

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

CIVIL ACTION NO. HBC 43 OF 2015

BETWEEN : **KALABO INVESTMENTS LIMITED** a limited liability company having its registered office at 411 Fletcher Road, Nabua, Suva carrying on business in Suva and elsewhere in Fiji under the name and style of "Shop N Save Supermarket".

PLAINTIFF

AND : **THE NEW INDIA ASSURANCE COMPANY LIMITED** a foreign company duly incorporated under the laws of India and having its place of business in Fiji at Suva and carrying on business as an insurance underwriter.

DEFENDANT

Appearances : Mr C.B. Young for the applicant/plaintiff
Mr R.R. Gordon for the respondent/defendant

Date of Hearing: 5 February 2019

Date of Ruling : 11 February 2019

R U L I N G

[on leave to appeal against Interlocutory Ruling]

[01] The applicant/plaintiff (*the applicant*) seeks to appeal the interlocutory orders of this court ordering the applicant to provide certain documents sought in the specific discovery application from the respondent/defendant (*the respondent*) made on 8 August 2018, wherein the court ordered:

1. *The defendant's application for specific discovery is allowed.*
2. *The plaintiff shall within 14 days provide to the defendant's solicitors certified true copies of the audited accounts, including the detailed profit and loss statements and detailed balance sheets for the years and/or financial periods and/or financial years and/or accounting years 2013, 2014, 2015 and 2016 of R Prasad Limited, Ratsun Hotels trading as Quest Hotels and/or ANZ Banking Corporation and/or any subsidiary company of R Prasad Limited, Kalabo*

Investments Limited trading as Shop 'N' Save Supermarket, Ratsun Hotels trading as Quest Hotels and/or ANZ Banking Corporation where more than half the nominal value of whose equity share capital is owned by R Prasad Limited, Kalabo Investments Limited trading as Shop 'N' Save Supermarket, Ratsun Hotels trading as Quest Hotels and/or ANZ Banking Corporation either directly or through other subsidiaries and any entity over which R Prasad Limited, Kalabo Investments Limited trading as Shop 'N' Save Supermarket, Ratsun Hotels trading as Quest Hotels and/or ANZ Banking Corporation exercises management control.

3. *The plaintiff shall pay summarily assessed the costs of \$2,000.00 to the defendant within 21 days.*

[02] By its summons filed on 17 August 2018 (*'the application'*), the applicant seeks:

"

1. *That leave be granted to the Plaintiff to appeal against the Interlocutory Judgment of Justice Ajmeer delivered on 8 August 2018, granting Order for Specific Discovery and costs upon the grounds appearing in the proposed Notice & Grounds of Appeal annexed to the Affidavit of Ashnita Deo.*
2. *That the execution of Justice Ajmeer's said Interlocutory Judgment dated 8 August 2018, be stayed pending the determination of the appeal.*
3. *That time for filing and service of the Notice and Grounds of appeal be extended by seven days from the date of the leave.*
4. *That costs of this application be costs in the cause.*
5. *Such further or other orders as this Honourable Court may deem just."*

[03] The application is supported by the affidavit of Ashnita Deo, the company secretary.

[04] The respondent did not file any affidavit in opposition albeit the court granted time, on their request, for the respondent for that purpose.

[05] This application is made pursuant to section 12(2) (f) of the Court of Appeal Act ('CAA'), Rule 26(3) and Rule 27 of the Court of Appeal Rules ('CAR') and the Inherent Jurisdiction of this court.

- [06] In terms of CAA section 12 (2) (f) (so far as material), no appeal shall lie without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge of the High Court.
- [07] CAR 26 (3) postulates that: *Wherever under these Rules an application may be made either to the Court below or to the Court of Appeal it shall be made in the first instance to the Court below.*
- [08] CAR 27 states that: *Without prejudice to the power of the Court of Appeal, under the High Court Rules as applied to the Court of Appeal, to enlarge the time prescribed by any provision of these Rules, the period for filing and serving notice of appeal under Rule 16 may be extended by the court below upon application made before the expiration of that period.*
- [09] The applicant intends to appeal the interlocutory orders upon the following proposed grounds:
1. *That the learned judge had no jurisdiction to make the Order requiring the plaintiff within 14 days to provide to the defendant's solicitors certified true copies of audited accounts of R Prasad Limited, Ratsun Hotels Limited, ANZ Banking Group Ltd and the stated subsidiaries for the years 2013, 2014, 2015 and 2016 as per prayer no. 1 of the defendant's summons. None of Orders 1, 2 and 24 of the High Court Rules 1988 relied upon by the defendant permit the court to make such an Order. Order 24 Rules 7 & 9 are the relevant Rules and those Rules do not give jurisdiction to the Court to make the Order.*
 2. *That the learned judge did not consider the appellant's written submissions filed on 20 June 2018 and 13 July 2018 and thereby erred in law and in fact. By not considering those submissions, the learned judge failed to appreciate that:*
 - a) *The insurance policy was a composite policy and not a joint policy. As such it had combined in one insurance a number of persons having different interests in the subject matter of the insurance.*
 - b) *The claim was by one insured only, namely, the plaintiff Kalabo Investments Limited for the loss to its Tavua supermarket.*
 - c) *None of the other insureds operated supermarket business and their different interests insured under the composite policy were not relevant to the determination of the plaintiff's claim to warrant disclosure of their financial information.*

- d) *Relevance had to be determined by the pleadings and average was not pleaded.*
 - e) *Average had to be pleaded by virtue of s.27 of the Insurance Law Reform Act 1996 and Order 18 rule 7(1) (c) of the High Court Rules.*
 - f) *An Order for specific discovery could not be made against the plaintiff to provide audited accounts of ANZ Banking Group Ltd who was an insured by virtue of its mortgage interest and was not a party to the proceedings. There was also no evidence that the plaintiff had in its possession such accounts of the bank. Incidentally, there is no entity known as ANZ Banking Corporation in Fiji.*
 - g) *An order for specific discovery could not be made against the plaintiff to provide the audited accounts of unnamed subsidiaries of each of the named insureds under a composite policy as they were not relevant to the plaintiff's claim and there was no evidence that he plaintiff had in its possession or control such accounts of any subsidiaries.*
 - h) *An Order for specific discovery could not be made against the plaintiff to provide the audited accounts R Prasad Limited and Ratsuns Hotels Limited when the defendant had failed to show by evidence that these companies accounts were in fact audited for the relevant years or that there were in existence audited accounts for the relevant years in the possession or control of the plaintiff.*
 - i) *The plaintiff had provided all the information requested by the defendant's loss adjuster MDD which was relevant to the Tavua Shop.*
3. *The learned judge failed to consider MDD's letter dated 1 December 2017, which clearly stated that all the information requested by them to adjust the plaintiff's claim had been received with the exception of details of the 2013 fire claim and details of PWC and Peter Faire's fees.*
 4. *The learned judge failed to consider paragraph 1 of the Terms of Adjournment which indicated that the plaintiff did not have the details of the 2013 fire claim and the defendant was authorized to use the information held by it of such claim provided they give copy of what is used to the plaintiff.*
 5. *The learned judge failed to appreciate that the details of PWC and Pete Faire's fees were provided to the defendant's solicitor's on 9 July 2018.*

6. *The learned judge was wrong to expunge the affidavit of Peter Faire on the grounds that he had not annexed a written authority of the plaintiff to swear his affidavit. Mr Faire was not an officer or employee of the plaintiff but was its expert witness and as such no written authority was required by law. The law is correctly stated by Master U.L. Mohamed Azhar in Pillay v Barton Ltd [2018] FJHC 599.*
7. *The order to provide audited accounts of unnamed subsidiaries is vague and uncertain.*

[10] At the hearing, both parties orally argued the matter. Additionally, only the applicant tendered their written submission.

Preliminary objection

- [11] At the commencement of the hearing, Mr Gordon of counsel appearing for the respondent raised a preliminary objection in respect of the affidavit sworn by Ashnita Deo on behalf of the plaintiff company in support of the application. His preliminary objection was that Ashnita Deo says she is a company secretary of the plaintiff company but she attaches no authority from the company for her to make that affidavit. Precisely, his contention is that the affidavit sworn by Ashnita Deo should be expunged and/or disregarded as she has sworn that affidavit without an authority from the company.
- [12] In response to the preliminary issue raised by Mr Gordon, Mr Young of counsel appearing for the applicant submitted the preliminary issue raised by them may be dealt with together with the substantive matter.
- [13] In my previous ruling in the very same matter, I ordered to expunge an affidavit sworn by Peter John Faire, Insurance Loss Preparer (now the plaintiff says he is an expert witness) on behalf of the plaintiff in opposition on the basis that he has failed to attach an authority from the plaintiff company to swear that affidavit on behalf of the company. Above all, Mr Faire is not an officer of the company. Thus, the court held that he had sworn an affidavit in opposition on behalf of the plaintiff without an authority from the plaintiff and ordered his affidavit be expunged. Mr Gordon cannot rely on this ruling in support of his current preliminary objection.

[14] Mr Gordon's preliminary objection has emerged after a few adjournments of the hearing on the ground that the parties were talking settlement. It appears that the preliminary issue has been raised when the hearing was taken up after settlement talks failed.

[15] Ashnita Deo has sworn the affidavit as a company secretary. She deposed it in her affidavit itself. An officer of the company could have ostensible authority to swear an affidavit on behalf of the company. I would, therefore, overrule the preliminary objection raised by the respondent.

Substantive issue

[16] The applicant seeks leave to appeal the interlocutory ruling delivered respecting an application for specific discovery from the respondents. In that ruling dated 8 August 2018, the court ordered that the applicant shall provide to the respondent certified true copies of the audited accounts, including the detailed profit and loss statements and detailed balance sheets for the years and/or financial periods and/or financial years and/or accounting years 2013, 2014, 2015 and 2016.

[17] The ruling which the applicant seeks leave to appeal is an interlocutory ruling.

[18] An interlocutory order or judgment of the High Court may be appealed with the leave of the Judge or the Court of Appeal (see CAA 12 (f)). The time for appealing an interlocutory order is within 21 days from the date on which the order was pronounced (see CAR 16).

[19] The applicant has made its application for leave within 21 days of the ruling which they intend to appeal.

[20] I bear in mind that there is reluctance in giving leave to appeal against case management decisions such as disclosure orders and orders dealing with timetable of the claim.

[21] Hon. Justice Calanchini in *Denarau Corporation Ltd v Slatter & Gutherine Co Ltd* [2013] FJCA 94 held [at para. 13]:

“Leave will be more readily granted when legal rights as distinct from matters of practice and procedure are involved and some injustice may be caused”

[22] The court considering a request for permission is not required to analyse whether the grounds of proposed appeal will succeed, but merely whether there is a real prospect of success (*Hunt v Peasegood* (2000) *The Times*, 20 October 2000).

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

[24] In support of his application, Mr Young submits that some injustice had occurred to the effect that it has affected the substantial right of the plaintiff. He cites para.7 of the submission filed on 20 June 2018 opposing the defendant’s application for specific discovery, which states:

“The Defendant’s affidavit must offer substantial assistance in establishing whether the particular documents to which the application refers do exist and relate to a matter in question: Beecham Group Ltd v Bristol-Myers Co [1979] VR 273 at 279 and Mulley v Manifold (1959) 103 CLR 341 at 344.”

[25] The gist of Mr Young’s submission is that the documents which the respondent sought to be discovered are not related to a matter in question. The respondent sought discovery of the documents in order to reasonably assess the applicant’s material and business interruption claim. Mr Young contended that the respondent was not entitled to discover the documents for assessment of average loss as the issue of average had not been pleaded by the respondent. He also submitted that the court did not consider his written submission when granting orders for specific discovery in favour of the respondent.

[26] Mr Young further contended that Order 24 does not empower the Court to order specific discovery as in the manner sought by the respondent in that he pointed out that none of Orders 1, 2 and 24 of the High Court Rules 1988 relied upon by the respondent permit the court to make such an order.

[27] Conversely, Mr Gordon submits that the applicant intends to canvass the points they did not raise at the hearing before this court on appeal. His submission

continues that: *“so now they are going on this very fine point, they are splitting hands and say ‘well we don’t have audited accounts, we can’t provide them and your Lordship have no powers to grant orders for specific discoveries’ but this was never raised before your Lordship.”* In conclusion he submits that therefore no leave should be granted at this stage and they should comply with the order.

[28] I have carefully considered the application, the affidavits filed by both parties and quality oral and written submission put forward by their counsel, and without analysing the grounds of the proposed appeal in depth, and having satisfied with the proposed grounds of appeal, especially with ground 2. The proposed ground 2, in my view, raises some legal points and legal rights which are arguable in the Court of Appeal.

[29] I am impressed that I should grant leave to appeal the interlocutory order dated 8 August 2018.

Stay of execution

[30] The applicant also applies for stay of the execution of the interlocutory order dated 8 August 2018, pending the determination of the appeal.

[31] The Court has granted an interim stay of execution until final determination of the leave application. I have now granted leave to appeal the interlocutory order.

[32] Injustice might follow from the implementation of the interlocutory order, for I would grant a stay on the execution of the order, pending the determination of the appeal.

Costs

[33] In all circumstances, I would order that costs shall be costs in the cause.

Final orders:

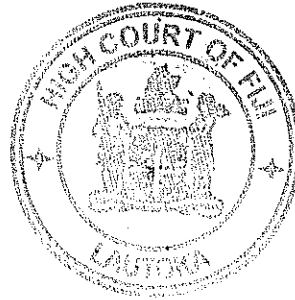
1. Leave to appeal the interlocutory order dated 8 August 2018 be granted.
2. Applicant will file and serve the notice and the grounds of appeal within 7 days of this ruling.

3. The execution of the interlocutory order dated 8 August 2018 is stayed until the final determination of the appeal.
4. Costs of this application shall be costs in the cause.

M. H. Mohamed Ajmeer
11/2/19

M. H. Mohamed Ajmeer

JUDGE



At Lautoka

11 February 2019

Solicitors:

For the applicant/plaintiff: M/s Young & Associates, Solicitors

For the respondent/defendant: M/s Gordon & Company, Barristers & Solicitors