

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 25 of 2008

BETWEEN

ESAVA CAKAUNITAVUKI of Garden of Joy, Navua, in the Republic of Fiji and of
Melbourne, Australia District Sales Manager.

PLAINTIFF

AND

COLONIAL FIJI LIFE LIMITED and **COLONIAL HEALTH CARE (FIJI) LIMITED**

companies duly incorporated in Fiji and having its registered office at Level 10,
Suva Central Building, Corner of Renwick Road and Pratt Street,
Suva Colonial Fiji Life Limited being successor in title to the
Colonial Mutual Life Assurance Society Limited pursuant
to the Colonial Fiji Life Act 1999.

DEFENDANTS

Counsel : Ms L. Vaurasi for the Plaintiff
Mr J. Apted with Ms W. Chen for the Defendants

Date of Hearing : 18th September 2019

Date of Ruling : 15th October 2019

RULING

(On the application for leave to appeal and stay)

[1] The plaintiff filed this writ of summons which was subsequently amended seeking to recover \$1,576,600.00 as special damages, General Damages and exemplary damages from the defendant for unlawful termination of his employment.

[2] On 09th March 2015 the defendant filed summons for further and better discovery of documents seeking the following order:

1. A further and better list of the documents which are or have been in his possession, custody or power relating to any matter in question in this action and;
2. An Affidavit –
 - (a) Verifying the said list;
 - (b) Stating whether he has or has at any time had in his possession, custody and power any document specified in the schedule hereto, and
 - (c) If the said document or any of them (whether on the list or specified in the Schedule hereto) has or have been but are now not in possession, custody or power stating he parted with the same, what has become of the same and in whose possession they now are.

AND FOR FURTHER ORDER that the plaintiff does within 7 days thereafter make available copies of such documents contained in the further and better list and as specified in the schedule hereto for inspection on behalf of the defendants.

AND that the proceedings be stayed until the plaintiff complies with such orders as the court makes

AND that the costs of and occasioned by this application be paid by the plaintiff.

[3] On 26th July 2016 the learned Master made the following orders:

- (a) The plaintiff to file and serve An Affidavit Verifying a List of Documents in respect of Tax Returns and Notices of Assessment for the period 2002 - 2014 inclusive.
- (b) The Plaintiff is directed to file and serve a Supplementary Affidavit annexing any salary slip, evidence of income, contracts or letters and advertisements of his employment as a part-time Purchasing Officer during the 2010 period only.
- (c) If the plaintiff is unable to discover any document, then he should set out clearly in the affidavit what attempts he has made to locate the documents and why he is not able to discover these documents including details of when he parted with any of them and what has become them.
- (d) Costs be in Cause.

[4] The learned Master made the following orders on 12th June 2018 on an application filed by the defendant seeking to have the plaintiff's action dismissed for non-compliance of the orders made on 26th July 2016:

- A. The plaintiff is hereby directed to comply in full with the Court's Ruling on 26th July, 2016 within 14 days timeframe.
- B. Further the Plaintiff is ordered to make full discovery as was sought for and accordingly give inspection.
- C. In the alternative, upon the failure of the plaintiff to comply with the orders at A and B hereinabove, the court will proceed to impose and '*Unless Order*' accordingly.

[5] On 17th June 2018 the plaintiff filed affidavit verifying his 5th supplementary list of documents. On 02nd July 2018 the learned Master fixed the matter for hearing to determine whether an "unless order" needs be imposed. The hearing was conducted on 03rd August 2018.

[6] The learned Master on 22nd March 2019 made the following orders:

- 21. The plaintiff in 21 days to obtain his assessment for 2005 and file necessary affidavit and complete discovery.
- 22. Parties are to meet and convene pre-trial conference and finalize the minutes in 21 days thereafter.

23. Costs to be in cause.

[7] The defendant sought leave to appeal the said order and for stay of its execution on the following grounds:

1. The learned Master erred in law and in fact and failed to exercise her discretion judicially and in accordance with the applicable principles in finding that, *inter alia*, the “*bundle of documents filed by the plaintiff on 02 December 2016 ... are sufficient discovery under order of 26 July 2016 except for the assessment for 2005 ...*” and “*There is no need for plaintiff to do further discovery of these documents except for the assessment for 2005 ... I will allow plaintiff further time to obtain this assessment for year 2005 from the Australian Taxation Office and file his affidavit regarding the same*” (“her Ruling”)

by failing to find that –

- (a) the rules, forms and principles applying to discovery were not limited to the physical disclosure of documents but also require a party to make a sworn affidavit deposing *inter alia* as to various details regarding various documents which were no longer in the party’s possession;
- (b) these rules, forms and principles are to ensure that a party makes full and truthful discovery and does not withhold any documents that might assist the other party;
- (c) despite the defendant’s requests and court’s orders, the plaintiff has consistently failed to make affidavits verifying his lists of documents that complied fully with the rules, forms and principles;
- (d) Order (c) made on 26 July 2016 required the plaintiff, in addition to giving reasons for not discovering documents, to “*set out clearly in the affidavit what attempts he made to locate the documents and why he is not able to discover these documents including details of when he parted with any of them and what has become them*”;
- (e) Order A made on 12 June 2018 directed him to “*comply in full with the court’s Ruling of 26th July, 2016 within 14 days’ time frame*”;
- (f) the plaintiff had failed to comply with both orders; and

- (g) to the extent that the plaintiff purported to comply with the direction in the Affidavit Verifying Plaintiff's Fifth List of Documents filed on 21 June 2018, the reason that he gave for not being able to discover the documents could not be true on the grounds identified in the defendants' submissions.
2. The learned Master erred in law and in fact in making her Ruling by failing to find that the plaintiff had not disclosed full copies of his PAYG Payment Summaries for 2011-2016 and Notices of Assessment for 2009-2015.
 3. The learned Master erred in law in making her Ruling by finding that the Plaintiff should be given further opportunity to obtain his 2005 Notice of Assessment from Australian Tax Authority without making a similar order in respect of his tax returns for the period 2002-2014.
 4. The learned Master erred in law in making her Ruling by not finding –
 - (a) that the plaintiff had not complied with the Court's orders of 26 July 2016 (“**2016 Orders**”) and 12 June 2018 (“**2018 Orders**”);
 - (b) there had been continuous defaults in complying with the rules and orders of the Court in relation to discovery;
 - (c) the plaintiff was guilty of contumacious conduct;
 - (d) in the circumstances, the Action should be struck out and dismissed as a matter of justice.
 5. Alternative to ground 4, the learned Master erred in law in making her Ruling by not finding for the reason set out in Ground 4(a) to 4(d) above that a final unless order requiring the Plaintiff to comply with the Court's Orders within 7 days.

[8] In **Niemann v. Electronic Industries Ltd.** [1978] V.R. 431 at page 441 where Supreme Court of Victoria (Full Court) held as follows:

".....leave should only be granted to appeal from an interlocutory judgment or order, in cases where substantial injustice is done by the judgment or order itself. If the order was correct then it follows that substantial injustice could not follow. If the order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to affect a substantial injustice by its operation.

It appears to me that greater emphasis is therefore must be on the issue of substantial injustice directly consequent on the order. Accordingly if the effect of the order is to change substantive rights, or finally to put an end to the action, so as to effect a substantial injustice if the order was wrong, it may be more easily seen that leave to appeal should be given.

In the case of **Khan v Suva City Council** [2011] FJHC 272; HBC406.2008 (13th May 2011) the following observations were made in regard to applications for leave to appeal;

It is trite law that leave will not generally be granted from an interlocutory order unless the Court sees that substantial injustice will be done to the applicant.

Further in an application for leave to appeal, it is incumbent on the applicant to show that the intended appeal will have some realistic prospect of succeeding.

In **Kelton Investment Ltd & Tapoo Ltd v Civil Aviation Authority of Fiji and Motibhai & Company Limited** Civil Appeal No. ABU 0034 of 1995 the Court of Appeal observed as follows;

The Courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence leave to appeal are not readily given. Having read the affidavits filed and considered the submissions made I am not persuaded that this application should be treated as an exception. In my view the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted.

In the case of **Ex parte Bucknell** (56 CLR 221 at page 224) it was held:

At the same time it must be remembered that the prima facie presumption is against appeals from interlocutory orders, and, therefore, an application for leave to appeal under section 35(1)(a) should not be granted as of course without consideration of the nature and circumstances of the particular case. It would be unwise to attempt an exhaustive statement of the considerations which should be regarded as a justification for granting leave to appeal in the case of an interlocutory order, but it is desirable that, without doing this, an

indication should be given of the matters which the court regards as relevant upon an application for leave to appeal from an interlocutory judgment.

In **Dunstan v Simmie & Co Pty Ltd** 1978 VR 649 at 670 it was held:

“...although the discretion to grant leave cannot be fettered, leave is only likely to be given in a case where the determination of the primary issue puts an end to the action or at least to a clearly defined issue or where, to use the language of the Full Court in *Darrel Lea (Vic.) Pty Ltd v Union Assurance Society of Australia Ltd.*, (1969) V.R. 401, substantial injustice would result from allowing the order, which it is sought to impugn, to stand.”

- [9] The learned Master's in her ruling has given a list of documents discovered by the plaintiff and found that there was sufficient discovery of the documents except for the assessment for 2005. The question arises for determination whether the documents discovered by the plaintiff satisfy the orders of the learned Master made on 26th July 2016.
- [10] The submission of the learned counsel for the defendant is that the ruling sought to be challenged in appeal is inconsistent with the ruling made on 26th July 2016 by the previous Master of the High Court. The other matter arise for consideration is whether the learned Master has the power to make an order contrary to the orders made by her predecessor.
- [11] The learned counsel for the defendant also submitted that the nature of the documents sought to be discovered are highly relevant and affect the substantive rights of the parties. It is correct to say that in ascertaining the exact amount the plaintiff is entitled to recover in these proceedings as loss of income these documents are absolutely necessary.
- [12] The learned Master also held in her ruling that there is no need for the plaintiff to do further discovery of documents except for the assessment for 2005 but the learned Master has not given any reason for her finding.
- [13] For these reasons I am of the view that the question of discovery of documents must be adjudicated upon before the matter proceeds to trial.

[14] For the reasons set out above I am satisfied that if leave to appeal is not granted substantial injustice would be caused to the plaintiff.


[15] The defendant also sought an order staying the proceedings of this matter, if leave to appeal is granted, until the final determination of the appeal. Since the decision of the appeal will have an impact on the final judgment the court is of the view that the proceedings must be stayed until determination this appeal.

ORDERS

1. The defendant is granted leave to appeal the ruling of the learned Master dated 22nd March 2019.
2. The proceeding of the substantive matter is stayed until the final determination of this appeal.
3. I make no order for costs of this application



15th October 2019


Lyone Seneviratne
JUDGE