

IN THE HIGH COURT OF FIJI AT LAUTOKA
CIVIL JURISDICTION

Winding Up Action No. HBE 18 of 2019

In the matter of committal proceedings under Order 52 of the
High court Rules 1988 against the respondents for
contempt of court.

BETWEEN

LEANY EDWARD HENRY of Cosgrove Rd, Strathfield,
South NSW 2156, Australia

APPLICANT

AND

KAMLESH MUNI NAIDU of Nalovo, Nadi.

FIRST RESPONDENT

AND

ANJINI NAIDU of Nalovo, Nadi.

SECOND RESPONDENT

Counsel : Mr. Singh R. for the Appliocant
Ms. Gounder A. for the Respondents

Date of Ruling : 03rd April 2024

RULING

(On the Application for Leave to Appeal)

[1] Leaney Edward Henry (the applicant) on 03rd July 2019 filed an application seeking the following orders against Vonu Apparel Pte Ltd (the Company):

1. (a) To have Mr. Muni Kamalesh Naidu, co-director and fifty per cent share holder of the Company;
 - i) Removed from the Company premises and prevented from interfering with the business of the Company and for me and persons appointed by me to take possession and control of the Company premises and operate the company.
 - ii) Removed as a director and a shareholder of the Company and that I be put in sole control and charge of it.

OR IN THE ALTERNATIVE

- (b) The Company be wound up on the grounds that it is just and equitable to do so.
2. That a liquidator be appointed (if need be), to conduct the winding up.
3. For such further and other order as may be just.

[2] On 10th July 2019 the applicant filed an ex-parte notice of motion seeking the following orders;

1. An order that this application be returnable *instanter*;
2. An order granting an interim injunction restraining and prohibiting forthwith Mr. Muni Kamlesh Naidu of Nalovo, Nadi by himself and or by his servants or by his agents from managing and operating the company until further order;

3. An order that Mr. Muni Kamlesh Naidu be removed from the Company premises and prevented from interfering with the business of the Company until further order;
4. An order that Edward Henry Leaney (Applicant) herein by himself and or by his servants and or by his agents take possession and control of the Company premises and operate the company;
5. An order that Muni Kamlesh Naidu off Andrews Road, Nakurakura, Nadi be immediately suspended from his position of director of the Company and the applicant be put in sole control and charge of it until further order;
6. Any other order(s) that this Honourable Court considers appropriate in the circumstances.

[3] The learned Master of the High Court on 16th July 2019 granted orders 2,3,4 and 5 above.

[4] On 12th August 2020 the Justice Nanayakkara struck out the winding up petition on the ground that it was not determined within six months as required by section 528(1) of the Companies Act 2015 and on an application of the applicant the matter was reinstated.

[5] The applicant on 03rd October 2019 made an application seeking leave to issue committal proceedings against the respondent for not complying with the orders made by the learned Master on 16th July 2019, which was granted by the court. The court heard the application of the applicant for an order of committal for contempt of court and delivered its judgment dismissing the application.

[6] The applicant then sought leave to appeal the said judgment to the Court of Appeal on the following grounds:

1. That the learned Trial Judge erred in law and in fact in finding as a matter of fact that Vonu Apparel Pte Ltd was not in operation and operating from 13th March 2019 from Nakurakura, Nadi when Vonu Apparel Pte Ltd was in operation from the premises at all material times.
2. That the learned Trial Judge erred in law and in fact in holding that the appellant was required to establish and show that the second respondent removed items belonging to the company.

3. That the learned Trial Judge erred in law and in fact in failing to hold that the respondents acted in breach of the orders of the High Court granted on the 16th of July, 2017 when the 2nd respondent entered the premises at Nakurakura, Nadi being encouraged by the 1st respondent at all material times.
4. That the learned Trial Judge erred in law and in fact in holding that there was no basis for the Master of the High Court for granting orders of the 16th of July 2017.
5. That the learned Trial Judge erred in law and in fact in holding that there was no evidence addressed to establish that Von Apparel Pte Ltd was in operation at all material times when the 1st respondent in his affidavit sworn on 20th July 2020 stated that,

“O’donell Apparel (Fiji) PTE Ltd (hereinafter called “O’Donell”) did not cease its business operations at all but was only made dormant in October, 2017. Vonu started its operation in August 2017.

6. That the learned Trial Judge erred in law and in fact in rejecting the application for contempt against the respondents when;

6.1 The respondent acted in direct breach of the orders of the Master of the high court granted on the 16th of July 2017, by coming into the premises where Vonu Apparel Pte Limited was being operated from and

6.2 The act of coming onto the premises at Nakurakura, Nadi as aforesaid amounted to interfering with the operations of Vonu Apparel Pte Limited.

[7] In **Reddy's Enterprises Ltd v Governor of the Reserve Bank of Fiji** [1991] FJCA 4; Abu0067d.90s (9 August 1991) Sir Moti Tikaram J. made the following observations:

It is not my function to assess the actual merits of the appeal but if prima facie it is obvious that the appeal is wholly unmeritorious or wholly unlikely to succeed then it would be appropriate for me to say so. As to the contention that the points raised are not novel all I can say is that the issue of novelty itself is not crucial. The important point is whether there is a

serious question for adjudication as opposed to it being frivolous or vexatious.

In the case of **Bank of Hawaii v Reynolds** [1998] FJHC 226 the court referred to the following passage from Ex parte Bucknell [1936] HCA 67; (1936) 56 C.L.R. 221 at 225 which are pertinent:-

“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 s 5(1)(a) should 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 inter interlocutory judgment.”

In **Kelton Investment Limited and Tappoo Limited v Civil Aviation Authority of Fiji & Anr** [1995] FJCA 15; Abu0034d.95s (18 July 1995) it was held:

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 **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.

- [8] The judgement sought to be appealed to the Court of Appeal is a final judgment of the High Court on an application for committal proceedings. However, as held in the case of **Reddy's Enterprises Ltd v Governor of the Reserve Bank of Fiji** (supra) the court has to consider the merits of the appeal to a certain extent in deciding whether there are meritorious grounds for this court to grant leave to appeal. In an application for leave to appeal the burden of establishing that there are grounds of appeal which the applicant would succeed at the hearing of the appeal is on the applicant.
- [9] As correctly observed by Justice Nanayakkara the onus is on the applicant to prove beyond reasonable doubt the allegation of breach of the orders made by the learned Master. Justice Nanayakkara has also correctly observed that the learned Master has not restrained the defendant respondents, the directors and shareholders of O'Donelle from visiting and entering the business premises.

[10] The learned Master's order only restrains the defendant from managing and operating the company until further order. It does not restrain the respondents from entering into the business premises.

[11] It is also important to note that there is no restraining order against the 2nd respondent.

[12] For the above reasons the court makes the following orders.

ORDERS

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


Lyone Seneviratne



JUDGE

03rd April 2024