IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

APPELLATE JURISDICTION

Civil Appeal No. 124 of 2016

BETWEEN : AISAKE RAVUTUBANITU on behalf of himself and on behalf of the majority members of the Mataqali Navusabalavu of Tagitaginatua, Tavua,

APPELLANT

A N D : OVINI BOKINI of Tavualevu, Tavua.

1st RESPONDENT

A N D : ANJALI DEVI PRAKASH of 28 Kavika Street, Tavua,

2ND RESPONDENT

A N D : ITAUKEI LAND TRUST BOARD a statutory body established under the iTaukei Land Trust Act.

3RD RESPONDENT

A N D : REGISTRAR OF DEEDS

4TH RESPONDENT

Counsel:

Mr. Niko Nawaikula for the Appellant
Mr.Ratu Isoa Tikoca for the First and Second Respondents
Mr. Tomasi Dunasali for the Third Respondent (iTLTB)
(Ms.) Manuliza Olivie Faktaufon for the Fourth Respondent (AG's Chambers)

Date of Hearing: Thursday, 12th July, 2018
Date of Ruling : Friday, 10th August, 2018

RULING

(1) This is an application filed by the Appellant seeking the following Orders;

(1) To enlarge time to file application for leave to appeal the Master's decision of 06th December 2017.

(2) Leave to appeal the Master's decision delivered on 06th December 2017.

(2) The application was made by Summons dated 23rd February 2018 and supported by an affidavit sworn on 20th February 2018 by 'Aisake Ravutubananitu', the Appellant. The application was opposed. An answering affidavit sworn on 14th March 2018 by 'Ovini Bokini', the First Respondent was filed on behalf of the First and Second Respondents. The Third and Fourth Respondents did not file any material in relation to this application.

(3) The Summons state that *"this application is made pursuant to Order 59 Rule 11 and Order 59 Rule 8 (2) of the High Court Rules 1988 and under the inherent jurisdiction of the Court."*

(4) **On the 11th May 2018, the First and Second Respondents applied to strike out the Appellant's Summons on the ground of irregularity.** The application was made by Summons dated 11th May 2018 and supported by an affidavit sworn on 24th April 2018 by Ovini Bokini, the First Respondent.

(5) The First and Second Respondent's Summons stated that;

> *This application is made under Order 2 Rule 2 Order 18 Rule 18 (1) a and d of the High Court Rules and the inherent jurisdiction of the Honourable Court;*
>
> *a. That the Appellants application is for an Interlocutory Judgment however a Final Judgment was given by the Master on the 6th of December 2017.*

b. *That the Appellant application is irregular and cannot be cured and therefore should be struck out.*

(6) I turn to the Appellant.The Appellant's application is essentially for extension of time to make an application for leave to appeal and for leave to appeal the decision of the Master delivered on 05th December 2017. The Orders of the Master appear in paragraph 35 of the decision;

> *(a) The Plaintiff's claim and the action is struck out.*
> *(b) The Plaintiff to pay a summarily assessed cost of $300 to 1st Defendant within 14 days from today.*

(7) The Master has struck out the Plaintiff's (Appellant's) claim and action pursuant to the First and Second Defendant's (Respondent's) application to strike out the pleadings under Order 18, rule 18 (1) (a),(b),(c) and (d) of the High Court Rules, 1988.

(8) As I understand the application made by the First and Second Respondents on the 11th May 2018, there is only one issue: **Was the decision of the Master final or interlocutory?**

(9) The First and Second Respondents presented arguments on the basis that Master's decision was a final order and not an interlocutory order and the Appellant does not need leave to appeal. The Respondents seek an order that the Appellant's application for leave to appeal be struck out and dismissed on the basis that **the application is irregular.**

(10) On the other hand, the Appellant contends that the decision of the Master is an interlocutory judgment and requires leave to appeal. Counsel for the Appellant cited Fiji (Full) Court of Appeal decision "**Gounder v Minister of Health (2008) FJCA 40.**

(11) What is the proper approach to be taken to decide whether any particular order or ruling is interlocutory or final?

(12) How an order is to be identified as interlocutory or final ? Two different approaches had been taken by Courts. The first was called the "**application approach**" while the second was called the "**Order approach**".

(13) In "**Shubrook v Tufnell**" **(1882) 9 Q.B.D. 621** Sir George Jessel M.R. and Lindley L.J. held, in effect, that an order is final if it finally determines the matter in litigation. Thus, the issue of final or interlocutory depended upon the nature and effect of the order as made. I refer to this as the "**Order approach**". The 'order approach' looks at the order actually made. If it brought the proceedings to an end, it was a final order; if it did not, it was an interlocutory order.

(14) In "**Salaman v Warner**" **(1891) 1 Q.B.D. 734**, in which Shubrook case does not appear to have been cited, a Court consisting of Lord Esher M.R., Fry L.J. and Lopon L.J. held that a final order is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation. I refer to this as the "**application approach**". The 'application approach' looks at the application rather than the order actually made. Thus, the issue of final or interlocutory depended upon the nature of the application or proceeding, giving rise to the order and not upon the order itself.

(15) Although the 'order approach' was preferred by the English Court of Appeal in some early decisions, it was the 'application approach' which prevailed. Putting an end to the judicial conflict that existed in England for over a century, the Court of Appeal in "**White v Brunton**" **(1984) Q.B. 570**, Sir John Donaldson M.R. at p. 573 stated; "*The Court is now clearly committed to the application approach*" in determining whether an order is interlocutory or final.

(16) The Fiji Full Court of Appeal followed "**White v Brunton**" (supra) and the "**application approach**" was adapted in the following full court of Appeal decisions;

- **Suresh Charan v Shah**
  (1995) 41 FLR 65

- **Shore Buses Ltd v Minister of Labour**
  (1995) FCA, ABU 0055
- **Gounder v Minister of Health**
  (2008) FJCA 40

(17) In "**Gounder v Minister of Health**" (supra) the full Court of Appeal adopting the "application approach" stated thus;

27. *All judgments are either final or interlocutory though it is sometimes difficult to define the borderline with precision.*

28. *In England the test whether an order is interlocutory or final depends on the nature of the application* ***(White v Brunton (1984)*** *QB 570) and not on the nature of the order as eventually made.*

29. *In Australia the courts have taken an "order approach", so that the order appealed from, not the nature of the application before the trial judge, is determinative. So in Australia for example, an order refusing to grant a declaration is interlocutory but the grant of a declaration is a final order.*

30. *In Fiji the Court of Appeal in* ***Suresh Charan v Shah*** *(1995) 41 FLR 65 [Kapi, Thompson, Hillyer JJA] held that refusal by the High Court to grant leave for Judicial Review is an interlocutory order. The Court of Appeal further held that for the orderly development of the law in Fiji it was generally helpful to follow the decisions of the English courts unless there were strong reasons for not doing so and accordingly adopted the "application approach".*

31. *That decision was followed in* ***Shore Buses Ltd v Minister for Labour*** *FCA ABU0055 of 1995, a case of dismissal of proceedings for want of possession.*

32. *In* ***Jetpatcher Works (Fiji) Ltd v The Permanent Secretary for Works & Energy & Ors*** *[2004] Vol 1 Fiji CA 213, [Ward P, Eichelbaum, Gallen JJA] the appellant filed an application for judicial review of a decision of the Major Tenders Board. The Appellant appealed to the Court of Appeal. The Respondent took the preliminary objection that the appeal was not properly instituted because it required leave.*

33. *The Court of Appeal overruled* ***Suresh Charan v Shah*** *(supra) and* ***Shore Buses*** *(supra) and held that the "order approach" was the correct approach in Fiji. The Court sought to distinguish the earlier cases on the facts (in both* ***Suresh Charan& Shore Buses*** *the appellants had other remedies) but the Court's reasoning is not clear.*

34. *The vice in the "order approach" is that where leave to appeal has not been obtained the parties may not know whether or not it was required until the case comes on for hearing before the Court of Appeal and a close examination of the order and its effect can be argued.*

35. *It seems to this Court that the "application approach" is the correct approach for the reasons stated in* ***Suresh Charan v Shah*** *and for the additional reason of legal certainty.*

36. *As a matter of fundamental principle a court ought not overrule itself unless there are compelling grounds for doing so but this is what the Court in* ***Jetpacker*** *(supra) did. In overruling* ***Jetpacker*** *(supra) the Court is restating the law as it was, but more importantly it is doing so to return legal certainty to the law of Fiji. This is especially important in 2008 where it has been some years since the Fiji Law Reports were published where decisions of this Court cannot always be readily accessed by Practitioners. Practitioners and litigants need to know with certainty whether a decision is interlocutory and therefore whether an appeal from that decision needs leave.*

37. *This is the position. Where proceedings are commenced in the High Court in the Court's original jurisdiction and the matter proceeds to hearing and judgment and the judge proceeds to make final orders or declarations, the judgment and orders are not interlocutory.*

(18) At paragraph 38, the Fiji Court of Appeal gave several examples of **interlocutory applications:**

38. *Every other application to the High Court should be considered interlocutory and a litigant dissatisfied with the ruling or order or declaration of the Court needs leave to appeal to that ruling order or declaration. The following are examples of interlocutory applications:*

(i) an application to stay proceedings;

(ii) an application to strike out a pleading;

(iii) an application for an extension of time in which to commence proceedings;

(iv) an application for leave to appeal;

(v) the refusal of an application to set aside a default judgment;

(vi) an application for leave to apply for judicial review.

(19) Therefore, on the basis of the decision in "**Gounder v Minister of Health**" (supra), the decision of the Master was an interlocutory Ruling and the Appellant does need leave to appeal.

(20) The Courts are clearly committed to the "application approach" as a general rule. However, there is an **exception to the general rule**. The exception arises in the context of a **split hearing.**

(21) In "**White v Brunton**" (supra) Donaldson M.R. stated at page 573;

> *The Court is now clearly committed to the application approach as a general rule and Bozson's case (1903) 1 K.B 547 can no longer be regarded as any authority for applying the order approach. However, the decision in Bozson's case, as district from the reasoning, can be upheld on a different ground as an exception to the general rule. It was a case of a "spilt trial", all questions of liability and breach of contract being tried before and separately from any issue as to damages. If the two parts of the final hearing of the case had been tried together, there would have been an unfettered right of appeal, even if the judgment had been that there was no liability and that accordingly no question arose as to damages. It is plainly in the interests of the more efficient administration of justice that there should be spilt trials in appropriate cases, as even where the decision on the first part of a spilt trial is such that there will have to be a second part, it may be desirable that the decision shall be appealed before incurring the possibly unnecessary expense of the second part. If we were to hold that the division of a final hearing into parts deprived the parties of an unfettered right of appeal, we should be placing an indirect fetter upon the ability of the court to order split trials. I would therefore hold that where there is a spilt trial or more accurately, in relation to a non-jury case, a spilt hearing, any party may appeal without leave against an order made at the end of one part if he could have appealed against such an order without leave if both parts*

had been heard together and the order had been made at the end of the complete hearing.

(22) The exception has the effect of allowing an appeal against an order made as part of a spilt hearing to be regarded as an appeal against a final judgment. In the result, leave is not required and the time limit for appealing is the same as for a final judgment.

(23) I have come to the clear conclusion that the exception does not apply in the case before me. The First and Second Respondent's application for striking out the pleadings under Order 18, rule 18 (1) came before the Master as an interlocutory application and not as a preliminary issue raised or as of a split final hearing.

(24) **ORDERS**

1. The objection raised by the First and Second Respondents is overruled.

2. The Summons dated 11th May 2018, filed by the First and Second Respondents is hereby dismissed.

3. The First and Second Respondents are ordered to pay costs of $500.00 (summarily assessed) to the Appellant within 14 days hereof.

HIGH COURT OF FIJI LAUTOKA

10/08/2018

Jude Nanayakkara
Judge

At Lautoka
Friday, 10th August 2018.