

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

**CIVIL ACTION NO. HBC 14 OF 2015**

**BETWEEN** : **NAINASO I RA HOLDING LIMITED** a limited liability company having its registered office at 33 Raojibhai Patel Street, Suva, P O Box 4132, Samabula Post Office, Suva.

**PLAINTIFF**

**AND** : **RAJNEEL KARAN SINGH** of Samuel K Ram Lawyers, 2<sup>nd</sup> Floor, Kamel Building, Kings Road, Ba Town, Legal Clerk.

**1<sup>ST</sup> DEFENDANT**

**AND** : **SAMUEL K RAM trading as SAMUEL K RAM LAWYERS**, a legal practice, duly established under the Legal Practitioners Decree, and having its registered office at 2<sup>nd</sup> Floor, Kamel Building, Kings Road, Ba, P. O. Box 3318, Ba.

**2<sup>ND</sup> DEFENDANT**

**AND** : **MATAQALI NAINASO HOLDINGS LIMITED**, a duly incorporated private company having its registered office at 2<sup>nd</sup> Floor, Kamel Building, Kings Road, Ba, P. O. Box 3318, Ba.

**3<sup>RD</sup> DEFENDANT**

**AND** : **YASAWA PROJECTS COMPANY LIMITED** a duly incorporated private company, having its registered office at 2<sup>nd</sup> Floor, Kamel Building, Kings Road, Ba. P. O. Box 3318, Ba.

**4<sup>TH</sup> DEFENDANT**

**AND** : **CAPITAL GROUP INVESTMENTS (FIJI) LIMITED**, a duly incorporated private company having its registered office at Suva, Fiji, P. O. Box 15859.

**5<sup>TH</sup> DEFENDANT**

**AND** : **ANWAR KHAN** of Drasa, Lautoka, P. O. Box 5490, Lautoka  
Businessman.

**6<sup>TH</sup> DEFENDANT**

**AND** : **KELEVI NABA** of Drasa, Lautoka, Retired.

**7<sup>TH</sup> DEFENDANT**

**AND** : **PATIMIO BACAIVALU** of Drasa, Lautoka, Company Director.

**8<sup>TH</sup> DEFENDANT**

**AND** : **Waisea Ratubusa** of Vatuwaqa, Suva, Pharmacist.

**9<sup>TH</sup> DEFENDANT**

**Appearances** : Mr S. Krishna for the second defendant/applicant  
Mr M. Naivalu for the plaintiff/respondent

**Date of Hearing** : 09 July 2020

**Date of Ruling** : 22 October 2020

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

*[on leave to appeal]*

### **Introduction**

[01] This is an application for leave to appeal an interlocutory ruling where the court dismissed an application made by the second defendant for direction, discovery and amendment of the statement of claim.

[02] By his summons filed with a supporting affidavit made by Samuel Kamlesh Ram, the second defendant/applicant (*the defendant*) seeks the following orders (*the application*):

1. *Leave to appeal the decision of the court (my decision) delivered on 4 March 2020;*

2. *The time for service and filing of this application and any appeal be abridged, if needed;*
3. *Execution on all orders made be stayed pending the determination of the Appeal;*
4. *All proceedings be stayed pending the determination of the Appeal;*
5. *That the costs of this application be in the cause.*

[03] The plaintiff/respondent (*'the plaintiff'*) did not file an affidavit in opposition. However, at the hearing it made an application to adjourn the hearing to another day. That application was refused and the matter proceeded to hearing.

[04] At the hearing, counsel for the second defendant made oral submission and tendered his written submissions as well.

## **Background**

[05] On 29 July 2019, the second defendant filed an application seeking the following orders:

1. *The matter be referred to the Master of the High Court for further directions to secure the just, expeditious and economical disposal of these proceedings on the grounds that the issues for trial have changed due to the settlement between the plaintiff and the iTaukei Land Trust Board (iTLTB) and the subsequent discontinuance of the action against the iTLTB (previously by 10<sup>th</sup> defendant); and in particular for the Master of the High Court to consider:-*
  - 1.1 *Further discoveries deemed necessary;*
  - 1.2 *Amendments to the pleadings;*
  - 1.3 *Joining of iTLTB as a third party;*
  - 1.4 *Re-convening the pre-trial conference to narrow down the issues in light of the settlement between the plaintiff and the iTLTB.*

[06] The application was heard and having satisfied that the statement of claim provides sufficient particulars as regards to the allegation it makes particularly in respect of fraud, defamation and damages and having found that the second defendant was not entitled to the discovery of documents or the details of the settlement of the claim as between the plaintiff and iTaukei Land Trust Board, the court [I] dismissed the second defendant's application for direction, discovery and amendment of the statement of claim with no order as to costs on 4 March 2020.

[07] The second defendant now seeks leave to appeal that interlocutory order.

### **The law**

[08] The application is made under section 12 (2) (f) of the Court of Appeal Act ("CA Act"), Rule 26 (3) of the Court of Appeal Rules ("CAR") and the inherent jurisdiction of the Court.

[09] There is no appeal 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 (see CA Act, 8.12 (2) (f)).

[10] The CAR, R 26 (3) provides 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.*"

[11] In the case of an appeal from an interlocutory order, an application for leave to appeal must be filed and served within 21 days, calculated from the date on which the judgment or order of the Court below was pronounced (see CAR, R 16 (a)).

## Governing principles

[12] The principles relevant to an application for leave to appeal against interlocutory decisions were discussed in *Abdul Hussein v NBF* [1995] FLR 130 where Pathik J referring to Murphy J's statement in Niemann said:

*"A useful summary of some of the matter which a judge may in practice consider on an application for grant of leave is to be found in the judgment of Murphy J in Niemann at p.141 which I adopt and they are as follows:*

- 1) whether the issue raised is one of general importance or whether it simply depends upon the facts of the particular case;*
- 2) whether there are involved in the case difficult questions of law, upon which different views have been expressed from time to time or as to which he has been 'sorely troubled';*
- 3) whether the order made has the effect of altering substantive rights of the parties or either of them; and*
- 4) that as a general rule there is a strong presumption against granting leave to appeal from interlocutory orders or judgments which do not either directly or by their practical effect finally determine any substantive rights of either party."*

## Proposed grounds of appeal

[13] The second defendant intends to appeal the interlocutory ruling on the following proposed grounds:

- 1. The Learned Judge of the High Court erred in law and in fact in not ordering the plaintiff to amend their Statement of Claim in regard to defamation when the plaintiff failed to plead the following:*

- 1.1 The precise words alleged to have been published.*

- 1.2 *The date of publication.*
  - 1.3 *The parts of the words that are defamatory.*
2. *The Learned Judge of the High Court erred in law and in fact at paragraph 16 when he said "Second Defendant cannot tell the Plaintiff as to how they should submit their statement of claim. It is their claim and they should decide what to plead in their claim. In my opinion, the second defendant is not entitled to seek an order that the plaintiff must amend its statement of claim" because:*
- 2.1 *Order 18 Rule 18(1) High Court Rules allows the court to order an amendment of the pleadings.*
  - 2.2 *There is settled common law that allows the court to order a plaintiff to amend their statement of claim.*
  - 2.3 *The plaintiff filed the claim on 30 January 2015, against all the defendants including ITLTB (as the 10 defendant) wherein the plaintiff alleged collusion of allegation of fraud by all the defendants against the plaintiff and specifically at paragraph 33 of the Statement of claim pleaded fraud between the appellant and ITLTB against the plaintiff.*

*The plaintiff filed a Notice of Discontinuance on 4 April 2017, against the ITLTB (10<sup>th</sup> defendant) but has not amended its statement of claim and as such the amendment is required to show precisely what fraud is against the plaintiff by the appellant.*
  - 2.4 *The Pre-Trial Conference was dispensed with and as such particulars are needed to identify what issue(s) are to be determined at the trial.*
  - 2.5 *Without amendment, the claim against the appellant remains that he is jointly and severally liable with the other defendants and colluded with ITLTB against the first respondent when the ITLTB is no longer a party to the proceedings.*

3. *The Learned Judge of the High Court erred in law and in fact at paragraph 13 where he said "The Settlement was between the Plaintiff and TLTB. The Plaintiff may have settled with TLTB on without prejudice basis. The Second Defendant has nothing to do with the Settlement between the Plaintiff and TLTB. Therefore, the second defendant is not entitled to recover the details of settlement with TLTB" because:-*

3.1 *The Learned Judge guessed that the plaintiff may have settled on a without prejudice basis when there was no evidence of the same.*

3.2 *There was no appearance by the first respondent opposing the application or providing any evidence that the settlement between the first respondent and ITLTB was on without prejudice basis;*

3.3 *The Learned Judge of the High Court could not make a conclusion on the nature of the settlement without any evidence;*

3.4 *Without amendment, the claim against the appellant remains that he is jointly and severally liable with the other defendants and colluded with ITLTB against the first respondent when the ITLTB is no longer a party to the proceedings.*

4. *The Learned Judge of the High Court erred in law and in fact at paragraph 12 of the decision holding that the court may refuse to make an order for particulars because there is a full and comprehensive defence to the claim and the appellant did not send a letter seeking further particulars as required by order 18 Rule 11 of the High Court Rules. The particulars of the error in fact in law are:-*

4.1 *The Learned Judge failed to apply his discretion properly in failing to consider:*

1. *The circumstances of the case.*

2. *That there are no pre-trial-conference minutes for agreed issues or facts.*

- 4.2 *In the statement of defence, the appellant pleads, at paragraphs 10, 16, and 23(d) that there is lack of particulars. At paragraph 23(d) the appellant pleads there is lack of particulars of the alleged permanent deprivation of the purported tourism lease; and*
- 4.3 *The Learned Judge did not consider whether there were sufficient reasons for the application by letter not having been made (Order 18 Rule 11 (6)).*
5. *The Learned Judge of the High Court erred in law and in fact and denied the appellant a fair trial by not allowing the amendment and the discovery particularly because:-*
- 5.1 *discovery, particulars and amendment are sought to avoid a trial by ambush and to ensure that the appellant is guaranteed his constitutional right to a fair trial determined by independent, impartial, competent and accessible system of Justice.*
- 5.2 *there are no pleadings of documents discovered showing the connection between the presentation of the petition and the purported loss of the tourism lease;*
- 5.3 *there are not pleadings or discovery showing that the re-entry by TLTB was done by as a result of the winding up petition being presented, or the orders being made;*
- 5.4 *while the claim is for the loss of the full tourism lease, the pleadings show that the first respondent agreed to sever 3 acres of land prior to the winding up petition. There are no pleadings showing how and what the claim is in light of the fact that the first respondent had agreed to surrender part of the lease without any action of the appellant;*
- 5.5 *there are no particulars of fraud;*



5.6 *there are no particulars of defamation; and*

5.7 *there are no particulars of damages*

6. *The Learned Judge of the High Court erred in law by not transferring the case of the Master of the High Court for further directions and interlocutory hearing especially since the discontinuance of the claim against the ITLTB substantially changed the cause of action.*

7. *The appellant may add further grounds of appeal upon receipt of the record.*

### **Discussion and determination**

- [14] The second defendant applies to this court for grant of leave to appeal the interlocutory ruling of this court pronounced on 4 March 2020. By that ruling, the court dismissed an application filed by the second defendant for direction, discovery and amendment of the statement of claim. The basis for dismissal was that the statement of claim provides sufficient particulars as regards the allegation it makes particularly in respect of fraud, defamation and damages and that the second defendant was not entitled to the discovery of documents or the details of the settlement of the claim as between the plaintiff and iTaukei Land Trust Board (“TLTB”).
- [15] The ruling the second defendant intends to appeal was delivered on 4 March 2020. He has made his application for grant of leave to appeal on 12 March 2020. Thus, he has made his application and served the same within 21 days as required by CAR, R 16 (a).
- [16] In this ruling, I would adopt and apply the principles relating to grant of leave to appeal an interlocutory ruling as enunciated in *Abdul Hussein*, above. For that purpose, I would look at the proposed grounds of appeal.
- [17] It is noteworthy that there is reluctance in giving leave to appeal against interlocutory decision involving practice and procedure. The court dismissed the

second defendant's application for direction, discovery and amendment. Accordingly, the interlocutory ruling the second defendant intends to appeal mostly involves practice and procedure, and it is a discretionary ruling.

- [18] The second defendant had made the application for direction, discovery and amendment of the statement of claim at the trial stage. He did not raise these issues at the pre-trial stage. The case was ready for trial after all pre-trial steps were concluded. He had filed a defence to the claim. He did not ask for further particulars or did not make an application to strike out the claim on the ground that it does not provide sufficient particulars of fraud and defamation. Instead, he is, at the trial stage, seeking an order directing the plaintiff to amend its statement of claim to disclose a reasonable cause of action. It appears to me that the second defendant is attempting to take the case back to the pre-trial stage.

*Issue of general importance*

- [19] Mr Krishna on behalf of the second defendant submits that the appeal raises an issue of general importance because it (the ruling) contravenes established laws of giving a litigant a fair trial.
- [20] The interlocutory application made by the second defendant was determined based on the facts pleaded in the statement of claim. The ruling does not determine the rights of the parties. The trial is yet to take place. The rights of the parties will be determined at the trial.
- [21] For the present purpose, I, having perused the proposed grounds of appeal, find that the issue raised there is not a general question of importance. This issue can be canvassed at the trial. It may be a triable issue for the second defendant, and it is not a pure question of law the determination of which would bring the proceedings into termination.

*Difficult question of law*

- [22] The second defendant intends to appeal the interlocutory ruling which dismissed his application for direction (order to transfer the matter back to the Master for further direction), discovery (of the details of the settlement between the plaintiff and iTLTB) and amendment of the plaintiff's statement of claim to disclose a reasonable cause of action.

[23] Having had a cursory look at the proposed grounds of appeal, I find that there is no difficult question of law to be settled by the Court of Appeal, if leave is granted.

*Substantive rights of the parties or either of them*

[24] As I said, the ruling the second defendant intends to appeal does not decide any substantive rights of the second defendant or of the parties. It struck out his application for direction, discovery and amendments. The court decided that the statement of claim provides sufficient particulars as regards the allegation it makes particularly in respect of fraud, defamation and damages, that the second defendant is not entitled to seek an order for amendment of the statement of claim and that the second defendant is not entitled to the discovery of the documents or the details of the settlement of the claim as between the plaintiff and TLTB.

*Presumption against granting leave to appeal interlocutory orders or judgments*

[25] There is a strong presumption against granting leave to appeal from interlocutory orders or judgments which do not either directly or by their practical effect finally determine any substantive rights of either party (see *Abdul Hussein v NBF*, above).

[26] By its interlocutory ruling, the court did not determine any substantive rights of either party. The issues raised in the second defendant's application could be taken at the trial. Then the court will determine those issues on the basis of evidence to be adduced by the parties.

**Conclusion**

[27] For the reasons set out above, I conclude that the second defendant has failed to make out a case for grant of leave to appeal an interlocutory ruling which does not determine the rights of either party. I would, therefore, refuse to grant leave to appeal the interlocutory ruling delivered on 04 March 2020. There will be no order as to costs.

[28] Since I have refused to grant leave to appeal, I need not consider the application for stay of proceedings pending determination of the appeal.

**The result**

1. Leave to appeal refused.
2. No order as to costs.

*M. H. Mohamed Ajmeer*  
*22/10/20*

**M. H. Mohamed Ajmeer**

**JUDGE**



At Lautoka

22 October 2020

Solicitors:

For the applicant/ second defendant: Krishna & Co, Barrister & Solicitor  
For the respondent/plaintiff: Rayawa Law, Barristers & Solicitors