IN THE HIGH COURT OF FIJI
CIVIL JURISDICTION
AT SUVA

Civil Action No. HBC 295 of 2011

BETWEEN: **TEMPLETEC FIJI LIMITED AND SHANGHAI URBAN CONSTRUCTION (GROUP) CORPORATION**

PLAINTIFFS/APPLICANTS

AND: **ATTORNEY-GENERAL OF FIJI**

DEFENDANT/RESPONDENT

Before: Hon. Acting Chief Justice Kamal Kumar

Counsels: Mr H. Nagin for Plaintiffs/Applicants

Ms S. Ali and Ms N. Ali for Defendant/Respondent

Date of Judgment: 26 May 2020

RULING
Application for Leave to Appeal Interlocutory Decision

1.0 Introduction

1.1 On 10 December 2019, Plaintiff (hereinafter referred to as **"the Applicant"**) filed Summons seeking following Orders:-

"(a) That leave be granted to the Plaintiffs to appeal the Ruling of the Honourable Mr Justice Kamal Kumar delivered on the 22nd November 2019 to the Fiji Court of Appeal.

(b) That the Defendant to pay costs of this application;

(**"the Application"**)

1.2 On 18 December 2019, Applicant and Defendant (hereinafter referred to as **"the Respondent"**) were directed to file Affidavits and Submissions by 21 February 2020, and the Application was adjourned to 26 February 2020, for hearing.

1.3 Application was heard on 26 February 2020, when parties made Oral Submissions mostly relying on Submissions filed in Court and the Application was adjourned for Ruling on notice.

1.4 Following Affidavits were filed in respect to the Application:-

For Applicant

Affidavit of Zhang Bei Yam sworn on 10 December 2019 (**"Zhang's Affidavit"**)

For Respondent

Affidavit of Ajay Singh sworn and filed on 7 January 2020 (**"Singh's Affidavit"**).

2.0 Application for Leave to Appeal

2.1 Section 12(2)(f) of the Court of Appeal Act 1949 provide as follows:-

"12-(2) No appeal shall lie-

(a) ....

(b) ....

(c) ....

(d) ....

(e) ....

(f) 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, except in the following cases, namely ...."

2.2 The principle in dealing with Appeals against interlocutory orders has been stated in **Gosai *v.* Nadi Town Council** [2008] FJCA 1.ABU116.2005 (22 February 2008) as follows:-

> *"28. APPEAL ON INTERLOCUTORY DECISION*
>
> *In coming to the decision that the appeal should be refused, the Court has also had reference to the High Court's decision in **Heffernan v. Byrne and Ors** HCF Civil Action No. HBM 105 of 2007 (19 February 2008). There, in refusing leave to appeal against an interlocutory decision, His Lordship set out a comprehensive collocation of the authorities, referring to **Kelton Investments Limited an Tappoo Limited v. Civil Aviation Authority of Fiji and Motibhai & Company Limited** [1995] FJCA 15, ABU 0034d.95s; **Edmund March & Ors v. Puran Sundarjee & Ors** Civil Appeal ABU 0025 of 2000; and **KR Latchan Brothers Limited v. Transport Control Board and Tui Davuilevu Buses Limited** Civil Appeal No. 12 of 1994 (Full Court).*
>
> *29. As His Lordship observed, in Edmund March & Ors this Court said:-*
>
> *As stated by Sir Moti Tikaram, President Fiji Court of Appeal in **Totis Incorporated, Sport (Fiji) Limited & Richard Evanson v. John Leonard Clark & John Lockwood Sellers** (Civ. App. No. 33 of 1996 p. 15):*
>
> *It has long been settled law and practice that interlocutory orders and decisions will seldom be amenable to appeal. Courts have repeatedly emphasized that appeals against interlocutory orders and decisions will only rarely succeed. The Fiji Court of Appeal has consistently observed the above principle by granting leave only in the most exceptional circumstances.*

30. *Further, as His Lordship also noted, in* ***KR Latchan Brothers Limited*** *a Full Court of Appeal (Tikaram, Quillam and Savage JJ) said:*

> *... The control of proceedings is always a matter for the trial Judge. We adopt what was said by the House of Lords in* ***Ashmore v. Corp. of Lloyd's*** *[1992] 2 All ER 486-*
>
> > *Furthermore, the decision or ruling of the trial judge on an interlocutory matter or any other decision made by him in the course of the trial should be upheld by an appellate court unless his decision was plainly wrong since he was in a far better position to determine the most appropriate method of conducting the proceedings."*

2.3 In **Kelton Investments Ltd** case (Supra) one of leading authority in this area, Justice Sir Tikaram (as he then was) stated as follows:-

> *"I am mindful that Courts have repeatedly emphasized that appeals against interlocutory orders and decisions will only rarely succeed. As far as the lower courts are concerned granting of leave to appeal against interlocutory orders would be seen to be encouraging appeals (see Hubball v Everitt and Sons (Limited) [1900] 16 TLR 168).*
>
> *Even where leave is not required the policy of appellate courts has been to uphold interlocutory decisions and orders of the trial Judge - see for example Ashmore v Corp of Lloyd's [1992] 2 All ER 486 here a Judge's decision to order trial of a preliminary issue was restored by the house of Lords.*
>
> *The following extracts taken from pages 3 and 4 of the written submissions made by the Applicants' Counsel are also pertinent:*
>
> *'.....*

5.2 The requirement for leave is designed to reduce appeals from interlocutory orders as much as possible (per Murphy J in Niemann v. Electronic Industries Ltd (1978) VR 431 at 441-2). The legislature has evinced a policy against bringing of interlocutory appeals except where the Court, acting judicially, finds reason to grant leave (Decor Corp v. Dart Industries [1991] FCA 655; 104 ALR 621 at 623 lines 29-31).

5.3 Leave should not be granted as of course without consideration of the nature and circumstances of the particular case (per High Court in Exparte Bucknell [1936] HCA 67; (1936) 56 CLR 221 at 224).

5.4 There is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. The appellant contends the Order of 10 May 1995 determines substantive rights.

5.5 Even "If the order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to effect a substantial injustice by its operation" (per Murphy J in the Niemann case at page 441). The appellant contends the order of 10 May 1995 determines substantive rights.

5.6 In Darrel Lea v. Union Assurance (169) VR 401 at 409 the Full Court of the Supreme Court of Victoria said:

"We think it is plain from the terms of the judgment to which we have already referred that the Full Court was stating that error of law in the order does not in itself constitute substantial injustice, but that it is the result flowing from the erroneous order that is the important matter in determining whether substantial injustice will result."

2.4 Applicant when seeking leave to appeal interlocutory decision must show that the Judge was plainly wrong and/or there are exceptional circumstances that warrant grant of leave.

2.5 When looking at exceptional circumstances, Court may consider whether Applicant will suffer substantial injustice if leave is not granted.

2.6 Applicant's proposed ground of appeal in summary are as follows:-

(i) Court erred in holding that Abhinesh Chand was a mediator rather than an adjudicator;

(ii) Court erred in relying on Counsel for Applicant's comments made on 27 April 2012, to straighten Courts view that Abhinesh Chand was a mediator;

(iii) Court erred in setting down the process of mediation process when Abhinesh Chand was an adjudicator;

(iv) Court erred in law in holding that parties intended to resolve dispute through Alternate Dispute Resolution with Abhinesh Chand as mediator;

(v) Court erred in law in holding that Abhinesh Chand failed to follow mediation process and instead made decision himself;

(vi) Court erred in law in holding that Abhinesh Chand's decision was not binding;

(vii) Court erred in law and in fact when in holding that Abhinesh Chand did not follow procedure for adjudication;

(viii) Court erred in law and in fact by expressing surprise that Applicant had their submissions ready on 24 July 2015;

(ix) Court erred in law and in fact it noted that parties signed Agreement to adjudicate when parties had agreed to mediate before Abhinesh Chand;

(x) Court erred in law and in fact when Court held that Abhinesh Chand had not made full disclosure;

(xi) Court erred in law and in fact when it did not hold that Respondent has not filed written notice of dissatisfaction in respect to Abhinesh Chand's decision within time specified in the contract.

2.7 Before proceeding to deal with the proposed ground of appeal it must be noted that Court's decision delivered on 22 November 2019, was largely based on facts put before the Court in terms of Affidavit evidence and Court records.

2.8 This Court at paragraph 3.1 to 3.2 of Ruling delivered on 22 November 2019, analysed the Affidavit evidence and Court notes in detail as to the reason why parties intention to have the matter resolved through mediation and not adjudication.

2.9 Proposed grounds for appeal in respect to what is stated at paragraph 3.23 to 3.29, 3.34 and 3.35 relates to observation made by this Court when it had held that Abhinesh Chand was an adjudicator and not mediator.

2.10 Applicant's Application to Enter Judgment was dismissed and struck out pursuant to Ruling delivered on 22 November 2019, solely on the grounds that Alternate Dispute Resolution process adopted by parties was mediation and the mediation process was not followed.

2.11 This Court therefore holds that proposed grounds of appeal number 7 to 11 (Annexure "A" of Zhang's Affidavit) has no relevance as that was not the reason the Application to Enter Judgment was refused.

2.12 Court after reading and hearing Submissions from both parties hold that Applicant has failed to show to Court that the decision was plainly wrong or there is any exceptional circumstance to grant leave to appeal the decision.

2.13 This Court also holds that no substantial injunction will be caused to Applicant if leave to Appeal the decision is not granted for the reason that:-

(i) Applicant's action is still on foot;

(ii) All Applicant will need to do is to prove its claim in Court by calling evidence and giving an opportunity to Respondent to defend the Applicant's claim by putting forward its evidence before the Court.

2.14 It is to be noted that substantive matter was already set down for hearing on 28 April 2015, and on that day Counsel for Applicant informed the Court that parties intended to settle the matter. At paragraph 2.3 and 2.4 under the heading " Chronology of Events" of the Ruling delivered on 22 November 2019, it is stated as follows:-

> "2.3 On 16 February 2012, the Originating Summons was adjourned to 27 April 2012, for hearing.
>
> 2.4 On 27 April 2012, Counsel for Applicants informed that parties were willing to appoint an adjudicator **to settle this matter** which was confirmed by Counsel for the Defendant (**"Respondent"**)."

2.15 This Court holds that Applicant has failed to establish that this Court was plainly wrongly and/or there is exceptional circumstances whereby Applicant will suffer substantive injustice.

2.16 Therefore Applicant's Application for Leave to Appeal is to be dismissed and struck out with costs.

3.0 Costs

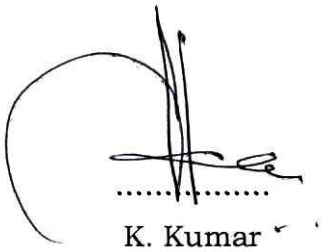
3.1 This Court takes into consideration parties have filed Affidavits and Submissions in addition to making oral Submissions.

4.0 Orders

4.1 This Court makes following Orders:-

(i) Applicant's (Plaintiff) Application for Leave to Appeal this Court's decision delivered on 22 November 2019, is dismissed and struck out;

(ii) Applicant (Plaintiff) do pay Respondent's (Defendant) cost of the Application assessed in the sum of $1,000.00 within fourteen (14) days from date of this Ruling.



K. Kumar

ACTING CHIEF JUSTICE

At Suva

26 May 2020

Sherani & Co. for the Applicant/Plaintiff

Office of Attorney-General for Respondent/Defendant