

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

**CIVIL ACTION NO. HBC 11 OF 2008**

**BETWEEN** : **VIJENDRA MANI** of Varadoli, Ba, Driver/Technician. **PLAINTIFF**

**AND** : **SUBHAS CHANDRA SHARMA** trading as **SHARMA MUSIC CENTRE** of Nadi Town. **DEFENDANT**

**Appearances** : Mr V. Chandra for the plaintiff  
: Mr A.K. Narayan (Jnr) for the defendant

**Date of Hearing** : 22 May 2019

**Date of Ruling** : 11 June 2019

## **R U L I N G**

[on leave to appeal out of time and stay of proceedings]

### **Introduction**

[01] This ruling concerns with an application for leave to appeal an interlocutory ruling of the learned Master (“*Master*”) delivered on 5 November 2018, in which the Master had treated the notice issued by the Court under O 25, R 9 of the High Court Rules 1988, as amended (“*HCR*”) as a summons for directions.

[02] By summons supported by an affidavit of Shinaal Shayal Lata filed on 21 November 2018, (“*the application*”) the defendant/applicant (“*the defendant*”) seeks the following orders:

- a) *That leave be granted to appeal the Interlocutory Orders of the Master Mohammed Azhar made in the High Court of Fiji at Lautoka on 5<sup>th</sup> November 2018;*
- b) *That the time for filing and serving a Notice of Appeal be enlarged;*

*c) That further proceedings in the High Court of 5<sup>th</sup> November 2018 be stayed pending the hearing and determination of this application and the hearing of the Appeal upon grant of leave.*

- [03] The application is made under O 3, R 4 and O 59, R 10 and 16 of the HCR and the inherent jurisdiction of the Court.
- [04] The plaintiff/respondent (*'respondent'*) has filed an affidavit in opposition on 18 February 2019. The defendant has filed an affidavit in response to the plaintiff's affidavit in opposition.
- [05] This matter was allocated to Mackie J. He could not complete the hearing and deliver a ruling as he had left the bench. As a result, I heard the matter. At the hearing before me, both counsel made oral submissions and tendered their respective written submissions.

### **The Background**

- [06] On 17 January 2008, the plaintiff brought this action against the defendant claiming compensation for personal injuries sustained by him as a result of a motor vehicle accident occurred on or about 4 November 2006.
- [07] On 26 March 2010, the pleadings had closed. There were some issues with respect to the PTC. On 5 October 2016, the court delivered a ruling and directed the parties to complete the PTC.
- [08] Thereafter, on 11 November 2016, the matter was taken off the cause list as there was no appearance by or for the plaintiff.
- [09] On 8 November 2017, the court on its own motion issued a notice under O 25, R 9 of the HCR requiring the parties to show cause as to why the matter should not be struck out for want of prosecution or for an abuse of the process of the Court.
- [10] The plaintiff filed an affidavit showing cause on 23 January 2018. On 28 March 2018, the defendant filed an affidavit in support of the Court's motion. Eventually, the matter was listed for hearing on 5 November 2018. On 5

November 2018, the Master converted the Court's notice/motion issued under O 25, R 9 into a summons for direction and directed the parties to file the PTC within 14 days. The Master's ruling is so brief and can be quoted in full, which is as follows:

*"I have gone through the history of this matter. The matter was for trial and the defendant filed the amended defence and counter-claim. The matter was for Pre-Trial conference again. The ruling on the Pre-Trial conference was delayed and the plaintiff didn't take any steps. The defendant too didn't proceed on the counter-claim. The matter should have gone for trial after the ruling of Judge Anare Tuilevuka delivered on 5/10/16. However, it was not. However, the interest of justice requires this matter to go for trial immediately. Therefore, I consider the Notice under Order 25 rule 9 as Summons for Directions. As a result I direct the parties to try the Pre-Trial conference again on the amended Counter Claim. Pre-Trial conference minutes before 20/11/18. Mention on 20/11/18. If not the Pre-Trial Conference to be amended before me. "(Emphasis provided)*

## **The Law**

[11] The defendant seeks to leave to appeal an interlocutory ruling of the Master. The HCR, O59 deals with the procedure regarding appeals from the decision of the Master.

### *Appeals from Master's interlocutory decision (R 8(2)).*

[12] No appeal shall lie from an interlocutory order or judgment of the Master to a single Judge of the High Court without leave of a single Judge of the High Court which may be granted or refused upon the papers filed (R 8 (2), HCR).

### *Time for Appealing an Interlocutory Order or Judgment (R 9 (b))*

[13] An appeal from an interlocutory order or judgment (R 9 (b)) of the Master shall be filed and served within 7 days from the date of granting of leave to appeal (R 9 (b), HCR).

### *Application for Leave to Appeal*

- [14] 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 order or judgment (R 11, HRC).

### **Extension of Time**

- [15] The HCR, O 59 R 10 has provision for extension of time which provides:

#### *Extension of time (O 59, R 10)*

*10.-(1) An application to enlarge the time period for filing and serving a notice of appeal or cross-appeal may be made to the Master before the expiration of that period and to a single judge after the expiration of that period.*

*(2) An application under paragraph (1) shall be made by way of an inter parte[s] summons supported by an affidavit*

- [16] The HCR, O 3, R 4(1) also empowers the Court to order extension of time, which states:

#### *Extension etc of time (O 3, R 4)*

*4 (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules, or by any judgment, order or direction, to do any act in any proceedings.*

### **The Governing Principles**

- [17] The governing principles to an application for leave to appeal out of time are as follows:

- a) The length of the delay
- b) The reasons for the delay
- c) The chances of appeal succeeding if an extension of time is granted
- d) The degree of prejudice to the respondent if the application is granted.

*(See Nair v. Prakash [2013] FJCA 147; Misc. Action 10.2011 (30 October 2013)).*

## Proposed Grounds of Appeal

[18] The applicant intends to appeal the impugned order of the Master on the following grounds:

1. *That there was a breach of natural justice as the Learned Master did not hear the application and/or allow the Appellant to support the Court's Motion which the Learned Master was required to do under Order 25 Rule 9 of the High Court Rules, such that it led to the Master to summarily convert its Motion under Order 25 Rule 9 to a Summons for Direction which resulted in a miscarriage of justice;*
2. *The Learned Master erred in law by not providing a reasonable opportunity for the Appellant to present its oral and written submissions in support of the Motion and went on to convert the Motion, in the absence of a hearing, to a Summons for Directions, when he had previously directed the Appellant to file evidence by way of an affidavit in support of the Motion;*
3. *The Learned Master erred in law by failing to provide the appellant with a reasonable opportunity to be fully heard on the Motion contrary to Section 15 of the Constitution of Fiji such that it led to a miscarriage of justice;*
4. *The Learned Master erred in law and in fact when he purportedly held that the delay was a result of the pending ruling of Justice Tuilevuka when:*
  - [i] *there was evidence to show that notwithstanding the delayed ruling by Justice Tuilevuka, the respondent was dilatory in prosecuting the action and caused significant delay prior to, and thereafter;*
  - [ii] *there was no reasonable and/or excusable reasons for the delay presented by the respondent; and*
  - [iii] *there was evidence to show specific and implied prejudice against the appellant as a result of the delays occasioned by the respondent,**and thereby fell into the error of converting its Motion to a Summons for Direction summarily;*
5. *The Learned Master's purported reason to convert its Motion to a Summons for Directions due to the pending ruling by Justice Tuilevuka is inadequate and/or contradictory when he had previously directed the Appellant to provide evidence by way of an affidavit in support of its Motion to strike out;*

6. *The Learned Master erred in law and in fact by failing to take into account of the evidence provided by the Appellant by way of his affidavit and accordingly converted its Motion to a Summons for Direction without providing any or any sufficient written reasons for his decision.*
7. *The Learned Master erred in law and in fact by failing to properly consider or consider at all the evidence produced by the Appellant in support of the Court's Motion under Order 25 Rule 9 such that it led to a summary conversion of the Motion to a Summons for Directions; and*
8. *The Learned Master erred in law by failing to consider or consider at all, the principles applicable to a motion under Order 25 Rule 9, including but not limited to, Grovit and others v Doctor and Others (1997) 01 WLR 640, 1997 (2) ALL ER, 417 and New India Assurance Company Ltd, V Rajesh K. Singh and Anor, Civil Appeal No, ABU 0031/1996, such that it led to a summary conversion of the Motion to a Summons for Directions.*

## Discussion

- [19] As I said, the applicant seeks leave of the Court to appeal the Master's decision dated 5 November 2018, out of time. The Master's order is an interlocutory order, which is arising out a notice issued by the Court on its own motion under O 25, R 9 of the HCR, calling for show cause from the parties why the action should not be struck out for want of prosecution or as an abuse of the process of the Court. The plaintiff filed an affidavit showing cause why the matter should not be struck out and the defendant filed his affidavit in support of the Court's notice. The matter (the hearing of the notice issued by the court) came up for hearing before the Master on 5 November 2018, when both counsel made oral submissions and the Master made an order that: "*I have gone through the history of this matter... Therefore, I consider the Notice under Order 25 rule 9 as Summons for Direction. As a result, I direct the parties to try the Pre-Trial Conference again on the amended counter claim ...*"
- [20] I will apply the governing principles relevant to an application for leave to appeal an interlocutory order to the current application.
- [21] The general provision contained in the HCR O 3, R 4 may be relied on for the application seeking an enlargement of time for leave to appeal against the Master's interlocutory ruling or judgment.

[22] The Court's discretion under O 3, R 4 to extend or abridge the period within which a person is required or authorized by the HCR, or by any judgment, order or direction to do any act in any proceedings (see O 3 R 4(1)) and the Court may extend such period although the application for extension is not made until after the expiration of that period (O3, R 4(2)).

[23] An application to enlarge the time period for filing and serving a notice of appeal or cross-appeal before the expiration of that period can be made to the Master and to a single Judge after the expiration of that period (see O 59, R 10 (1)).

[24] The defendant seeks to enlarge the time period for filing and serving an application for leave to appeal the interlocutory order of 5 November 2018, delivered by the Master.

#### **The length of the delay**

[25] There is no appeal 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 (see O 59, R 8).

[26] Any application for leave to appeal an interlocutory order or judgment of the Master must be made by a summons with a supporting affidavit, filed and served within 14 days of the delivery of the order or judgment (see O 59, R 11).

#### **Grounds of Merit**

[27] I have carefully considered the proposed grounds of appeal. The principal ground for appealing the Master's decision turns to be that the Master erred in law in converting the notice issued by the court under O 25, R 9, in the absence of a proper hearing and without giving reasons for doing so.

[28] The Court has the power, **upon hearing the application**, to either dismiss the case or matter on such terms as may be just or deal with the applications as it were a summons for directions (see O 59, R 9 (2)).

[29] In my view, the proposed grounds of appeal raise an arguable point whether the Master has the power to deal with the notice issued by the Court on its own motion under O 59, R 9 as it were summons for directions, especially without a proper hearing and without adducing reasons for such a course of action.

[30] In *Engineer Procure Construct (Fiji) Ltd v Sigatoka Electric Ltd* [2017] FJCA 9; ABU 105.2016 (22 February 2017). The Fiji Court of Appeal granted leave to appeal and enlargement of time on the basis that the application raises arguable issues.

[31] Having had a quick glance at the proposed grounds of appeal, I am satisfied that it raises some arguable issues to be considered on appeal.

### **Length of Time**

[32] The defendant seeks to appeal out of time an interlocutory order of the Master pronounced on 5 November 2018. The HCR, O 59, R 11, requires that an application for leave to appeal an interlocutory order to be made within 14 days. The permitted period of 14 days expired on 19 November 2018. The application for leave to appeal out of time has been made on 21 November 2019. The delay is as little as 2 days.

### **Reasons for Delay**

[33] The defendant explains the delay that there were difficulties in obtaining instructions and a written authority from the defendant's insurer, Sun Insurance (Fiji) Limited ('Sun') (as it conducts the defence on the principles on subrogation) to appeal the Master's decision on time. The defendant further explains that the officer authorised to sign the affidavit on behalf of the Sun was only available to sign the affidavit in support on 20 November 2019.

[34] The explanation offered for the delay is not unreasonable. I am satisfied that the delay was not intentional and not inexcusable.

### **Prejudice to the respondent**

[35] I do not find any evidence that the plaintiff will be unfairly prejudiced if the time for appealing the Master's decision is enlarged.

### **Stay Pending appeal**

[36] In considering an application for a stay pending appeal, the Court will consider:

- a) whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory;



- b) whether the successful party will injuriously be affected by the stay;
- c) the *bona fide* of the applicants as to the prosecution of the appeal;
- d) the effect on the third parties;
- e) the novelty and importance of questions involved and
- f) the public interest in the proceeding (see *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* (FCA Civil Appeal No. ABU 0011 of 2004S (18 March 2005 on page 3)).

- [37] The defendant submits that the Master has already given a decline for the Pre-trial Conference Minutes to be finalized following which the case would be referred to a judge for Trial. He also submits that it would render the appeal nugatory if the fresh steps taken to file PTC Minutes and the Trial is conducted.
- [38] There is no evidence before the Court that the plaintiff (respondent) will be injuriously affected by the stay.
- [39] The issues of the effect on the third parties and the public interest in the proceeding do not arise in this application.
- [40] The *bona fide* of the defendant as to the prosecution of the appeal was not in dispute.
- [41] I have already found that the grounds of appeal disclose some arguable points and I provisionally find, for the present purpose, the proposed appeal has the prospect of success.
- [42] I am satisfied that the defendant's right of appeal would be rendered nugatory if a stay is not granted. I would, therefore, grant a stay pending appeal.

## Conclusion

- [43] For the reasons set out above, I would grant leave to appeal and enlargement of time to appeal the Master's decision of 5 November 2019. I would, also grant a stay pending appeal. The defendant must file and serve the notice of appeal within 7 days of the date of the ruling. Thereafter, the defendant will follow the

HCR relating to appeal from the Master's Court to the High Court. The costs shall be in the appeal.

**The result**

1. Leave to appeal and enlargement of time to appeal the Master's decision of 5 November 2018 is granted.
2. The defendant will file and serve the notice of appeal within 7 days of the date of this ruling.
3. There will be a stay of proceedings pending appeal.
4. The costs will be costs in the appeal

*Handwritten signature*  
..... 11/6/19  
**M.H. Mohamed Ajmeer**  
**JUDGE**



**At Lautoka**  
**11 June 2019**

Solicitors:

For the plaintiff: Millbrook Hills Law Partners, Barristers & Solicitors

For the defendant: AK Lawyers, Barristers & Solicitors