merit and that the Master's decision was on wrong basis and it should be set aside" (emphasis mine)

"[47]. Having considered the submissions of both the Counsel, it is the considered decision and the firm view of this Court that even if there was a breach of natural justice in failing to consider or order a trial of a preliminary point, the only formal application the Master had dealt with was the Defendant's application for specific discovery. There was no formal application for the Master to deal with any application under Order 33. There could thus be no deprivation of a right of the plaintiff to the substantive hearing".

22. It is based on the above findings; the grounds of appeal and following questions of law have been framed to be argued at the proposed appeal. The questions are as follows:
 - (a) Can the Court invoke Order 33 without a formal application by the party to the proceedings?
 - (b) Should the Court have invoked Order 33 on the written and oral submissions of the Plaintiff and ordered the determination of the preliminary issues?

- (c) Did the justice of the case demand that the Court invoke Order 33 and order determination of the preliminary issues?
 - (d) Is the learned Judge's decision "that the Master's ruling was on an interlocutory issue "bad in law for failure to properly explain or to give reasons for that decision?"
 - (e) Was the criterion for leave to appeal against an interlocutory judgment met?
23. In my view , that the learned Judge's conclusion in paragraph 47 of the impugned judgment to the effect "There was no formal application for the Master to deal with any application under Order 33" itself has laid a good arguable ground for the Court of Appeal to decide the propriety of the ruling of the Master and that of the judgment of the learned judge , for the simple reason that there is no provision for a formal application to be made to the Master moving for preliminary hearing before him under Order 33 and since it is possible only before a judge prior to or at or after the trial.
24. The existence of an alternative provision, to rule out an order for discovery or to suspend it temporarily, under Order 24, r 4, "***Order for determination of issue, etc., before discovery***" seems to have escaped the attention of the Master, when he arrived at his decision to order for discovery in paragraph 11(in pages 38 and 39) of his ruling. Learned Judge also, in his impugned judgment, has approved the view of the Master in this regard. This, in my view is another important point that warrants the consideration of the Court of Appeal.
25. It is also observed that one of the reasons adduced by the Master in justifying his discovery order, according to his ruling, was the failure of the Plaintiff to make a formal application moving to disregard the affidavits of the Defendant filed in support of discovery, on the ground of irregularity, an argument Master seems to have understood as advanced by the Counsel for the plaintiff. But what the Counsel for the Plaintiff submits is that he did not challenge regularity of the affidavit except for the insufficiency and inadmissibility of the evidence therein. This has not been addressed by the learned judge in his judgment and this too appears to be an arguable point before the Court of Appeal.
26. Another salient point, the Court of Appeal may possibly take into consideration is the alleged vagueness that appears in the relief granted in paragraph 4 in page 42 of the Master's ruling. It reads as follows:

"Any irrelevant part of a document that is subject to disclosure should be covered up when the document itself is produced"

- 26(1) On plain reading of the above paragraph, the following inevitable questions will arise as to what are the irrelevant parts of a particular document that need to be covered up? Who decides the relevancy and irrelevancy? Who does the covering up? The Court of Appeal may also decide the propriety of the above relief whether it can stand as it is.
27. The learned Counsel for the Defendant (FEA) in paragraphs 1.4, 2.3 and 2.4 of his written submissions in opposition heavily relies on the alleged failure of the plaintiff to make an application before the Master for the Master to act under Order 33. According to the provisions in the HCR it is abundantly clear that the Master cannot and is not supposed to have a preliminary hearing before him except by a judge. What the Master can do is to act under rule 4 of Order 24 if the circumstances in the case demand such a move.
28. The Defendant's Counsel in his written submissions has drawn my attention to series of authorities that discourage the granting of leave. At the same time, I find the very same authorities and those cited by the Plaintiff's Counsel in his written submissions richly support the granting of leave when the facts and circumstances of the case demand.
29. Basically, what is challenged in this process is the impugned ruling of the Master dated 29th April, 2016 that granted the order for discovery. What the learned judge has so far exercised herein is his appellate jurisdiction over the Master's ruling. Instead there is no before me any interlocutory decision of a trial judge made in the course of the trial as stated in paragraph 28 of the written submissions of the Defendant (FEA). The Court of Appeal would decide the propriety of the Master's ruling and that of the impugned judgment dated 19th June, 2017 on the strength of the arguments to be placed before their Lordships during the Appeal.
30. In *Hussain v National Bank of Fiji [1995] FJHC 188; [1995] 41 FLR 130* (1 June 1995) the High Court held that as a general rule there is a 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.
31. Fiji Court of Appeal in *Habib Bank Ltd v Ali's Civil Engineering Ltd [2015] FJCA 47; ABU7.2014* (20 March 2015) granted leave to appeal having satisfied with the summary of grounds that raises appealable issues that should be considered by the Court of Appeal.
32. The Counsel for the Defendant heavily relies on the decision in *Niemann V Electronic Industries Ltd [1978] Vic Rp 44* in support of his application not to grant leave. The observation made by the full federal Court of Australia in *Re Décor Corporation Pty*

Ltd and Rain Tooling Industries Pty Ltd V Dart Industries Inc [1991] FCA 655 is worthy of reproduction as follows. In paragraph 3 thereof the Court said:

“In our opinion, the major consideration to be derived from Niemann do provide an appropriate litmus test for the general run of the cases in which leave to appeal from an interlocutory decision is sought. If differently constituted courts are to give consistent rulings, it is necessary that they be guided by relevant principles. There is a considerable body of authority which supports the approach taken in Niemann. But we do not understand the judges who decided Niemann to have laid down any rigid rules that might destroy a court’s discretion in all cases but those falling within them.”

In paragraph 6 thereof the Court said:

“In the present case, the interlocutory decision in respect of which are certainty attended with difficulty, and their correctness is open to dispute. If they are wrong, significant consequences will be suffered by the applicant. We regard this as a clear case for the grant of leave”

33. The plaintiff’s counsel submits that the grounds of appeal raise some question of general importance to be determined by the Court of Appeal. I have considered the summary of the proposed grounds of appeal. The question of general importance is whether commercially sensitive information or documents need to be exposed or exhibited in the name of discovery. Admittedly, there is no local authority in this regard and it is preferred to have a home- grown decision on the subject to settle the law and to develop the Fijian Jurisprudence. As the counsel opined, a decision by higher forum in Fiji will greatly assist the legal profession and the business community.
34. Plaintiff’s Counsel also submits that, apart from the merits of the matter being of general importance, the appeal also raises the issue of procedural fairness as a matter of general importance. The alleged failure of the Master to consider the submissions of the Plaintiff that the more equitable and just course was for the Master to order the determination of the preliminary question or issue (which has to be before a judge and not by an application before the Master as observed by the Defence Counsel and the judge on appeal), and to defer to a later date the making of an order on the Defendant’s summons for production of commercially sensitive information or documents.
35. Plaintiff’s Counsel has by his submissions and the authorities cited have convinced this Court that there lies a real prospect of success. I find that the plaintiff has satisfied this Court for a favorable consideration in the question of granting leave. Lord Woolf MR

said in *Swain v Hillman [2001] 1 All ER 91* that a ‘real’ prospect of success means that prospect of success must be realistic rather than fanciful.

36. In *Beedell v West Ferry Printers Ltd [2001] EWCA Civ 400; [2001] ICR 962*, it was said that even hopeless appeal may be allowed to proceed, where the area of law in question is the subject of considerable controversy.
37. The impugned judgment dated 16th June, 2017 though an interlocutory one has ultimately compelled the Plaintiff to divulge varieties of documents, which the plaintiff claims to be commercially sensitive. This order for discovery of such documents seems to have been made without considering the merits of the objection raised by the plaintiff with regard to the adequacy and admissibility of evidence placed by way of affidavit. When the plaintiff complains about denial of natural justice, procedural fairness, violation of substantive rights and when the matter involves general importance as aforesaid, the Court of justice need to pay heed to the matter complained of. The presumption against granting leave to appeal from an interlocutory order need not strictly and necessarily be applied in a situation of this nature.
38. I am satisfied that the summary of grounds of appeal raises question of general importance and the area of law in question is the subject of considerable controversy and obtaining clarification on the law is needed. As stated in Beedell’s case, even hopeless appeal may be allowed to proceed where the area of law in question is the subject of considerable controversy. I therefore decide this is a fit and proper case to grant leave to the plaintiff to appeal the judgment dated 19th June, 2017 which will also decide the propriety of Master’s ruling dated 29th April, 2016. It follows that leave to appeal is granted under section 12 (2) (f) of the CAA.

E. Stay Pending Appeal:

39. Let me now decide the second issue that whether there ought to be a stay pending the appeal of the 28 June Ruling.
40. The basic rule is that a litigant is entitled to enjoy the fruits of its success (see *BMW AG v Commissioners of HM Revenue and Customs [2008] EWCA Civ 1028 and Chand v Lata [2008] FJHC 162*)).
41. Unless the court below or the Court of Appeal otherwise directs, an appeal will not operate as a stay of execution or of proceedings under the decision of the court below (see CAR, 34-(1)).
42. The court has an unfettered discretion to impose a stay of execution if the justice of the case so demands (see *BMW AG* (above)). In so doing, the court will take into

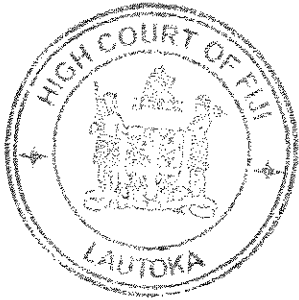
consideration the principles governing a stay application as set out in *Ward v Chandra [2011] FJSC 8; CBV0010 (20 April 2011) and Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd [2005] FJCA 13; ABU 0011.2004S (18 March 2005)*.


43. In order to obtain a stay the plaintiff must establish that he has sufficiently exceptional circumstances as stated in Ward's case (above).
44. The plaintiff submits that a stay ought to be granted on the following grounds: That without a stay the appeal will become nugatory. That it will be obliged to comply with the Master's decision and make specific discovery of commercially sensitive documents before the appeal is determined and if the plaintiff were to win the appeal the discovery made cannot be retrieved or expunged. In this sense, plaintiff claims, that it will suffer irreparable damages.
45. I am of the view, when considered the nature, facts and circumstances in this case, the discovery, if made before the appeal is decided, would be a prejudicial to the plaintiff and the harm of it to the plaintiff is greater than to the defendant: whereas the defendant could be compensated by interest and/or costs for any delay;
46. The plaintiff has acted diligently in prosecuting the proposed appeal; the questions raised by the plaintiff in the proposed appeal are of general importance. The balance of convenience and the need for the protection of the status quo are in favour of the plaintiff. The Defendant has not sternly pressed for the execution of the discovery order or vehemently objected the stay. However, the Defendant can be adequately compensated by way of cost and interest in the event the present decision remains after the appeal.
47. For all these reasons, I grant a stay of execution of the ruling dated 29th April, 2016 delivered by the Master, pending the appeal. It follows the stay is granted under CAR, Rule 34 (1).

F. Final outcome

- a. Leave is hereby granted to the plaintiff to appeal against the interlocutory judgment of my predecessor delivered on 19th of June 2017 refusing the Plaintiff's leave to appeal application and appeal against the ruling dated 29th April, 2016 pronounced by the Master.
- b. There will be a stay of execution of the ruling of the learned Master dated 29th April, 2016, pending appeal.
- c. The time for appeal is extended (decision by consent)

- d. The Plaintiff shall file papers within 14 days from today,
- e. Costs shall be in the cause.




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A.M.Mohammed Mackie
Judge

At Lautoka
13th April, 2018