IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBC 271 of 2014

BETWEEN : **MALTI DEVI**

PLAINTIFF

AND : **SHIVNEIL PRASAD & NAVNEEL PRASAD**

1ST DEFENDANT

AND : **SHARON SYLVIA PRATAP**

2ND DEFENDANT

AND : **REGISTRAR OF TITLES**

3RD DEFENDANT

AND : **SUNIL KUMAR** practicing as **SUNIL KUMAR ESQ**

4th DEFENDANT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. A. Nand for the plaintiff
: No appearance for the first defendant
No appearance for the second defendant
Ms. G. Naigulevu for the third defendant
Ms. S. Chand for the fourth defendant

Date of hearing : 1 March 2022
Date of decision : 10 November 2022

DECISION

PRACTICE &PROCEDURE Leave to appeal – considerations in the grant of leave – stay of order for costs

The following cases are cited in this decision:

a) *Attorney General of Fiji v Richard Krishnan Naidu HBC 202.2022 (14 October 2022)*
b) *Niemann v Electric Industries [1978] VR 431*
c) *Kelton Investments Ltd v Civil Aviation Authority of Fiji Ltd [1995] FJCA 15; ABU 0034D.95S (18 July 1995)*
d) *Paul v Director of Lands and others [2020] FJSC 3; CBV 0018.2019 (9 June 2020)*

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1. By decision dated 26 January 2022, the court dismissed the fourth defendant's summons, which sought *inter alia* to strike out the plaintiff's amended writ of summons and amended statement of claim filed on 6 January 2020. Alternatively, the summons had sought an order for leave to issue third party notice against Mr. Ashneel Amit Nand, practicing as Messrs. Kohli and Singh Suva and be joined as a third party to indemnify the fourth defendant of any damages, costs or causes of action arising from the plaintiff's action. He also asked for an order to expunge from the court record the amended statement of defence filed on 3 October 2016 and contained in the copy pleadings filed on 22 December 2020 and for the first defendant to file a new statement of defence.

2. The court did not grant any of the reliefs sought by the fourth defendant. Therefore, he seeks the leave of this court to appeal the decision dated 26 January 2022. By summons filed on 4 February 2022, he sought *inter alia* the following orders :

1) "That the 4th Defendant be granted leave forthwith to appeal to the Court of Appeal of Fiji the interlocutory Ruling of the High Court including all orders arising therefrom of the Honorable Mr. Justice Javed Mansoor dated the 26th day of January, 2022.

2) An order that the High Court interlocutory Ruling of Honorable Mr. Justice Javed Mansoor dated 26th day of January 2022 be wholly stayed forthwith pending the determination for leave to appeal, appeal and delivery of the Judgment of the Court of Appeal on any appeal brought pursuant to such leave.

3) Time for bringing the appeal from the within interlocutory Ruling of the High Court including all orders arising therefrom of the Honorable Mr. Justice Javed Mansoor dated 26th day of January, 2022 to the Court of Appeal if required be extended until such times as this Court determines the 4th Defendant's application for leave.

4) Alternatively, the within interlocutory Ruling of the High Court including all orders arising therefrom of the Honorable Mr. Justice Javed Mansoor dated the 26th day of January 2022 be wholly stayed forthwith pending determination of any further application for leave and extension of time in the Court of Appeal and the entire appeal process is such leave is granted".

3. The application for leave was supported by an affidavit from Mr. Sunil Kumar. He averred that his submissions concerning irregularities in the plaintiff's case were not given consideration by the ruling of 26 January 2022. He said that he has not come across a case in which a solicitor was made a party to proceedings for owing a duty of care to an opposing party. He said that there was bias on the part of the court in failing to consider the matters urged by him. Mr. Kumar said that he had acted in the capacity of a commissioner for oaths, and that in terms of section 144 (2) of the Legal Practitioners Act, action could not be taken if duties are discharged in good faith. He stated that if leave to appeal is not allowed, the current action would result in every person suing his opposing counsel.

4. The deponent also sought a stay of the order directing him to pay costs in a sum of $3,000.00 within four weeks of the decision. He said the order for costs was unjustified as the summons to strike out was the first application made by him in the plaintiff's action.

5. An affidavit in opposition was given by Aradna Arishma Singh on behalf of the law firm, Kohli and Singh Suva, which was filed on 14 February 2022. The affidavit was filed on behalf of the plaintiff. He averred that the fourth defendant misinterpreted section 144 (2) of the Act. The deponent averred that the issue whether the fourth defendant had witnessed the document in good faith had to be determined at the trial, and that the cause of action against the deponent's law

firm was based on collusion and fraud, and not on negligence as asserted by the fourth defendant.

6. At the hearing held on 1 March 2022, the first and second defendants were not represented. The third defendant was represented at the hearing, but did not make submissions.

Preliminary issue

7. Ms. Chand who appeared for the fourth defendant raised a preliminary issue stating that the affidavit filed on behalf of the plaintiff on 14 February 2022 is defective and in breach of the High Court Rules 1988. Ms. Chand submitted that the affidavit was deposed to by a solicitor at the law firm, Kohli and Singh Suva. She cited the Fiji Supreme Court decision in *Paul v Director of Lands*[1]. It was also submitted that the affidavit did not contain the plaintiff's authority to prepare an affidavit and does not say why the plaintiff did not depose to the matters contained in it. She submitted that the deponent has not stated the source of the claims that were made in the affidavit. Counsel submitted that the affidavit should be struck out as it did not disclose whether the deposition was made on behalf of the plaintiff or the law firm.

8. Responding to the submission on the preliminary issue, Mr. Nand, who appeared for the plaintiff submitted that the prohibition on legal clerks to swear affidavits on facts does not prevent lawyers from deposing as to legal matters. He submitted that the affidavit in opposition complied with Order 41 r 9 of the High Court Rules, and that it contained an endorsement on behalf of the plaintiff. He said that in any event, Order 41 rule 4 permitted an affidavit to be received in evidence notwithstanding any irregularity in form. Mr. Nand submitted that it was not necessary to attach the plaintiff's authority, according to the rules of court.

9. In *Paul v Director of Lands and others*, the application was for enlargement of time to file a petition of appeal. The Supreme Court struck out an affidavit deposed by a senior litigation clerk of a law firm. The court was critical of third parties

[1] [2020] FJSC 3; CBV 0018.2019 (9 June 2020)

deposing to facts of which they had no knowledge. The President of the Supreme Court, Kumar, acting CJ, made it clear that a third party is not prevented from deposing to affidavits in support or in opposition in interlocutory applications provided it is on the basis of information received and the source is disclosed, and set out certain guidelines in the judgment. In this application, the affidavit in opposition is not based on facts.

10. The affidavit in opposition given on behalf of the plaintiff by a solicitor and barrister of the law firm is in substantial compliance of the rules of the High Court. The affidavit carries an endorsement that it is filed on behalf of the plaintiff. Even where no affidavit in opposition is filed, the granting of leave is a matter for court. The preliminary issue is decided in favour of the plaintiff.

Leave

11. Section 12 (2) (f) of the Court of Appeal Act requires leave of a judge of the High Court or of the Court of Appeal to appeal an interlocutory order.

12. Courts have repeatedly emphasised that appeals against interlocutory orders and decisions will rarely succeed[2]. In order to succeed, an applicant must show that the judge was wrong and secondly, that substantial injustice would be done by allowing the erroneous decision to stand.

13. In *Kelton Investments Ltd v Civil Aviation Authority of Fiji Ltd*, the Fiji Court of Appeal observed that even where leave is not required, the policy of the appellate courts has been to uphold interlocutory decisions and orders of the trial Judge.

14. In the recent decision of *Attorney General of Fiji v Richard Krishnan Naidu*[3], the High Court considered the question as to whether leave to appeal the court's interlocutory decision should be granted. Nanayakkara, J said that the considerations to be applied by the High Court for leave to appeal from the interlocutory order or judgment is different from the considerations that apply in

[2] Kelton Investments Ltd v Civil Aviation Authority of Fiji Ltd [1995] FJCA 15
[3] HBC 202. 2022 (14 October 2022)

the Court of Appeal when the matter comes before the Court of Appeal on a motion for leave to appeal from the interlocutory order or judgment.

15. The following passage in *Niemann v Electric Industries*[4], which was cited with approval in the *Richard Naidu* case, sets out the approach to be taken by the court whose decision is sought to be appealed:

> "Likewise in Perry v. Smith (1901), 27 V.L.R 66 and the Darrel Lee Case, {1969} V-R. 401, the Full Court held that leave should only be granted to appeal from an interlocutory judgement or order, in cases where substantial injustice is done by the judgement 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 effect a substantial injustice by its operation.
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> It appears to me that greater emphasis therefore must lie 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 more easily be seen that leave to appeal should be given. Indeed, this approach seems to have been adopted in the Darrel Lea Case.
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> It also seems to me important to note that the judge who makes the interlocutory order or judgment may be in a different position, when considering whether to grant leave to appeal from his order or judgment from that in which the Full Court finds itself when considering a similar application.
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> He has tried the case, whatever it may be, he has made the interlocutory order or given the interlocutory judgment. He could not be expected, when considering whether or not to grant an application for leave to appeal, to say that his order or judgment was clearly wrong and that substantial injustice would follow if it went undisturbed. If those criteria had in all cases to be established, leave would never be granted by the primary judge.
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> In practice, he may consider (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

[4] [1978] VR 431

"sorely troubled"; (3) whether the order had made the effect of altering the 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.

When the matter comes before the Full Court on a motion for leave to appeal from the interlocutory order or interlocutory judgment, it seems to me that different considerations should apply"[5]

16. I am in agreement with the approach taken in the Kelton Investments and the Neimann judgments.

The fourth defendant's grounds of appeal

17. The fourth defendant proposed 18 grounds of appeal. These are reproduced below:

1) "That the learned judge erred in law and in fact in failing to follow the dicta established by the Court of Appeal in the case of Jai Prakash v Savita Chandra Civil Appeal ABU 0037/1985 wherein it held in absence of a reply it is deemed admission thus have severally prejudiced the Appellant.

2) That the learned Judge erred in law and in fact by discrediting an independent court record of the Judiciary Department in which it contained the times on which the Appellant had acted for late Ambika Prasad.

3) That the learned Judge erred in law and in fact by failing to correctly interpret that in the Family Action No. 05/SUV/0377, the subsequent orders of the Resident Magistrate Vishwa Datt Sharma as he was then, had in fact superseded and modified the initial orders made by Resident Magistrate Ms. Anjala Wati as she was then, and that parties were bound by new orders and not by the previous orders.

4) That the learned Judge erred in law and in fact in hearing the 1st Respondent without there being any Opposition or Response being served unto the Appellant taking him by surprise with the new facts in the ruling resulting in severe

[5] [1978] VR431 at 44

prejudice to the Appellant which infringed his rights enumerated under section 15 of the Fijian Constitution;

5) That the learned Judge erred in law and in fact by failing to consider that as per the Section 144 (2) of the Legal Practitioners Act 2009, no action shall be brought against the conduct of any Commissioner of Oaths discharging their duties in good faith.

6) That the learned Judge erred in law and in fact by failing to consider that it was 3 years after from when the Family matter was disposed-off and from when the Appellant ceased to act for late Ambika Prasad that he had witnessed a transfer document produced to him by the latter which no reasonable person would predict arose from a disposed file.

7) That the learned Judge erred in law and in fact by disregarding the principle established in the case of George Transport Limited and Maan Singh v Vijay P. Maharaj; Action No. 222 of 1989 which was tendered by the Appellants counsel denoting that *"any solicitor in this country performing the functions of a barrister as now held by the Common Law, will be immune from civil process in Fiji in the same way as he would in England."*

8) That the learned Judge erred in law and in fact by wholly disregarding the Legal Practitioners Act 2009, which in no way dwells about Legal Practitioners owing duty of care to an opposing party. See case Wehrenberg v Pickering [2022] FJILSC 1 (7 January 2022)

9) That the learned Judge erred in law and in fact at paragraph 12 of his Ruling whereby he failed to analyze the crux of the authorities that were cited by the Appellants counsel in support of the Appellants application them being Prasad v Prakash [2020] FJHC 18; HBC58 of 2005 (30 January 2020), Ketenavu v Native Land Trust Board [2005] FJHC 351; HBC0371.2003 (16 September 2005), Wing Investments Ltd v Chand [2004] FJHC 394; HBC0440.2003L (24 March 2004), Jai Prakash Narayan v Savita Chandra, Civil Appeal ABU 0037/1985.

10) That the learned Judge erred in law and in fact at paragraph 16 of his Ruling, whereby his Lordship misdirected himself by stating that the Appellants Counsel, *"Mr Kumar submitted that Orders 15 & 16 must be considered together in adjudicating*

the application for third party notice" when no such submissions were made by the Appellants counsel.

11) That the learned Judge erred in law and in fact at paragraph 18 of his Ruling whereby his Lordship failed to analyze that the Appellant's basis to issue third party notice was in fact connected with the original subject matter of the action which subject matter was issues around the order of the Family Court in Family Action No. 05/SUV/0377.

12) That the learned Judge erred in law and in fact at paragraph 20 of his Ruling by making a finding that *"... the third party's presence is not necessary to determine the issues between the plaintiff and the defendants."* Without first analyzing that third party was present at the first instance that being when the Family Court proceedings was on foot hence it was only the third party who could provide for reasons as to why Family Court orders had not initially been compiled by them.

13) That the learned Judge erred in law and in fact at paragraph 21 of his Ruling by making a finding that Appellant ***had not specified the date of the cause of action***, without paying heed to the written submission filed by the Appellant which in it clearly depicted that the time limit as per Section 6 of the Limitations Act 1971 is before the expiration of two years from the date on which that right accrued to the first tortfeasor which in this case was when the Appellant was first made a party to this proceedings which was in December, 2019.

14) That the learned Judge erred in law and in fact at paragraph 25 of his Ruling whereby his Lordship misdirected himself by stating that "*The substituted first defendant filed its amended statement of defence on 3 October, 2019 in response to the plaintiff's amended statement of claim"* when in fact Court Record shows that Amended Statement of Defence was filed on the 3rd of October 2016 which is not a response to the Amended Statement of Claim filed on the 6th day of January, 2020 and this gives rise to reasonable apprehension of bias thereby causing substantial miscarriage of justice and causing serious prejudice to the Appellant.

15) That the learned Judge erred in law and in fact by stating that there are matters in dispute when there was no Opposition filed by the 1st Respondent which gives rise to reasonable apprehension of bias and has thus severally prejudiced the Appellant and has resulted in substantial miscarriage of justice.

16) That the learned Judge erred in law and in fact when he failed to give adequate reasons on the following issues:-

a) The basis on which, how and why the Appellants application for leave to issue third party notice was not connected to the original subject matter of the action.

b) The relevance and/or linkage of Order 15 of the High Court Riles 1988 to the Appellants application which was made pursuant to Order 16 of the High Court Rules 1988

c) The reason for not expunging Amended Statement of Defence filed on the 3rd day of October, 2016 when the 1st Defendant in the first place had not complied with orders to file amended statement of defence as per the Ruling dated 23rd day of December, 2019.

d) The disregard of the fact that there was conflict of interest between the 1st Defendant, 2nd Defendant and the 4th Defendant which required the expunging of Amended Statement Defence filed on the 3rd day of October 2016 giving rise to reasonable apprehension of bias.

e) The reasons for the award of an excessive indemnity cost when no Affidavit in Opposition no written submissions were filed by the Respondent nor any analysis of law had been done by his Lordship to support the same, see case Pettit v Dunkley [1971] 1 NSWLR 376 CA.

17) That the learned Judge erred in law and in fact of being bias in hearing the case with a close mind taking irrelevant matters into consideration leaving out the relevant ones thus has result in miscarriage of justice.

18) That the Appellants reserves the right to file such further grounds of Appeal upon receipt of the full Court Record".

18. Ms. Chand made submissions on the grounds raised on behalf of the fourth defendant. The fourth defendant also tendered written submissions. Mr. Nand made oral submissions on behalf of the plaintiff but informed court he would not be filing written submissions.

19. Ms. Chand submitted that the family court record showed the dates on which the fourth defendant appeared in the family court. Lengthy submissions were made concerning the family court proceedings explaining why the fourth defendant should not have been made a party to the action. The fourth defendant submitted that the earlier orders of the magistrate were superseded by subsequent orders made by then magistrate, Mr. V.D Sharma.

20. On the question of limitation, Ms. Chand submitted that the cause of action began to run on the day when the plaintiff's amended statement of claim was served on the fourth defendant in January 2020. The fourth defendant was not a party when the plaintiff instituted action. She submitted that when the case was filed, collusion and fraud were not issues before the court. She submitted that a third party notice could be issued within 2 years of being served a statement of claim, and that section 6 (1) of the Limitation Act made provision to recover damages from a tortfeasor. Counsel submitted that there was no cause of action to recover from a tortfeasor before the fourth defendant was added as a party, and that the fourth defendant's application has been made within time.

21. In his reply, Mr. Nand submitted that the grounds of law relied upon by the fourth defendant did not raise questions of law or disclose prospects of success. He submitted that good faith was a requirement in terms of section 142 of the Legal Practitioners Act, and that good faith is an issue that must be decided at the trial and not by affidavits. Mr. Nand submitted that the writ action was commenced in 2014 and that the cause of action which the fourth defendant relies upon against his law firm has expired. The relevant period of limitation in this case, he submitted, is six years, and that period has expired. He submitted that the fourth defendant was added as a party on 23 December 2019, and that the strike out application was filed on 3 September 2021.He submitted that the plaintiff and the second defendant would be prejudiced if leave is granted and asked that the application be dismissed with further costs.

22. The decision of 26 January 2022 dealt with many of the grounds that are now raised by the fourth defendant except the assertion of bias that is raised in this proceeding. The fourth defendant's complaint of bias stands to be rejected. There

is no basis upon which this can be said. The court's rejection of a position taken by a litigant cannot amount to bias.

23. Grounds 1 and 4 concern the plaintiff's failure to file an affidavit in opposition. The decision deals with this matter. Grounds 2, 3 and 6 concern matters in proceedings before the family court. This is a matter for evidence. The earlier decision makes this clear. Ground 2 makes the illogical assertion that the court has discredited a record kept by the judiciary. Grounds 5 and 7 are best suited to be determined after trial. Ground 8 is raised on the basis of duty of care. The plaintiff's application to add the fourth defendant was on the basis of fraud and collusion. Ground 9 says the court did not consider the fourth defendant's authorities. Ground 10 states that counsel did not make submissions saying that Order 15 and 16 applied to the issue of a third party notice. That submission alone did not result in an adverse order against the fourth defendant. Even if grounds 9 and 10 are taken as correct, they are not matters on which leave should be granted to appeal an interlocutory order. Grounds 11 & 12 concern the court's refusal to issue third party notice. The decision of 26 January 2022 states with sufficient clarity the reason for the court's refusal to issue third party notice. Ground 13 is that the period of limitation was not considered. The earlier decision has given adequate consideration to the matter. The grounds of bias in 14, 15 and 17 are without rational basis. Ground of appeal 16 raises several matters. There was no reason upon which to expunge the first defendant's statement of defence. The order for costs is explained at paragraphs 27 to 33 of the decision dated 26 January 2022.

24. Considered as a whole, the grounds raised by the fourth defendant do not satisfy this court that leave should be granted. The fourth defendant's application does not fulfill the requirements set out in the *Kelton Investments Ltd v Civil Aviation Authority of Fiji Ltd* and the *Niemann v Electric Industries Ltd* decisions. I do not see any major flaws in the decision dated 26 January 2022 in rejecting the fourth defendant's summons at that stage was inappropriate. He has not shown that the decision dated 26 January 2022 has caused him substantial prejudice. There is no reason to stop the case from finally proceeding to trial. The plaintiff filed this action nearly 9 years ago in 2014. Since then a number of applications have

conspired to delay the trial. This case needs to be set down to trial as early as possible.

25. As the proposed grounds of appeal are not strong, it is not necessary for court to stay the order for costs in the decision of 26 January 2022.

ORDER

A. The fourth defendant's summons filed on 4 February 2022 is struck off.

B. The fourth defendant is to pay the plaintiff costs summarily assessed in a sum of $1,500.00.

Delivered at **Suva** on this **10th** day of November**, 2022**

M. Javed Mansoor
Judge