IN THE HIGH COURT OF FIJI AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 157 of 2015

BETWEEN

BERNADETTE a.k.a **BERNADETTE CHINNA** a.k.a **BERNADETTE SHANKARAN**

of Wailoaloa, Nadi, School Teacher.

APPLICANT / 1st DEFENDANT

AND

LEELA WATI a.k.a **LILAWATI SHANKARAN** a.k.a **BERNADETTE CHETTY**

of Nadi, retired School Teacher and as the Administratrix of the

Estate of Ganesh Shankaran under Letters

De Bonis Non.

FIRST RESPONDENT / PLAINTIFF

AND

INISE NEISAU of Saunaka, Nadi as the Executor and Trustee of the Estate of Vijai Shankaran and **MICHEAL JOSEPH SHANKARAN** of Wailoaloa, Nadi.

SECOND RESPONDENT / 2nd DEFENDANT

AND

DIRECTOR OF LANDS

THIRD RESPONDENT / 3rd DEFENDANT

AND

REGISTRAR OF TITLES

FOURTH RESPONDENT / 4th DEFENDANT

AND

ATTORNEY GENERAL'S OFFICE

FIFTH RESPONDENT / 5th DEFENDANT

Counsel : Mr. Vananalagi for the Applicant

Mr. Naidu D. for the 1st Respondent

Date of Hearing : 06th September 2023

Date of Ruling : 03rd October 2023

RULING

(On the Application for Indemnity Costs)

[1] The 1st defendant (Applicant), on 01st April 2022 filed a summons before the learned Master of the High Court pursuant to seeking the following orders:

[1] Indemnity costs in favour of the 1st defendant in the sum of FJ$10,779.13 pursuant to order for payment of indemnity costs made on 13th November 2020;

[2] Costs in favour of the plaintiff in the sum of $3,000.00 for this application; and

[3] Any other order that this Honourable Court deems just and equitable.

[2] Following are the orders made by the learned Master on 13th November 2020:

a. The plaintiff is ordered to delete all the averments in the statement of defence filed on 26.1.2018 to counter-claim of the first defendant, in relation to her original claims that were struck out on 02.5.2016,
b. The plaintiff should limit her defence to counter-claim pleaded in paragraphs 17, 18 and 19 of the first defendant's statement of defence and counter claim filed on 19.02.2016,
c. The plaintiff should file the amended statement of defence within 14 days from today, i.e. on or before 27/11/20,
d. The plaintiff and her solicitor jointly pay the cost to the first defendant on solicitor / client indemnity basis, and
e. The matter to be mentioned on 15.02.2021 to check on compliance.

[3] The learned struck out the summons filed on 01st April 2022 on the ground that the 1st defendant (the applicant in the present application) did not provide any reason for the delay to exercise its discretion considering the circumstances which caused the delay.

[4] Being aggrieved by the said decision of the sought leave to appeal on the following grounds:

1. The learned Master erred in law by striking out the appellant's application for assessment of indemnity costs, purportedly under Order 62 rule 29(1), when:
   [i] the relevant rules did not give a power to the court to strike out and/or dismiss the application;
   [ii] the effect of non-compliance with Order 62 rule 29(1) by the appellant merely allowed to respondents to move for an assessment of the appellant's costs through their own motion.
2. The learned Master erred in law and in fact by refusing to give leave for an extension of time and striking out the appellant's application for assessment of indemnity costs, purportedly under Order 62 rule 29(1), when;
   [i] the 1st respondent failed to demonstrate any actual and perceived prejudice suffered as a result of non-compliance of Order 62 rule 29(1);
   [ii] the court has unfettered discretionary powers under Order 62 rule 11 and order 3 rule 4(1) to extend the time and grant leave for the continuation of the hearing.
3. The learned Master erred in law and in fact when he struck out the appellant's application for assessment of indemnity costs based on a preliminary objection taken at the hearing thereof by the counsel for the 1st respondent, when:

[i] the non-compliance by the appellant with Order 62 rule 29(1) did not nullify the proceedings and was merely an irregularity that was curable in the circumstances of the case;

[ii] the 1st respondent had not filed an application under Order 2 rule 2 to set aside the appellant's application for assessment of indemnity costs.

[iii] the 1st respondent has waived her rights to move to set aside the appellant's application for assessment of indemnity costs by taking a fresh step by filing an affidavit of Kunal Chand filed on 26th May 2022 and consenting to the fixing of a hearing date of the appellant's application.

[5] In the following decisions on leave to appeal interlocutory orders have been discussed at length.

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."

The learned counsel in this regard cited the decision 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.

[6] Under Order 62 rule 9 of the High Court Rules 1988, an application for assessment of indemnity costs must be filed within 3 months after the judgment. In this case the learned Master delivered his ruling on 13th November 2020 and the summons for assessment of indemnity costs was filed by the applicant after about one and half years, on 01st April 2022.

[7] The delay was inordinate and as the learned Master correctly observed in his ruling the applicant failed to provide any reason justifying the delay. The learned counsel for the applicant submitted the learned Master had a discretionary power to extend the time which is correct. However, from the record it appears that there had been no application for extension of time. The court cannot be expected to exercise its discretionary power on it its accord without any reason.

If a party expects the court to exercise its discretionary power he must provide the some reason justifying such an exercise.

[8] Order 62 rule 29(3) provides;

> Where a party entitled to costs fails to begin proceedings within the time limit specified in paragraph 1, any other party to the proceedings which gave rise to the taxation proceedings may with the leave of the taxing officer begin taxation proceedings.

[9] With the refusal of the application for assessment of indemnity costs made by the applicant, the assessment proceedings do not come to an end. Any other party to the proceedings has the right to make an application.

[10] For the reasons set out above the court is of the view that the learned Master is correct in refusing the application of the applicant for not complying with the requirements of Order 62 rule 29(1).

[11] Although the learned Master has not observed, in the summons filed on 01st April 2022 the applicant has not sought an order for assessment of indemnity costs but to recover $10,779.13 as indemnity costs.

ORDERS

1. Application for leave to appeal is refused.
2. There will be no order for costs.

HIGH COURT OF FIJI LAUTOKA

Lyone Seneviratne

JUDGE

03rd October 2023