IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CIVIL PETITION NO. CBV 0013 of 2019
[Court of Appeal No. ABU 0022 of 2018]

BETWEEN : **THE FIJI ELECTRICITY AUTHORITY**

Petitioner

AND : **PUNJAS FLOUR LIMITED**

Respondent

Coram : **The Hon. Madam Justice Chandra Ekanayake**
Judge of the Supreme Court

The Hon. Mr. Justice Priyasath Dep
Judge of the Supreme Court

The Hon. Mr. Justice Priyantha Jayawardena
Judge of the Supreme Court

Counsel : **Mr. A K Narayan and Ms. S Lata for the Petitioner**
Mr. C B Young for the Respondent

Date of Hearing : **16th of August, 2022**

Date of Judgment : **26th of August, 2022**

JUDGMENT

Ekanayake, J

[1] I have read the judgment in draft in the above case. I agree with the reasons, conclusions and the orders proposed.

Dep, J

[2] I have read in draft the judgment of Jayawardena J and I agree with his reasoning and conclusions.

Jayawardena, J

Facts in Brief

[3] The Petitioner stated that the Respondent set up a flour mill at Navutu Industrial Subdivision in Lautoka. Thereafter, in or around June 2005, the Respondent had entered into a contract with the Petitioner for the sale and supply of electricity to the said flour mills. Pursuant to entering into the said contract, the Petitioner had installed two (2) transformers and the main switchboard on the flour mill site and commenced supplying electricity to operate the said flour mill.

[4] Thereafter, the Petitioner had issued monthly invoices for the supply of electricity to the said flour mill measured on the meter of the said main switchboard, from July 2005, and the Respondent had paid the said invoices issued for the said period.

[5] Subsequently, the Plaintiff had installed and commissioned six new silos at the flour mill site in 2012. Hence, the Respondent requested an increase in the supply of electricity as it had enhanced the capacity of the mill. Accordingly, new installations too had been supplied with electricity from the said main switchboard with effect from the 26th of September, 2012.

[6] However, in or about August 2013, the Petitioner had replaced the electricity meter at the main switchboard, which had been in use since 2005. Thereafter, the Petitioner had sent a bill for a sum of $196,335.29 for the month of September – October, 2013. After the said

bill was received by the Respondent, it complained to the Petitioner that its electricity bill had gone up from $23,754.68 to $196,335.29 for the month of September – October, 2013.

[7] In response to the said complaint, the Petitioner had informed the Respondent that a defect in metering had been identified in or around September, 2013 and that it had been rectified on the 9th of September, 2013. Further, the said defect had been caused due to the faulty work of the Petitioner's servants or agents whilst installing the meter in the year 2005. Further, it was stated that it was revealed that the Respondent had been undercharged for its electricity consumption over a period of time.

[8] Following the said revelation, the Petitioner had requested the Respondent to furnish details of the production figures to calculate the actual consumption of electricity with a view to recovering the actual charges due for the consumption of electricity.

[9] However, the Respondent had not furnished the documents requested by the Petitioner. Instead, it instituted an action against the Petitioner alleging that the Petitioner had breached the said contract to supply electricity. Further, the Petitioner had been negligent in installing the electricity meter, and it is now estopped from claiming money for the past consumption of electricity Furthermore, it was stated by the Petitioner that the Respondent sought declaratory and injunctive reliefs to prevent the Petitioner from claiming money for additional electricity consumed by it.

Statement of Claim

[10] The Respondent stated that the installation of the meter had caused the alleged error in the calculation of the consumption of electricity. Further, the alleged error was caused due to the negligence of the employees and/or agents of the Petitioner and thereby, it resulted in a breach of the contract to supply electricity to the Respondent. It was further alleged that the Petitioner had impliedly represented to the Respondent that the transformers, the switch board, and the electricity meter were properly installed.

[11] Further, the Petitioner was under a duty of care to the Respondent to employ competent persons and to exercise reasonable skill and care in carrying out the installation of the transformers, the main switchboard, the electricity meter, and the laying of cables for the supply of energy to the flour mill.

[12] Furthermore, the Respondent pleaded that it had relied on the Petitioner's representation and acted on it. Particularly, it had paid the monthly invoices issued by the Petitioner between 2005 and 2013. Furthermore, the Respondent had relied on the monthly bills sent to it by the Petitioner and used the said bills to calculate the operating expenses to calculate the taxable income.

[13] Moreover, it was stated that it had relied on the monthly invoices and furnished them to the Prices and Incomes Board and to the Commerce Commission of Fiji to fix or amend the price of flour from 2005 to 2013. The Respondent stated that it would be adversely affected if the Petitioner was allowed to claim unbilled charges for the period of 2005 to 2013. Particularly;

(a) the Respondent cannot claim adjustment in flour prices fixed by the Prices & Incomes Board or by the Commerce Commission of Fiji between 2005 and 2013.
(b) the Respondent cannot recover the additional charges from the buyers of flour sold between 2005 and 2013.
(c) the Respondent has lost the chance to compute the taxable income between 2005 and 2013.
(d) the Respondent would suffer substantial loss of income in the year of payment and that would adversely affect its net profit and dividend payments to its shareholders.

In the circumstances, the Respondent prayed for;

"(i) a Declaration that the Petitioner is estopped from claiming from the Respondent any monies for unbilled charges for energy supplied between July, 2005 and September, 2013,

(ii) a Declaration that the Petitioner is responsible for its own losses and cannot claim such losses from the Plaintiff.
(iii) a Declaration that the Petitioner's claim or part of it is unenforceable by reasons of section 4 of the Limitation Act.
(iv) an injunction restraining the Petitioner and/or its servants or agents from demanding or procuring payment (including by disconnection of supply) for unbilled charges for the electricity supplied to the Defendant between July,

2005 and September, 2013, until the final determination of the case or until further Order of the Court.

(v) Costs of this proceeding."

Statement of Defense

[14] The Petitioner had filed a Statement of Defense denying the allegations made in the Statement of Claim and included a counterclaim against the Respondent for the unpaid electricity consumed over the period of July, 2005 to September, 2013. The Petitioner relied on the express and/or implied terms of the said contract, entered into with the Respondent to supply electricity, powers under the Electricity Act, and restitutionary rights for unjust enrichment to recover the money for the unpaid electricity.

[15] The Petitioner further stated that the Respondent knew or ought to have known about the metering defect and that its actual consumption well exceeded the billed amount. Further, it was agreed that the basis for billing for the electricity would be for the consumption of electricity at the applicable electricity tariff plus VAT.

[16] Alternately, the Petitioner was authorised under Regulation 71 of the Fiji Electricity Regulations to adjust the electricity account of the Respondent according to the criteria specified in the said Regulations. Hence, the Petitioner had requested the Respondent to provide details of the production and other information over the period of June, 2005 to September, 2013 to ascertain the correct consumption of electricity and calculate the charges that the Respondent ought to have been paying for the same.

[17] As the Respondent had failed to provide the required information, the Petitioner had calculated the consumption of electricity by taking into account the following factors;

a. average metric tons of wheat imported by the Respondent per month,
b. approximate metric tons of wheat processed,
c. wheat to flour extraction factor of 79,
d. total bills paid by the Respondent during the metering anomaly was rectified,
e. average monthly consumption after metering anomaly was rectified,
f. actual power demand advised by Respondent's consultants, and

g. adjusting the power demands for the various periods from June 2005 to April 2014 based on additional demand.

[18] After applying the prevailing tariff and VAT rates, the Respondent owes the Petitioner a sum of $5,093,747.20 for the consumption of electricity and/or under the Electricity Regulations. In the alternative, the Respondent has unjustly enriched itself due to a defect in the metering system installed by the Petitioner from June, 2005 to September, 2013**.**

[19] Further, the Petitioner is not barred from making a claim for the value of the benefit obtained or received by the Respondent by way of restitution.

In the circumstances, the Petitioner prayed for;

> *"1. The Plaintiff's claim be dismissed with costs,*
> *2. A declaration that the plaintiff is obliged to pay for the unbilled units of electricity supplied and utilized by the Plaintiff at its flour mill,*
> *3. Judgment for the sum of $5,093,747/21 or such other sum as the court may assess, and*
> *4. Interest pursuant to the Law Reform (Miscellaneous Provisions) (Death and Interest) Act from the date and at a rate to be fixed by the Court."* [emphasis added]

Application for Specific Discovery

[20] After the pleadings were completed, the Petitioner had filed an application for Discovery of documents stating that it was necessary to have the said documents to ascertain the actual consumption of electricity by the Respondent and the Respondent's knowledge of the actual consumption. Further, it would defeat the defense of negligence and estoppel raised against the Petitioner.

[21] The application filed by Petitioner for the discovery of documents included the following documents;

> " *[i] THAT the Plaintiff do within 14 days disclose by affidavit whether copies of records for the purchase and/or import of all wheat the Plaintiff for the years 2005 to 31st December 2014 pertaining to the Plaintiff are or have at any time been in their possession, custody or power and if it parted with them, when it parted with any of them and what has become of them* *__AND__*

FOR A FURTHER ORDER that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant.

[j] *THAT the Plaintiff do within 14 days disclose by affidavit whether copies of records of sales of flour and other manufactured items by the Plaintiff in the course of its business for the years 2005 to 31st December 2014 pertaining to the Plaintiff are or have at any time been in their possession, custody or power and if it parted with them, when it parted with any of them and what has become of them AND FOR A FURTHER ORDER that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant.*

[k] *THAT the Plaintiff do within 14 days disclose by affidavit whether copies of all VAT returns filed by the Plaintiff with the Fiji Revenue & Customs Authority or its predecessor for the years 2005 to 31st December 2014 pertaining to the Plaintiff are or have at any time been in their possession, custody or power and if it parted with them, when it parted with any of them and what has become of them AND FOR A FURTHER ORDER that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant.*

[l] *THAT the Plaintiff do within 14 days disclose by affidavit whether copies of all VAT assessments issued to the Plaintiff by the Fiji Revenue and Customs Authority or its predecessor for the years 2005 to 31st December 2014 pertaining to the Plaintiff are or have at any time been in their possession, custody or power and if it parted with them, when it parted with any of them and what has become of them AND FOR A FURTHER ORDER that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant.*

[m] *THAT the Plaintiff do within 14 days disclose by affidavit whether copies of full financial statements including balance sheets / profit and loss/ depreciation schedule filed by the plaintiff with the Fiji Revenue and Customs Authority or its predecessor for the years 2005 to 31st December 2014 pertaining to the Plaintiff are or have at any time been in their possession, custody or power and if it parted with them, when it parted with any of them and what has become of them AND FOR A FURTHER ORDER that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant.*

[n] *THAT the Plaintiff do within 14 days disclose by affidavit whether copies of tax assessments issued by the Fiji Revenue and Customs Authority or its predecessor to the Plaintiff for the years 2005 to 31st December 2014 pertaining to the Plaintiff are or have at any time been in their possession, custody or power and if it parted with them, when it parted with any of them and what has become of them AND FOR A FURTHER ORDER that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant.*

[p] THAT the Plaintiff do within 14 days disclose by affidavit whether copies of all documents containing installed loads in the Plaintiff's flour mill for 2005 to 31st December 2014 pertaining to the Plaintiff are/or have at any time been in their possession, custody or power and if it parted with them when it parted with any of them and what has become of them AND FOR A FURTHER ORDER that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant.

[q] THAT the Plaintiff do within 14 days disclose by affidavit whether copies of all documents containing records in any form including but not limited to digital photographic or computer generated records, of the milling of wheat and production of flour at its flour mill at Navutu-Levuka for the years June 2005 to December 2014 pertaining to the Plaintiff are or have at any time been in their possession, custody or power and if it parted with them, when it parted with any of them and what has become of them AND FOR A FURTHER ORDER that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant.

[r] THAT the Plaintiff do within 14 days disclose by affidavit whether copies of all submissions, reports or representations made or given to the Prices and incomes Board or the Commerce Commission in respect of the fixing of prices for flour produced from its flour mill and sold or to be sold for the years June 2005 to December 2014 pertaining to the Plaintiff are/or have at any time been in their possession, custody or power and if it parted with them, when it parted with any of them and what has become of them AND FOR A FURTHER ORDER that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendant."

[22] The said application for discovery of documents was opposed by the Respondent on the basis that the documents sought by the Petitioner were highly confidential and commercially sensitive. Further, disclosure of such documents would end up in the hands of their business competitors through the Petitioner's solicitors, who are also handling legal matters for the competitor.

[23] Thereafter, the Master heard oral submissions of both the parties with regard to the application for specific discovery and allowed them to file written submissions. Notwithstanding the fact that the Respondent did not file an application before the Master to try the preliminary issues first before the trial, the Respondent had made an application to try the preliminary issues in the first instance in the written submissions filed before the Master

Ruling of the Master

[24] The Master of the High Court at Lautoka had delivered the Order on the 29th of April, 2016. The said ruling stated as follows;

*"**FINAL ORDERS***

1. *I grant order in terms of prayer (i), (j), (k), (l), (m), (n), (p), (q) and (r) of the Defendant's Amended Summons for Specific Discovery, dated 17th September, 2015.*

2. *As to prayer (m) of the Amended Summons, the plaintiff should disclose only the profit and loss balance sheet and books of account from which that balance sheet was made up for the relevant period concerned.*

3. *The Plaintiff be excused from disclosing the documents in prayer (i), (j), (k), (l), (m), (n), (p), (q), and (r) of the Defendant's Amended Summons, for Specific Discovery, unless within 14 days hereof the Defendant by its Solicitor give an undertaking in writing to the Plaintiff and the Court that the said documents/information will not be shown nor their contents will be divulged to anyone other than the Defendant and the Defendant will not use the said documents/information or permit it to be used for any purpose 'collateral' or 'ulterior' to the conduct of the action.*

4. *Any irrelevant part of a document that is subject to disclosure should be covered up with the document itself is produced.*

5. *Costs in the case."*

[25] Being aggrieved by the said Order delivered by the Master, the Respondent sought leave to appeal against the said Order. When the said application was taken up to consider the granting of leave, with the concurrence of the court, the parties had agreed to consider the application for leave and the appeal together. Thereafter, the said application was heard by the High Court, which dismissed the said application.

Judgement of the High Court

[26] After the hearing of the appeal the learned High Court judge had held inter alia;

> "*Having considered the submissions of both the counsel it is the considered decision and the first view of this court that even if there was a breach of natural justice in failing to consider or order a trial of a*

preliminary point, the only formal application the Master had dealt with was the Defendant's application for specific discovery. There was no formal application for the Master to deal with any application under Order 33. There could thus be no deprivation of a right of the plaintiff to the substantive hearing."

[27] Accordingly, the appeal had been dismissed by the High Court. Being aggrieved by the said Order, the Respondent appealed to the High Court.

[28] Being aggrieved by the judgment of the learned High Court judge dated 19th of June 2017, the Respondent had filed an appeal in the Court of Appel on the following grounds;

"1. That the learned Master was wrong to order specific discovery of commercially sensitive documents without first determining under Order 33 the preliminary questions or issues raised by the Appellant because such course was just and equitable to avoid the real risk of causing irreparable damage to the Appellant's business if the Appellant were to succeed on those questions or issues at the substantive hearing.

2. The learned Judge was wrong to dismiss the appellant's summons for leave to appeal on the ground that there was no formal application before the Master under Order 33 without considering and giving new weight to the following material factors:

(a) The appellants written submissions to the Master had raised Order 33;

(b) Order 33 was also raised in the Appellant's counsel's closing oral submissions to the Master;

(c)A formal application by either party was not necessary. Order 33 was applicant neutral. It could be invoked by the Court itself at any stage if justice so required and was no dependent upon an application by a party to the proceeding;

(d) The case of Steel v Steel [2001] C.P. Rep.106; and

(e) Justice of the case warranted the prior determination of the preliminary questions or issues under Order 33.

[29] The learned Judge was wrong not to grant leave, *allow the appeal and determine the preliminary questions or issues under Order 33 Rules 4(2), 5(1) and 7 before dealing with*

or directing ***the*** *Master to deal with the Respondent's Summons for specific discovery. (emphasis added)*

In the said appeal the Respondent prayed for -

"The Appellant seeks the following Orders:

(a) That the appeal be allowed and the judgment of Justice Sapuvida as well as the Master's Ruling and Orders be set aside; and

(b) That directions be given under Order 33 for the following preliminary issues to be determined by the High Court before the hearing of the Defendant's Summons for specific discovery and the Defendant's Counterclaim, namely:

(i) Whether the Defendant is estopped from claiming any monies for unbilled charges for energy supplied between July 2005 and 9 September 2013;

(ii) The true meaning and effect of Regulations 68(2)(b), 69(3)(b) & 71 of the Electricity Regulations; and

(iii) That costs of this appeal as well as the costs in the Courts below be awarded to the Appellant.

[30] After hearing the appeal, the Court of Appeal delivered its judgment on the 7th of June, 2019 and dismissed the appeal preferred by the Respondent. However, in paragraphs 18 and 19 of the judgement, the Court of Appeal directed the Master of the High Court to consider the preliminary issues at the first instance if an application is made by the Respondent for the same.

Judgement of the Court of Appeal

[31] After hearing the appeal, the Court of Appeal delivered its judgement on the 7th of June, 2019. The Court of Appeal inter alia held that;

[32] The Appellant is seeking an Order that the case be remitted back to the High Court with directions that the preliminary issues raised by the Appellant, namely, plea of estoppel and interpretation of regulations 68, 68 & 71 of the Electricity Regulations, be determined under Order 33 before the High Court hears the Respondent's Summons for Specific

Discovery and the Respondent's Counterclaim. This can be done is several ways under Order 33. One way is to first decide the Appellant's plea of estoppel and the interpretation point and if the plea of estoppel is unsuccessful then to determine the Respondent's Summons for Specific Discovery and the Respondent's Counterclaim based on unjust enrichment and regulation 71.

[33] Having considered the facts of the case, the learned Master had allowed the application for Specific Discovery of documents referred to in prayer (n) to (r), except prayer (o) in the said application. The said prayer (o) refers to copies of manuals, specifications, production capacity, etc. Further, it was held that the said documents would not assist in ascertaining the electricity usage of the plaintiff.

[34] In regard to request (i), the Respondent had requested for copies of the records for the purchase and/or import of all wheat of the plaintiff for the years 2005 to December 2014. Request (j) pertains to the sales of flour and other manufactured items in the course of its business during the same period. Whereas, requests (k) and (l) respectively deal with copies of all VAT returns filed by the plaintiff with the Fiji Revenue and Customs Authority and VAT assessments issued to the plaintiff for the relevant period. Request (m) pertains to full financial statements including balance sheets/profit and loss/depreciation schedules for the same period. Requests (n), (p), and (q) respectively refer to copies of TAX assessments issued by the Fiji Revenue and Customs Authority, documents containing installed loads in the plaintiff's flour mill, and records in any form, including but not limited to digital photographic or computer-generated records of the milling of wheat and production of flour during the relevant period. Lastly, request (r) deals with copies of submissions, reports or representations made or given to the Prices and Incomes Board or the Commerce Commission for the same period.

[35] The documents requested in (k), (l), (m), and (n) are documents that are already available with the Fiji Revenue and Customs Authority or at least documents the Appellant would have furnished to the above authority. Therefore, there was no reason to withhold an order for the discovery of those documents, as they were no longer confidential documents. The documents sought by the Petitioner are in respect of the period from 2005 to December,

2014. Hence, those documents do not have any commercial sensitivity. Undoubtedly, the particulars requested in prayers (i) and (j) are necessary to ascertain the correct amount of electricity consumption for the said period. In the same manner, prayers (q) and (r) are also necessary for such computation.

[36] In regard to prayer (r), the Respondent requested the reports to be submitted to the Prices and Incomes Board or the Commerce Commission for the relevant period. Therefore, the Respondent cannot claim either commercial sensitivity, confidentiality or secrecy of documents since those documents are already in the public domain.

[37] Therefore, in order to accurately calculate the amount of electricity used by the Respondent over the years, the Petitioner needed the said documentation and had made an application for Specific Discovery of documents. Therefore, the application for the Specific Discovery of documents should be allowed in order to calculate the accurate amount of electricity that had been consumed by the appellant during the relevant period.

[38] The Respondent had stated that it was not given an opportunity to try the preliminary issues, i.e. (a) estoppel; (b) interpretation of regulations 68(2)(b), 69(3)(b) and 71 of the Electricity Regulations, before making an order in respect of the application for Special Discovery of documents.

[39] A perusal of the High Court Record, especially the pleadings, did not reveal an application made by the appellant under Order 33. However, the appellant had in passing mentioned and requested the court to act on Order 33 Rule 3 and inquire into the alleged preliminary issues. These submissions had been filed on the 3rd of December, 2015 but as per the 'hearing notes' of the 25th of September 2015, an application had not been made by the Respondent requesting an inquiry under Order 33 of the High Court Rules.

[40] As per the journal entries aforementioned, it is clear that the hearing had commenced and concluded on the same day, and the Order was reserved for the 11th of March, 2016.

[41] Despite the claim of the Respondent regarding an application under Order 33 Rule 3, it is evident that it had not made such an application. The court cannot, therefore, act on mere conjecture without an application having been made in that regard. It was incumbent on

the Respondent to have made an application under Order 33 for the court to take cognizance of such a matter, without which the court could not have gone into an inquiry under Order 33.

[42] Further, the Court of Appeal held in paragraphs 18, 19 and 20 as follows:

> *"[18] The learned Master or the High Court Judge was not at fault. However, I am not unmindful of the consequences that will follow if the discovery of documents is permitted before the preliminary issues are dealt with. The alleged preliminary issues would certainly reduce or end the proceedings within a short time if they were answered in favour of the appellant. Therefore, I direct the learned Master to deal with the preliminary issues at the outset, provided a proper application is made before the Master. Hence, I hold that the application for the discovery of documents should be allowed. The Master is directed to carry out the orders of this court in relation to discovery of the documents subsequent to determining the preliminary issues.*
>
> *[19] If the Master decides the preliminary issues raised by the plaintiff/appellant in favour of the plaintiff/appellant, it will bring this case to a conclusion. Otherwise, the lower court can thereafter carry out the orders of this court in relation to the discovery of documents. In regard to the orders of the learned Master dated 29th April 2016, in order 4 he has ordered that "any relevant part of a document that is subject to disclosure should be covered up when the document itself is produced." I find this order of the Master to be vague, nebulous, and cryptic, which could potentially lead to confusion. To avoid such a situation, I direct the learned Master to decide and for the learned Master himself to lend his mind to the matter of determining the portions to be covered of the requested documents without delegating the task to any other person.*
>
> *[20] In view of the above reasons, I affirm the judgment of the learned High Court Judge dated 19th June 2017 and the ruling of the learned Master dated 16th April 2016 and I order the parties to bear their own costs. Subject to the above reasoning, the appeal is dismissed. Subject to the directions contained in paragraph 18, I answer the grounds of appeal thus;"*

[43] In the circumstances, the Court of Appel held that;

"Ground 1

I reject this ground of appeal for want of a formal application under Order 33 for the Master to consider an inquiry.

Ground 2

Responding to 2(a), (b), (c) and (d) cumulatively, I find that the appellant failed to plead Order 33 in the pleadings albeit raising the issue of Order 33 in its submissions. A formal application is necessary for the court to act and in the absence of such the court cannot take cognizance of an un-pleaded issue. Even the criteria enunciated in Steel v Steel [2001] c.p.Rep.106 requires a proper formal application. Hence, I reject the 2nd ground of appeal.

Ground 3

It is redundant to answer this issue, as the learned High Court Judge by his ruling dated 13th of April, 2018 had allowed the application for leave to appeal the interlocutory order.

Ground 4

For the reasons stated above, I reject this ground of appeal.

Orders of Court:

1). Appeal dismissed.

2). Parties to bear their own costs."

Leave to Appeal Application

[44] Being aggrieved by the directions given to the Master in paragraphs 18, 19 and 20 of the said judgment of the Court of Appeal dated 7th of June, 2019 the Petitioner sought leave to appeal from the Supreme Court against the said directions in the Court of Appeal judgment.

The Petitioner stated inter alia;

[45] The application for Specific Discovery of documents made by the Petitioner was heard on the 3rd of December, 2015 by the Master in the High Court at Lautoka and an Order was delivered on the 29th of April, 2016.

[46] Being aggrieved by the said Order, the Respondent had appealed to the High Court. After the hearing, the High Court and delivered the judgement on the 19th of June, 2017 and dismissed the appeal. Thereafter, the Respondent had appealed to the Court of Appeal against the said judgment of the High Court. After hearing the appeal, the Court of Appeal

delivered its judgement on the 7th of June, 2019. In the Orders, the Court of Appeal had stated;

(a) The Appeal is dismissed.

(b) Parties to bear their own costs.

[47] However, the Court of Appeal in paragraphs 18 and 19 of the said judgement directed the Master of the High Court in Lautoka to consider the preliminary issues at the outset, provided that a proper application is made to the Master by the Respondent to try the issues before the Respondent discloses the documents ordered by the Master. The Petitioner stated that the Respondent has not made an application to date before the Master of the High Court under Order 33 Rule 3 of the High Court Rules, although the Respondent's solicitors have intimated to the court that a formal application would be made.

[48] In the circumstances, the Petitioner pleaded that the Court of Appeal erred in law by giving directions requiring the Master of the High Court to hear a trial of preliminary issues if an application is made by the Respondent. Further, the Court of Appeal erred in law by directing the Master to deal with the preliminary point if an application is made by the Respondents prior to them disclosing the documents referred to in the Master's Order, as those documents are necessary to counter;

a. the issue of negligence,
b. the issue of estoppel, and
c. the issue of unjust enrichment on the counterclaim raised by the Respondent.

Grounds of Appeal

[49] The petitioner pleaded the following grounds of appeal in the petition;

Ground 1

The Court of Appeal erred in law by giving directions requiring the Master of the High Court to hear preliminary issues if an application is made by the Respondent.

a. The Court of Appeal had proceeded to correctly and unconditionally order the dismissal of the appeal;

b. *The Respondent had already argued in the Appeal that the Master erred by not dealing with the preliminary point first before dealing with discovery;*

c. *The Court of Appeal held that the Master could not be faulted as there was no such application before the Master of the High Court.*

Ground 2

The Court of Appeal erred in law by directing the Master of the High Court to deal with a preliminary point, if an application is made by the Respondents, prior to them providing discovery as ordered, when the Master lacked jurisdiction to hear a preliminary point under Order 33 of the High Court Rules.

Ground 3

The Court of Appeal erred in law by directing the Master to deal with the preliminary point, if an application is made by the Respondents prior to them providing discovery as ordered, when discovery of documents was required, necessary and relevant to the issues or a significant issue in the Respondent's anticipated matters for trial of preliminary issues namely;

a. the issue of negligence;
b. the issue of estoppel;
c. the issue of unjust enrichment on the counterclaim.

Ground 4

The Court of Appeal erred in law, by the directions preceding the final orders, by assuming that no evidence would be required or called by the parties (particularly the Petitioner) in determining the anticipated issues or significant issues (being those issues in 3(a) to (c) above) calling for determination as a preliminary issue if an application is made by the Respondent.

[50] In the circumstances, the Petitioner stated that it suffered substantial and grave injustice, and the issues raised in the instant application are far-reaching questions of law, matters of great general and public importance. Further, the appeal raises novel issues of law and issues of law relating to matters of practice and procedure in civil litigation.

[51] Furthermore, the subject matter of the instant appeal raises issues of substantial general interest to the administration of civil justice insofar as it is relevant to all civil proceedings brought before the courts, which are relevant to compliance with Orders, directions that

can be given by the Court of Appeal, and matters of practice and procedure which affect the general public at large.

[52] Hence, the Petitioner prayed to set aside the directions given in paragraphs 18 and 19 of the said judgement of the Court of Appeal without interfering with the Order of the court which dismissed the said appeal.

Submissions of the Petitioner

[53] The counsel for the Petitioner submitted that an application was made for the discovery of certain documents in order to establish the Respondent's knowledge of the actual consumption, which would defeat the defense of negligence and estoppel raised against the Petitioner. The above application was opposed by the Respondent on the basis that the documents sought by the Petitioner were highly confidential and commercially sensitive documents, which if disclosed, would end up in the hands of the Respondent's business competitor through the Petitioner's solicitors, who are said to be handling legal matters for the Respondent's competitor. In the circumstances, the Petitioner was compelled to file an application before the Master for specific discovery of documents. Further, after an inquiry, the Master allowed the said application of the Petitioner. Moreover, the Master allowed the application made by the Petitioner for the discovery of documents. Later, the High Court affirmed the said Order.

[54] Further, the Court of Appeal dismissed an appeal made by the Respondent against the judgment of the High Court. However, in paragraphs 18 and 19 of the judgment, the Court of Appeal had given directions to the Master of the High Court in Lautoka to consider the preliminary issues at the outset if a proper application is made before him to try the issues prior to the trial.

[55] It was further submitted that the Court of Appeal held that the Master could not be faulted as there was no application to consider the preliminary issues before the Master of the High Court. Further, the Court of Appeal had unconditionally ordered the dismissal of the appeal preferred by the Respondent. Therefore, it was submitted that, having dismissed the appeal,

the Court of Appeal erred in law by giving directions to the Master of the High Court to hear preliminary issues if an application is made by the Respondent.

[56] Furthermore, the Court of Appeal erred in law by directing the Master of the High Court to consider preliminary issues if an application is made by the Respondent prior to disclosing documents as ordered by the Master. Moreover, the Master does not have jurisdiction to hear a preliminary issue under the High Court Rules.

[57] Moreover, the Court of Appeal erred in law by directing the Master to consider the preliminary issues when discovery of documents was required to counter the defense of -

a. the issue of negligence, and

b. the issue of estoppel raised by the Respondent.

[58] Furthermore, those documents are needed to prove the counterclaim.

[59] It was further submitted that the Court of Appeal erred in law by giving directions to hear the preliminary issues before the discovery on the basis that no evidence would be required or called by the parties at the trial.

[60] In the circumstances, the counsel for the Petitioner submitted that the Petitioner has suffered substantial and grave injustice and the issues raised in the instant application are far-reaching questions of law, matters of great general and public importance. Further, the appeal raises novel issues of law and issues of law relating to matters of practice and procedure in civil litigation.

[61] Further, the subject matter of the instant appeal raises issues of substantial general interest to the administration of civil justice and they are relevant to all civil proceedings brought before the courts.

[62] In the circumstances, the counsel for the Petitioner moved court to set aside the directions given in paragraphs 18 and 19 of the said judgement of the Court of Appeal without interfering with the Order of court which dismissed the said appeal.

Submissions of the Respondent

[63] The counsel for the Respondent opposed the granting of leave to appeal on the basis that none of the questions raised in the Petition satisfy the threshold requirements stipulated in section 7(3) of the Supreme Court Act, 1998.

[64] Further, it was submitted that;

(a) the judgment of the Court of Appeal dealt with procedural matters arising from an interlocutory Order of the Master and it did not determine any substantive rights of the parties.
(b) the decision of the Court of Appeal is relevant only to the parties of the instant application and it is not a matter of public interest.
(c) the petition does not raise any novel point or an important question of law.
(d) there would not be any prejudice to the Petitioner by postponing the application for Specific Discovery of documents until the determination of the preliminary issues; and
(e) the Court of Appeal was correct in considering Order 33 and giving directions to the Master.

[65] Furthermore, the counsel for the Respondent submitted that;

(i) there are no conflicts between the formal Orders made by the Court of Appeal and the directions given by that court. Further, the formal orders and the directions given by the Court of Appeal are not contradictory, inconsistent or illogical as submitted by the Petitioner,

(ii) the formal Orders must be construed in the context of the entire judgment. Further, the formal Orders were not unconditional, but were clearly qualified by, or made subject to, the directions in paragrphs18 and 19 of the judgment,

(iii) the directions in paragraph 18 and 19 of the judgement are not inconsistent with the finding that the learned Master and the High Court judge were not at fault in not dealing with the matter under Order 33. The Court of Appeal took the view that as there was

no formal application before the Master and the High Court and therefore, they were justified in not considering Order 33.

(iv) the Court of Appeal had the powers to deal with Order 33. Section 13 of the Court of Appeal Act and Rule 22(3) & (4) of the Court of Appeal Rules allow the Court of Appeal to make such orders,

(v) the directions in paragraph 18 and 19 were part of the judgment of the Court of Appeal and were fair and just and protected the interests of both parties. The Petitioner would get an opportunity to have the documents ordered by the Master, if the Respondent was unsuccessful on its application,

(vi) the Court of Appeal did not direct the Master to personally determine the application under Order 33. Consequently, there is no issue of the Master's lack of jurisdiction or the Court of Appeal conferring jurisdiction on the Master,

(vii) the purpose and intent of the Court of Appeal's directions are clear. They are for the proper authority to deal with the application under Order 33 and was not intended for the Master to decide it, if he had no jurisdiction,

(viii) the Court of Appeal is presumed to have known the jurisdiction of the Master under Order 59,

(ix) the real purpose of the application for specific discovery was to support the Petitioner's counterclaim of unjust enrichment. Hence, the discovery of documents has little relevance to the preliminary issues or to the directions given by the Court of Appeal, and

(x) the Court of Appeal did not assume that the Respondent would not be calling evidence. What the Court stated was that the determination of the preliminary issues will reduce or end the proceedings within a short time, if they were answered in favour of the Respondent.

Criteria for Grant of Special Leave

[66] Section 7(3) of the Supreme Court Act, 1998 states that in civil matters the court "must not grant special leave to appeal unless the case raises: -

a. a far reaching question of law;

b. a matter of great general or public importance;

c. a matter that is otherwise of substantial general interest to the administration of civil justice."

[67] The counsel for the Petitioner submitted that the grounds of appeal and the questions of law raised in the petition warrant granting of leave to appeal. Further, it was submitted that the above criteria are met by the Petitioner.

[68] In view of the above, the counsel for the Petitioner submitted that leave to appeal should be granted and the appeal should be allowed.

Consideration of Granting of Leave to Appeal

[69] The jurisdiction of the Supreme Court with respect to special leave to appeal is set out in section 7 of the Supreme Court Act, 1998 which states;

> *7(1) In exercising its jurisdiction under section [98 of the Constitution of the Republic of Fiji] with respect to ... leave to appeal in any civil or criminal matter, the Supreme Court may, having regard to the circumstances of the case-(a) refuse to grant ... leave to appeal;*
>
> *(b) grant ...leave and dismiss the appeal or instead of dismissing the appeal make such orders as the circumstances of the case require; or*
>
> *(c) grant ... leave and allow the appeal and make such other orders as the circumstances of the case require.*
>
> *7(2) In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless-*
>
> ***(a)*** *A question of general legal importance is involved;*
> ***(b)*** *A substantial question of principle affecting the administration of criminal justice is involved; or*

(c) Substantial and grave injustice may otherwise occur."

7(3) In relation to a civil matter (including a matter involving a constitutional question) the Supreme Court must not grant special leave to appeal unless the case rises -

a. A far reaching question of law;
b. A matter of great general or public importance;
c. A matter that is otherwise of substantial general interest to the administration of civil justice."

[70] The criteria laid down in section 7(3) of the Supreme Court Act, 1998 in order to obtain special leave shows that special leave to appeal to the Supreme Court cannot be obtained as a matter of course but after fulfilling the criteria set out by the Act.

[71] In view of the fact that the legislator has set out a criteria that needs to be satisfied to obtain special leave to appeal, it is necessary to consider whether the Appellant has met the threshold set out in section 7(3) of the Supreme Court Act. Thus, the court has to consider whether the instant appeal contains any of the grounds setout in section 7(3) of the Supreme Court Act.

[72] A question of general legal importance or a substantial question of principle affecting the administration of criminal justice or a substantial and grave injustice that may otherwise occur.

[73] I have considered the grounds of appeal and the questions of law stated in the petition, and I am of the view that the said questions of law that are required to be determined in this appeal are far-reaching questions of law, matters of great general and public importance, and has substantial general interest to the administration of civil justice.

[74] Thus, I hold that the Petitioner has satisfied the threshold contemplated in section 7(3) of the Supreme Court Act, 1998 to obtain special leave to appeal and therefore, in the circumstances of this appeal the application for special leave is allowed.

Analysis

[75] The counsel for the appellant submitted that paragraphs 18 and 19 contain directions to the Master. Further, the said directions are contrary to the provisions of the High Court and the Rules published thereunder. Moreover, the said findings are contradictory to the Orders made in the said judgment. Hence, he moved court to set aside the directions given in paragraphs 18 and 19 of the said judgment of the Court of Appeal without interfering with the Order of court which dismissed the said appeal.

[76] The counsel for the Respondent submitted that paragraphs 18 and 19 do not contain directions to the Master to try the issues by himself. In this regard, it was submitted that the Master could refer the issues to the High Court to try them before the trial. Thus, it was submitted that the said paragraphs does not contradict the Order made by the judgment of the Court of Appeal.

[77] The issues that need to be considered in this appeal are -

(1) whether paragraphs 18, 19 and 20 contains directions to Master,

(2) whether the contents in paragraphs 18 and 19 are contrary to the conclusion and the Orders of the Court of Appeal.

(3) Whether the directions given in paragraphs 18 and 19 of the said judgement are contrary to High Court Act and the Rules

[78] Hence, I will first consider whether paragraphs 18 and 19 of the Court of Appeal judgment contains directions to the Master.

[79] The Court of Appeal in its judgement inter alia held that;

"**<u>Ground 1</u>**

I reject this ground of appeal for want of a formal application under Order 33 for the Master to consider an inquiry.

Ground 2

Responding to 2(a), (b), (c) and (d) cumulatively, I find that the appellant failed to plead Order 33 in the pleadings albeit raising the issue of Order 33 in its submissions. A formal application is necessary for the court to act and in the absence of such the court cannot take cognizance of an un-pleaded issue. Even the criteria enunciated in *Steel v Steel* *[2001] c.p.Rep.106 requires* a proper formal application. Hence, I reject the 2nd ground of appeal.

Ground 3

It is redundant to answer this issue, as the learned High Court Judge by his ruling dated 13th April, 2018 had allowed the application for leave to appeal from the interlocutory order.

Ground 4

For the reasons stated above, I reject this ground of appeal.

Orders of Court:

1). Appeal dismissed.

2). Parties to bear their own costs."

However, paragraphs 18, 19 and 20 of the said judgement states as follows;

"[18] the learned Master or the High Court Judge was not at fault. However, I am not unmindful of the consequences that will follow if the discovery of documents is permitted before the preliminary issues are dealt with. *The alleged preliminary issues would certainly reduce or end the proceedings within a short time if they are answered in favour of the appellant. Therefore, I direct the learned Master to deal with the preliminary issues at the outset, provided a proper application is made before the Master.* Hence, I hold that the application for the discovery of documents should be allowed. *The Master is directed to carry out the orders of this court in relation to discovery of **the** documents subsequent to determining the preliminary issues.*

[19] *If the Master decides the preliminary issues raised by the ~~plaintiff/appellant~~* ***Plaintiff/Respondent*** *in favour of the plaintiff/appellant, it will bring this case to a conclusion.* Otherwise, the lower court can thereafter carry out the orders of this court in relation to the discovery of documents. In regard to the orders of the learned Master dated 29th April 2016, in order 4 he has ordered **that** "any relevant part of a document that is subject to disclosure should be covered up when the document itself is produced." I find this order of the Master to be vague, nebulous, and cryptic, which could potentially lead to confusion. To avoid such a situation, I direct the learned Master to decide and for the learned Master himself to lend his mind to the matter of determining the portions to be covered of the requested documents without delegating the task to any other person.

[20] In view of the above reasons, *I affirm the judgment of the learned High Court Judge dated 19th June 2017 and the ruling of the learned Master dated 16th April 2016 and I order the parties to bear their own costs. S*ubject to the above reasoning, the appeal is dismissed. Subject to the directions contained in paragraph 18, ~~and~~ I answer the grounds of appeal thus;"

Whether paragraphs 18 and 19 of the Court of Appeal judgment contains directions to the Master?

The relevant parts of paragraphs 18, 19 and 20 are reproduced bellow;

"[18] ……………………. *The alleged preliminary issues would certainly reduce or end the proceedings within a short time if they are answered in favour of the appellant. Therefore, I* ***direct*** *the learned Master to deal with the preliminary issues at the outset, provided a proper application is made before the Master.*

………………………………………. *The Master is directed to carry out* ***the orders of this court*** *in relation to discovery of the documents subsequent to determining the preliminary issues.*

[19] *If the Master decides the preliminary issues raised by the plaintiff/appellant in favour of the plaintiff/appellant, it will bring this case to a conclusion. ……………………………….*

[20] In view of the above reasons, *I affirm the judgment of the learned High Court Judge dated 19th June 2017 and the ruling of the learned Master dated 16th April 2016 and I order the parties to bear their own costs. S*ubject to the above reasoning, the appeal is dismissed. Subject to the **directions** contained in paragraphs 18 and 19. I answer the grounds of appeal thus;"

[80] Paragraph 18 of the judgement states - "……………Therefore, I direct the learned Master to deal with the preliminary issues at the outset, provided a proper application is made before the Master." Further, "… The Master is directed to carry out the orders of this court in relation to discovery of the documents subsequent to determining the preliminary issues." Moreover, in paragraph 19 it says "If the Master decides the preliminary issues raised by the plaintiff/appellant in favour of the plaintiff/appellant, it will bring this case to a conclusion." Furthermore, paragraph 20 states "Subject to the directions contained in paragraphs 18 and 19 I answer the grounds of appeal thus;"

[81] A careful consideration of paragraphs 18, 19 and 20 of the judgement shows that the said paragraphs contain specific directions given to the Master to consider the preliminary issues at the outset if a proper application is made before the Master by the Respondent.

[82] Hence, I am of the opinion that the learned judge of the Court of Appeal has given a direction to the Master to try the preliminary issues before the trial.

[83] Further, the Master is bound by the said direction given by the Court of Appel and thus, it is not possible for the Master to refer the case to the High Court to try the issues before the trial. Further, the High Court is unable to exercise its jurisdiction to try the issues before the trial in view of the direction given to the Master by the Court of Appeal.

[84] Now I will consider the findings of the Court of Appeal with regard to the Order made by the Master. The judgment of the Court of Appeal states, "the learned Master or the High Court Judge was not at fault." Further,

“Ground 2

[85] Responding to 2(a), (b), (c) and (d) cumulatively, I find that the appellant failed to plead Order 33 in the pleadings albeit raising the issue of Order 33 in its submissions. A formal application is necessary for the court to act and in the absence of such the court cannot take cognizance of an un-pleaded issue. Even the criteria enunciated in *Steel v Steel [2001] c.p.Rep.106 requires* a proper formal application. Hence, I reject the 2nd ground of appeal.”

[86] As the Respondent has not canvassed the said finding in the judgment or the Court of Appeal judgment with regard to the legality of the Order made by the Master, it is not necessary to consider the legality of the said Order in this appeal. In any event, the Respondent has not canvassed the said finding in the Court of Appeal judgement before this court.

[87] The legality of the directions given to the Master in paragraphs 18 and 19 of the said judgment will be considered now to ascertain whether the Court of Appeal erred in law by directing the Master to try the issues before the trial and whether the direction given to the Master in paragraphs 18 and 19 is contrary to the provisions of the High Court Act and the Rules.

Did the Court of Appeal err in law by directing the Master to try the issues before the trial?

[88] The Petitioner has filed an application for discovery and inspection of documents under Order 24 of the High Court Rules, after the pleadings were closed. The said application had been taken up for inquiry by the Master and parties had made oral submissions before the Master. Further, both parties had filed written submissions. Thereafter, the Master had delivered the Order allowing the said application for discovery.

[89] The Respondent had submitted to the Court of Appeal that at the inquiry before the Master it made an application to hear the preliminary issues in the case prior to making an order to disclose the documents. Further, the said request was made in the written submissions

filed before the Master. In this regard, the Court of Appeal has made the following observations in its judgement.

> *The Respondent stated that it was not given an opportunity to try the preliminary issues, i.e. (a) estoppel; (b) interpretation of regulations 68(2)(b), 69(3)(b) and 71 of the Electricity Regulations, before making an order in respect of the application for Special Discovery of documents.*
>
> *On a perusal of the High Court Record, especially the pleadings, did not reveal an application made by the appellant under Order 33. However, the appellant had in passing mentioned and* ***requested the court to act on Order 33 Rule 3*** *and inquire into the alleged preliminary issues. These submissions had been filed on the 3rd of December, 2015 but as per the 'hearing notes' of the 25th of September 2015, an application had not been made by the Respondent requesting an inquiry under Order 33 of the High Court Rules.*
>
> *As per the journal entries above, it is clear that the hearing had commenced and concluded on the same day, and the Order was reserved on the 11th of March 2016. Despite the claim of the Respondent regarding an application under Order 33 Rule 3, it is evident that it had not made such an application. The court cannot, therefore, act on mere conjecture without an application having been made in that regard. It was incumbent on the Respondent to have made an application under Order 33 for the court to take cognizance of such a matter, without which the court could not have gone into an inquiry under Order 33.*

[90] At the hearing before the Supreme Court, the counsel for the Respondent admitted that the Respondent did not make any application under Order 24. Further, a formal application was not made to the Master under Order 33 rule 3 to try the issues before the trial.

[91] As stated above, after the pleadings were closed, the Petitioner has made an application for discovery. The respondent has objected to the said application on the basis referred to above. However, in the written submissions, the Respondent has requested to try the issues before the trial under Order 33. It is pertinent to note that at no stage of the case the Respondent had made an application under Order 24 rule 4 of the High Court rules to determine the issues before the trial.

High Court Order 24 rule 4 states;

"Order for determination of issue, etc., before discovery *(O.24, r.4)*

4.– (1) Where on an application for an order under rule 2 or 3 **it appears to the Court** that any issue or question in the cause or matter should be determined before any discovery of documents is made by the parties, the Court **may** order that that issue or question be determined first.

(2) Where in an action begun by writ an order under this rule for the determination of an issue or question, Order 25, rules 2 to 7 shall, with the omission of so much of rule 7(1) as requires parties to serve a notice specifying the orders and directions which they desire and with any other necessary modifications, apply as if the application on which the order was made were a summons for directions."

"***Discovery by parties without order*** *(O.24, r.2)*

2.–(1) Subject to the provisions of this rule and of rule 1 and rule 4, the parties to an action between whom pleadings are closed must make discovery by exchanging lists of documents and, accordingly, each party must, within 14 days after the pleadings in the action are deemed to be closed as between him and any other party, make and serve on that other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question between them in the action.
[emphasis added]

"Order for discovery *(O.24, r.3)*

3.–(1) Subject to the provisions of this rule and of rules 4 and 8, the Court may order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to make and serve on any other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter, and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.

(2)   …………………

(3)   …………………"

[92] The words "Where on an application for an order" in Order 24 rule 4 requires a party to make an application for the discovery of documents. In such instances, if it appears to court that any issue or question in the case or matter should be determined before any discovery of documents is made by the parties, the court has the power to order an issue or question to be determined first.

[93] However, in the instant appeal, the Respondent has not made an application (either oral or written) under Order 24 rule 4 to determine the issues before an order for discovery. Further, there were no materials before the Master which requires the Master to make an order to determine the issues prior to the trial. Hence, after an interparty inquiry, the Master has allowed the application for discovery made by the Petitioner.

[94] In the circumstances, the Respondent is not entitled in law to invoke Order 24 rule 4 and request the court to determine the issues before the discovery. Thus, as the Master has already ordered to disclose the documents sought by the Petitioner, the Respondent cannot rely on Order 24 rule 4 at this stage of the case.

[95] Further, the Respondent has made an application in the written submissions filed before the Master and moved to try the issues before the trial under Order 33. Order 33 rule 3. The said rule states;

"Time, etc. of trial of questions or issues *(O.33, r.3)*

> **3**. **The Court may** order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and party of law, and **whether raised by the pleadings** *or* **otherwise**, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated." [emphasis added]

[96] Now I will consider the scope and applicability of Order 33 of the High Court rules.

[97] The word "may" used in the said Order shows that an order to try a preliminary issue cannot be obtained as of right. Further, the word "may" has conferred power on the court either to allow or refuse such an application.

[98] Further, by the use of the words "or otherwise" legislature made provision for any party to make an application to obtain an order to try the issues before the trial. Thus, the said Order casts a duty on the court to judicially evaluate such an application and make an appropriate Order by using judicial discretion. Hence, in order to use judicial discretion to evaluate such an application. It is necessary to have materials before court.

[99] Moreover, such an application should justify the court to try the preliminary issues before the trial. In this regard, such an applicant should satisfy court that trying the preliminary issues at the first instance shall dispose the case or substantial part of the case, and thereby, it will reduce the time taken to decide the case and the costs of the parties involved in the litigation. Further, the words "and may give directions as to the manner in which the question or issue shall be stated." Hence, Order 33 rule 3 requires the court to evaluate the materials before it and make an appropriate order.

[100] Furthermore, once such an application is made under Order 33 rule 3, it should be served on the other party so that the other party can either consent to the said application or oppose it. Thereafter, the court should hear the parties and make an appropriate Order.

[101] Moreover, the courts will not try issues before the trial which are complicated and mixed with law and facts. A similar view was expressed in ***Salim v iTaukel Land Trust Board*** where it was held:

"The issue is mixed law and fact and needs the hearing of the witnesses in this matter by the court. This type of case is not justified to deal in terms of Order 33 of the High Court Rules of 1988, as the matter is not complicated and will not serve any purpose except the delay and cost by proceeding this path. It is the court that needs to decide there is no need to proceed with Order 33 of the High Court Rules of 1988.

Further, i*n* ***Tilling and Another v Whiteman*** *[1979] 1 All ER 737 Lord Wilberforce (p738-739) it was held;*

"I, with others of your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of courts of appeal and tends to increase the cost and time of legal proceedings. If this practice cannot be confined to cases where the facts are complicated and the legal issue short and easily decided, cases outside this guiding principle should at least be exceptional."

[102] Thus, I am of the opinion that a formal application should be made by the parties to invoke the powers under Order 33 rule 3 unless, the pleadings disclose a requirement to try the issues before the trial. In such an instance even without an application, the court can act *ex mero motu* and make an order to try the issues before the trial.

Order 24 v Order 33 of the High Court Rules

[103] When considering Order 24 and Order 33, it is apparent that the said Orders provide for two different situations. Particularly, Order 24 deals with a situation where a party can make an application to determine an issue before discovery. However, Order 33 does not confer power on the court to determine an issue before the trial. Hence, the Respondent is not entitled in law to circumvent the Order made by the Master for discovery by invoking Order 33.

Legality of the directions given in paragraphs 18 and 19 of the judgement of the Court of Appeal

[104] Further, the Court of Appeal has held that there should be a formal application before court to consider an application to try the preliminary issues in the first instance. However, the Court of Appeal has directed the Master to try the preliminary issues in the first instance, if an application is filed for the same by the Respondent.

[105] I am of the opinion that the Court of Appeal erred in law by making such a direction, as a court cannot make decisions and/or give directions on assumptions and on a hypothetical basis.

[106] Further, as stated above, Order 33 casts a duty on the court to consider an application made under the said Order to decide whether to allow or refuse the same. This too shows that a proper judicial evaluation of the materials is needed to make a considered decision by court. However, the direction given by the Court of Appeal to the Master to consider the preliminary issues in the first instance has taken away the discretion conferred on the court by Order 33 of the High Court Rules. Thus, I am also of the view that the Court of Appeal erred in law by directing the Master to try the preliminary issues before giving effect to the Order made in respect of the discovery of documents.

[107] Further, Order 33 rule 1 and Order 33 rule 2 require to try any case, or matter, or any question or issue before a judge in court. Hence, Master has no jurisdiction to determine an issue before the trial.

Powers of the Master

[108] Further, Order 59 Rule 2 of the High Court Rules stipulates the powers of the Master. It states as follows:

> *"The Master shall have and exercise all the power, authority and jurisdiction which may be exercised by a judge in relation to the following causes and matters:*
>
> *(a) chamber applications, except in respect of -*

(i) injunction, other than injunctions by consent or in connection with or ancillary to charging orders;

(ii) proceedings involving the liberty of the subject;

(iii) criminal proceedings;

(iv) proceedings under the Family Law Act 2003;

(v) appeals from Magistrates Courts or any other tribunal;

(vi) applications for leave to seek judicial review: or

(vii) applications for constitutional redress;

(b) applications for summary judgement;

(c) proceedings under the Land Transfer Act (Cap 131) relating to caveats;

(d) assessment of damages where liability has been determined;

(e) entry of every order or judgment by consent;

(f) costs;

(g) applications for wind companies;

(h) mediation;

(i) applications and proceedings under the Fiji national Provident Fund Act (Cap 218)

(j) grants of Probates and letters of administration, where uncontested;

(k) possession of land under section 169 of the Land Transfer Act (Cap 131) and Orders 88 and 113, where uncontested and

(l) any other matter in respect of which jurisdiction is conferred upon the Master by or under any other written law or by the Chief Justice."

[109] A careful consideration of the said Order shows that the Master is not conferred the jurisdiction to try the issues before the trial

Whether the directions given in paragraphs 18 and 19 of the said judgment are contrary to the High Court Act and the Rules?

[110] Once a judgment is delivered by the Court, the Registrar of the Court is required to prepare 'Settling of Orders for Sealing' in terms of practice directions No. 3 of 2000 (30 June, 2000) containing the Orders of Court and seal the same. In view of the above, the directions given in the body of the Judgment cannot be included in the said ''Settling of Orders for Sealing" as direction given in the body of a Judgment does not form part of the Orders of court.

Thus, I am of the opinion that directions given in the body of a judgment does not form part of the Order of the judgment and therefore, the directions given to the Master in paragraphs 18 and 19 of the judgment is not a part of the 'Order' of Court. In the circumstances, I hold that the direction given in the said paragraphs of the judgment of the Court of Appeal is contrary to the aforementioned practice rule and the orders of the court.

[111] A careful consideration of the High Court Rules shows it does not confer power on the Master to determine the preliminary issues. Particularly, the Master has no jurisdiction to consider the preliminary issues before the trial. I have already held that paragraphs 18 and 19 of the judgement contains directions to the Master. In the circumstances, I hold that the directions given to the Master in paragraphs 18 and 19 of the judgement of the Court of Appeal-are contrary to the High Court Rules. Particularly, to Order 59 rule 2, Order 33 rule 1 and Order 33 rule 2 of the High Court rules.

Conclusion

[111] In the circumstances, I answer the below mentioned issues as follows;

(1) whether paragraphs 18, 19 and 20 contains directions to Master?
Yes.

(2) whether the contents in paragraphs 18 and 19 are contrary to the conclusion and the Orders of the Court of Appeal?
Yes.

(3) whether the directions given in paragraphs 18 and 19 of the said judgement of the Court of Appeal are contrary to High Court Act and the Rules?
Yes.

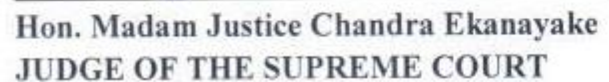
Orders of Court

(1) Appeal is allowed,

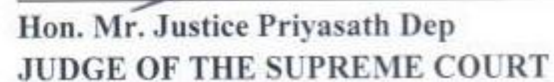
(2) I set aside the directions given in paragraphs 18, 19 and 20 of the judgement of the Court of Appeal dated 7th of June 2019,

(3) The answers given in respect of the grounds of appeal and the Orders of Court made in the said Court of are affirmed without any conditions,

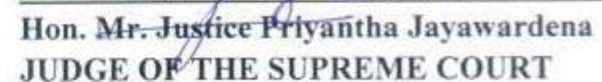
(4) No order as to costs.



Hon. Madam Justice Chandra Ekanayake
JUDGE OF THE SUPREME COURT



Hon. Mr. Justice Priyasath Dep
JUDGE OF THE SUPREME COURT



Hon. Mr. Justice Priyantha Jayawardena
JUDGE OF THE SUPREME COURT