

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No: **HBC 219** of **2023**

BETWEEN : **DHIRENDRA PRASAD SHARMA** trading as **ON-TIME ENGINEERING** having its principal place of business at Lot 2 Jai Hanuman Road, Suva, Businessman.

Plaintiff/Respondent

AND : **GOODMAN FIELDER INTERNATIONAL (FIJI) PTE LIMITED** a limited liability company having its registered office at Karsanji Street, Vatuwaqa, Suva in the Republic of Fiji.

Defendant/Applicant

Coram : **Banuve, J**

Counsels : **Munro, Leys Solicitors** for the Defendant/Applicant
Sherani & Co Solicitors for the Plaintiff/Respondent

Date of Hearing : 4th February 2025
Date of Ruling : 28th February 2025

RULING

A. INTRODUCTION

1. A Summons for Leave to Appeal the Decision of the Master of the High Court was filed on 22 August 2024 by the Defendant/Applicant for orders that:
- (i) *It be granted leave to appeal to a Judge of the High Court from the Orders of the Master, Ms Vandhana Lal (Master), delivered by way of a Ruling on 9 August 2024 (Ruling) whereby it was ordered that :*
 - (a) *The Defendant’s application filed on 18 August 2023 fails and is dismissed; and*
 - (b) *The Defendant shall pay the Plaintiff costs summarily assessed at \$1,000 by 12 noon on 16 August 2024.*
 - (ii) *The costs of this application be paid by the Plaintiff.*

UPON the grounds that:

- (i) *The learned Master misdirected herself in law and in fact in holding that the Plaintiff in HBC 190 of 2022 (**Discontinued Action**) and the Plaintiff in the current proceedings are completely different entities when:*
 - (a) *The Plaintiff in the Discontinued Action and the current proceedings are the same;*
 - (b) *The Acting Master Kashyapa Wickramasekara (**Acting Master**) did not make any ruling on whether the Plaintiff in the Discontinued Action is a “non existing company”.[the Plaintiff in reality is a sole trader, not a limited liability company, by admission, and the ruling of the Master on costs is to that effect-ie costs against the Plaintiff as a sole trader not as a limited liability company]*
 - (c) *In its written ruling dated 4 July 2023 for the Discontinued Action, the Acting Master acknowledged that the Plaintiff, Dhirendra Prasad Sharma, identified himself as the ‘intended and rightful Plaintiff trading as On Time Engineering’, who is the named party in the current action.*

- (d) *The Plaintiff in his affidavit in support of summons seeking leave to discontinue the Discontinued Action filed on 19 June 2023 at paragraph 2, deposed that “the Plaintiff named in the current action is not a limited liability company but is operated by me as a sole trader business”*
- (e) *The Plaintiff’s Discontinued Action Affidavit also stated at paragraph 5 that “ I through my solicitors Sherani & Co, might consent to withdraw the action from the Defendant but the same was not granted. As such I seek leave of this Honorable Court to discontinue the current action.*
- (ii) *The learned Master misdirected herself in law by allowing the Plaintiff to file and rely on the Plaintiff’s List of Authorities and not providing the Defendant with an opportunity to file Reply Submissions when:*
- (a) *The cases in the Plaintiff’s List of Authorities are not referred to in the Plaintiff’s written submissions filed on 16 November 2023;*
- (b) *There was no direction or orders by the court for the Plaintiff to file supplementary submissions or “List of Authorities”;*
- (c) *It is a breach of the rules of natural justice and fairness;*
- (d) *The Defendant is prejudiced by not being given the opportunity to reply to the Plaintiff’s submissions on the Plaintiff’s List of Authorities.*
- (iii) *The learned Master misdirected herself in law and in fact and failed to exercise her discretion judicially by awarding costs against the Defendant in the sum of \$1,000 when:*
- (a) *The Defendant was simply enforcing the Court’s orders issued in the Discontinued Action; and*
- (b) *Because of the failure of the Plaintiff to pay the \$8,000 costs, the Defendant enforced its rights as provided/required under Order 21, rule 5 of the High Court Rules 1988 (Rules).*
- (iv) *The above grounds show that the appeal has a real prospect of success.*

(v) *The Appellant reserves the right to supplement its grounds of appeal prior to the hearing of this matter.*

2. The Summons is supported by an affidavit deposed by Stephanie Jones.
3. The Plaintiff/Respondent filed an Affidavit in Opposition deposed by Dhirendra Prasad Sharma on 23 September 2024.
4. The Applicant filed an Affidavit in Reply deposed by Richard Sekiguchi on 30th October 2024.
5. The Defendant/ Applicant provided Submissions for Leave to Appeal the Decision of the Master.

B. The Application for Leave.

6. Leave to Appeal is being sought against the Interlocutory Ruling of the Master dated 9 August 2024, that the Defendant/Applicant was not entitled to stay new proceedings, Civil Action HBC 219 of 2023, initiated on 21 July 2023, pursuant to Order 21 Rule 5 of the *High Court Rules 1988*¹, despite the cause of action in the new proceedings being substantially the same as that in an earlier proceeding HBC 190 of 2022, discontinued on 4 July 2023, with costs that remain unpaid.
7. The Court will address the first ground of appeal outlined in paragraphs 1(a)- (e), of the Summons for Leave to Appeal.
8. The learned Master had premised her finding on the basis that the Plaintiff in HBC No 190 of 2022, and in the current proceeding, Civil Action HBC No. 219 of 2023, were different, in that the Plaintiff in the discontinued proceeding was a non-existent company, whilst the Plaintiff in the current proceeding was a sole trader, and that the Acting Master had not in the discontinued proceedings referred to Dhirendra Prasad Sharma, as the Plaintiff in HBC 190 of 2022, though he may have acknowledged that Dhirendra may be the rightful Plaintiff, and that the latter was never substituted as a Plaintiff in place of the non-existent entity.

¹ **Where a party has discontinued an action or counterclaim or withdrawn any particular claim made by him [or her] therein and he [or she] is liable to pay any other party's costs of the action or counterclaim or the costs occasioned to any other party by the claim withdrawn , then if, before payment of those costs, he [or she] subsequently brings an action for the same, or substantially the same, cause of action, the Court may order the proceedings in the action be stayed until those costs are paid.**

9. In its submissions, the Defendant/Applicant disputes the primary finding of the Master in her ruling of 9 August 2024 and contends that it arises from a misreading of the Acting Master’s earlier ruling of 4 July 2023, (discontinuing proceedings), on the following basis;

- (i) The Acting Master has identified in his written ruling that the Court acknowledged that the Plaintiff, Dhirendra Prasad identified himself as the *‘intended and rightful Plaintiff trading as On-Time Engineering.*

- (ii) The Plaintiff in his affidavit in support of summons seeking leave to discontinue the Discontinued Action filed on 19 June 2023 at paragraph 2 deposed that *the Plaintiff named in the current action is not a limited liability company but is operated by me as a sole trader business.*

- (iii) ‘The Plaintiff’s Discontinued Action Affidavit also stated at paragraph 5 that *“I through my solicitors Sherani & Co, sought consent to withdraw the action from the Defendant but the same was not granted. As such I seek leave of this Honorable Court to discontinue the current action.*

10. The Plaintiff/Respondent ‘s position is set out in the Affidavit in Opposition deposed by the Plaintiff and filed on 23rd September 2024 and is summarized;

- (i) The grounds of appeal advanced by the Defendant/Applicant do not raise arguable points and do not have good prospects of success.

- (ii) It has not breached the Court Orders issued in Civil Action No HBC 190 of 2022, made by the Acting Master as the orders were clearly made against the Plaintiff in HBC 190 of 2022, and not against me or my sole trader company. There is therefore no basis for the grant of an order for stay against Civil Action HBC 219 of 2023 under Order 21 Rule 5, because it is not the same as the discontinued proceeding, Civil Action HBC 190 of 2023.

C. The Applicable Law

11. The Application was filed pursuant to Order 59 rules 8(2) of the *High Court Rules* 1988;

8 (1)

(2) *No appeal shall lie from an interlocutory order or judgment of the Master*

to a single judge of the High Court without the leave of a single Judge of the High Court which may be granted or refused upon the papers filed.

12. Additionally, Orders 59 rule 12 states:

12. *An appeal shall be brought by way of a notice of appeal which may be given in respect of the whole or any specified part of the order or judgment of the Master.*

13. In Volume 1 of the ***Supreme Court Practice 1999*** (White Book), paragraph 21/5/24 at p404, it is stated;

*“Staying subsequent actions until costs paid (r.5)- Rule 5 was taken from O.26, r. 4 and applies to discontinued actions or counterclaims the principle on which the Court under its inherent jurisdiction stays actions in cases where a previous action brought for substantially the same cause of action had been dismissed or stayed, and the Plaintiff has not paid to the defendant costs of such previous action ordered to be paid by him. See **Re Payne** (1883) 23 Ch.D 288; **Martin v. Earl Beauchamp** (1883) 25.Ch. D 12”*

14. As the Master’s decision is an interlocutory one, leave to appeal must be obtained. Authorities in this jurisdiction² establish;

- (i) that the onus lies on an the applicant to establish that the decision of the primary judge is wrong and if leave is not given, an injustice will otherwise be done;
- (ii) 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.³

D. Analysis.

15. The Plaintiff/Respondent’s opposes the grant of leave on the basis that the Master’s decision in Civil Action 219 of 2023 of 9 August 2024 is correct and that costs orders ought not have been made against it, by the Acting Master in his earlier

² *Lakshman v Estate Management Services Ltd –Civil Appeal No 0014 of 2012 citing **Niemann v Electronic Industries Ltd** [1978] VR 431*

³ *In re the Will of FB Gilbert (deceased)* 46 NSW 318

discontinued proceeding Civil Action 190 of 2022, of 4 July 2023 in that the 2 proceedings are not the same and the Plaintiffs are different in that;

“ The limited liability company does not exist and on this basis the previous action was discontinued. My sole trader business and I are the named Plaintiff in HBC 219 of 2023”.

16. The Court has reviewed the ruling of the learned Master of 9 August 2024 in Civil Action HBC 219 of 2023 for which leave to appeal is premised and with respect, finds her primary finding less than rigorous.

In her ruling the Master states;

15. *I would agree with the Plaintiff’s counsel that the Plaintiff named in HBC 190 of 2022 and the current proceeding are different. The Plaintiff named in HBC 190 of 2022 is a non-existent company due to which that proceeding was withdrawn. Whilst the Plaintiff in the current proceeding is a sole trader. The two are completely different entities and not the one and the same.*

17. The Master did not address the separate issue of whether the cause of action in the new proceeding HBC 219 of 2023, remained the same or substantially the same, as that in the discontinued action HBC 190 of 2022.

As alluded to earlier in the commentary from the White Book on Order 21, rule 5;

*“Rule 5 was taken from the former O.26, r.4 and applies to discontinued actions or counterclaims the principle on which the Court under its inherent jurisdiction **stays action in cases where a previous action brought for substantially the same cause of action has been dismissed or stayed, and the Plaintiff has not paid to the defendant costs of such previous actions to be paid by him..**”*

18. A central plank of Order 21, rule 5 is whether or not the previous or current actions are the same, and the other is whether costs awarded from the discontinued case remained unpaid by the Plaintiff, on the initiation of the new proceeding. There is no dispute that the cause of action pursued in HBC 190 of 2022, and discontinued, are the same or substantially the same, as that pursued by the Plaintiff in HBC 219 of 2023, the breach of an agreement to pay for remedial work for the installation and commissioning of equipment carried out by the Plaintiff for the Defendant for which

a specific amount is sought to be recovered, together with interest and costs, on an indemnity basis.

19. The cause of action is the same and the Defendant is the same. As stated by the English Court of Appeal in *Martin v Earl Beauchamp* (1883) 25 Ch D 12;

*“The rule is established that where a plaintiff having failed in one action commences a second action for the same matter, this second action must be stayed until the costs of the first action have been paid. Here **the Defendant is only one of the Defendants** in the old suit, but he is sued in the same character as before. The Plaintiff in the former suit sued as personal representative of Elizabeth Bunch, he now sues as administrator de bonis non of Williams Jennens. But though he is not suing in the same character as that in which he formerly sued he is suing substantially by virtue of the same alleged title. If he recovers any part of this estate from the Defendant he will recover it as a trustee for the estate of Elizabeth Bunch, and I am of the opinion that he is to be treated as bringing a second suit for the same matter as the first”*

20. How has the Court dealt with the plea that a party in a proceeding was non-existent? In *Guangzhou Huitao Real Estate Investment Company Ltd v Century Holdings Ltd* –Civil Action No HBE 15 of 2004, the Court (per Tuilevuka J), held that the Petitioner,(GHL), a foreign company, not registered in Fiji, under the Companies Act, had no locus to institute proceedings in Fiji and dismissed the petition for winding up on that basis. Whilst the Court was inclined to grant costs against the petitioner, it could not do so, because it was an entity that did not exist. Whilst not a case determined under Order 21, rule 5, the applicable facts and law justified the Court there dismissing the petition on the basis of standing.

This was not an approach that was available to the Master in HBC 219 of 2023 when dealing with an application made pursuant to Order 21, rule 5 and on the factual/legal matrix it was based on.

21. In contrast to the GHL case, in *Roadwork Fiji Ltd v Fletcher Construction (Fiji) Ltd* – Civil Action HBC 108 of 2016, (per Ajmeer J), the Defendant/Applicant filed a summons to stay proceedings on the grounds that the Defendant was a non-existent party and as the parties had submitted to arbitration, the Court had no jurisdiction. Fletcher Construction (Fiji), the named Defendant was a non-existent company and the proper Defendant party was Fletcher Building (Fiji) Ltd. Did the Court in the *Roadwork Fiji Ltd* case rule that as the Defendant was non-existent, no orders could

be granted in its favor? The Court held that whilst the initial Defendant was non-existent, the actual Defendant, Fletcher Construction (Fiji) Ltd, remained ready and willing to do all things necessary for the proper conduct of arbitration, and in its ultimate finding granted the proper Defendant, designated as Fletcher Construction (Fiji), a division of Fletcher Building (Fiji) Ltd, the order for stay it sought together with costs.

22. The ruling of the Acting Master in the *discontinued proceedings*, HBC 190 of 2022, appears consistent with the ruling in the *Roadwork Fiji Ltd* case in awarding costs against the proper Plaintiff, in this instance Dhirendra Prasad Sharma, trading as On Time Engineering. The basis for the discontinuation of proceeding was that the proper Plaintiff, was a business name, that existed at all relevant times, and not the limited liability company, named in the proceeding.
23. The decision of the Acting Master must be understood in this regard. He did not rule that as the Plaintiff was non-existent, he could not award costs against it as this Court found in the *GHL* case, but in fact awarded costs against the proper available Plaintiff as the Court did in the *Roadwork Fiji Ltd* case.
24. In the Court's opinion, the learned Master's focus on the standing of the Plaintiff lead her to an unduly restrictive application of Order 21 rule 5. It was patently clear that the cause of action in HBC 190 of 2022 ('discontinued case'), and in HBC 219 of 2023, were the same, and that the latter was necessitated by the discontinuation of the earlier proceeding. It is also clear that the Acting Master in HBC 190 of 2022, was awarding costs not against a non-existent entity, but against Dhirendra Prasad Sharma who had in that proceeding "*identified himself as the intended and rightful Plaintiff trading as On-Time Engineering*"⁴ This admission was made at the outset of the hearing, and distinguishes this case from isolated cases like *Guangzhou Huitao Real Estate Investment Company Ltd v Century Holdings Ltd –Civil Action HBE 15 of 2004 (GHL Case)*, where costs could not be awarded because the Petitioner was non-existent, *under any pretext*, as it had not been registered as a company in Fiji, and nothing could be done to review that position on the peculiar facts of that case.
25. It is not of little moment and is necessary to note that the Plaintiff/Respondent had in fact been willing to pay limited costs for discontinuing proceeding before the Acting Master in HBC 190 of 2022, which does rather seat oddly with its current position

⁴ Paragraph 2 of the ruling of the Acting Master of 4 July 2024.

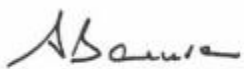
that it ought not pay costs at all as a non-existent entity.⁵ It is an issue which the Court has borne in mind when reaching its finding on costs

26. The Court finds that the Defendant/Applicant has discharged the onus that it has an arguable case made out on the basis of the Ground of Appeal in paragraph 1 (a) – (e) of the Summons for Leave to Appeal and that leave to appeal be granted on that basis.
27. The Court finds that it unnecessary to deal with the other proposed grounds of appeal raised by the Defendant/Applicant given its finding on these ground.

ORDERS

1. **Order in Terms of the Defendant/Applicant's Summons for Leave to Appeal the Decision of the Master of the High Court filed on 22 August 2024 granted.**
2. **Costs to the Defendant/Applicant summarily assessed at \$2000 to be paid within 14 days of the delivery of this Ruling.**




Savenaca Banuve
Judge

At Suva
28th February, 2025.

⁵ "29. The Plaintiff submits that the costs should be made at the rate of \$2500.00, in my view holds no valid basis".