

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL ABU 132 OF 2017
(High Court HBC 346 of 2015)

BETWEEN : **EMMET KENT MORGAN**
Appellant

AND : **RAVINDRA LAL**
Respondent

Coram : **Calanchini P**

Counsel : **Ms M Muir for the Appellant**
Mr A Chand for the Respondent

Date of Hearing : **7 August 2018**

Date of Ruling : **23 October 2018**

RULING

- [1] In an application before the Master of the High Court in Suva the Respondent (Lal) applied for an order for security for costs pursuant to Order 23 of the High Court Rules and the inherent jurisdiction of the Court. Order 23 of the Rules provides, so far as is relevant, that:

“(1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court

(a) that the Plaintiff is ordinarily resident out of the jurisdiction; or

*(b) - (d) _____
then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the Plaintiff to give such security for the defendant’s costs of the action or other proceeding as it thinks just.”*

[2] In a written Ruling dated 31 May 2017 the Maser ordered, amongst others, that:

“(1) The Plaintiff is hereby ordered to pay a sum of \$10,500.00 as security for costs into the Chief Registrar’s interest bearing account within 28 days.”

[3] Being dissatisfied with the Master’s Ruling the appellant (Morgan) sought to appeal the Ruling. Being an interlocutory Ruling Morgan was required to apply to a judge of the High Court for leave to appeal pursuant to Order 59 Rule 8(2) of the Rules. It was also necessary for Morgan to apply to the Judge for an enlargement of time under Order 59 Rule 10 of the Rules. In the application before the Judge Morgan relied upon 7 grounds of appeal against the Master’s Ruling. However, as the learned Judge noted, Morgan’s main contention was that the Master erred in law and in fact in holding that (1) Morgan was not a resident in Fiji by virtue of being an American national, since he has a Fiji Immigration work permit from 15 July 2015 to 15 July 2017, issued as a Director and shareholder of Morgan Enterprises Fiji Limited; he travels out of Fiji, but always returns to Fiji “*as place of abode*” his residential address is at the Waterfront Buildings, Savusavu and he owns substantial movable and immovable assets in Fiji.

[4] In a Ruling delivered on 4 October 2017 the High Court Judge granted an enlargement of time. However he refused the application for leave to appeal the Master’s Ruling.

[5] Being dissatisfied with the decision of the court below Morgan now appeals to this Court. In doing so he must satisfy two threshold requirements. First he must establish that his appeal involves a question of law only under section 3(4) of the Court of Appeal Act 1949 (the Act). Secondly he must obtain leave from the Court to appeal under section

12(2)(f) of the Act. In **Subindar Kaur –v- Baljeet Singh** [1999] FJCA 46; ABU 11 of 1998, 13 August 1999 this Court observed:

“Section 12(1)(c) [now section 3(4)] of the Court of Appeal Act confers a right to appeal to this Court from a decision of the High Court in the exercise of its appellate jurisdiction on grounds which involve a question of law only but the right is subject to subsection (2). Section 12(2)(f) provides that, subject to presently irrelevant exceptions, there shall be no appeal from an interlocutory order of the High Court except by leave.”

[6] These requirements that arise under section 3(4) and section 12(2)(f) of the Act are consistent with section 99(3) of the Constitution.

[7] The effect of these two provisions is that there is no right of appeal against an interlocutory order or judgment of the High Court unless leave is granted and one of the matters that must be determined when considering whether to grant leave in the case of any judgment given by the High Court in the exercise of its appellate jurisdiction, is whether any ground of appeal involves a question of law only.

[8] The grounds of appeal upon which Morgan seeks to rely in the event that leave is granted are set out in a notice of appeal attached to the supporting affidavit as:

- “1. *That the Learned Judge erred in law in misdirecting himself on the law for security for costs and took into account irrelevant considerations and failed to take into account relevant considerations.*
2. *That the Learned Judge erred in law in making a finding that the Plaintiff is not an ordinary resident within the jurisdiction when he:*
 - (a) Failed to give due weight to the evidence before the court in particular the Plaintiff's work permit and*
 - (b) Drew incorrect inferences that the Plaintiff's director and shareholder position in Morgan Enterprises resulted in his work permit which was separate from the resident issue being a personal issue.*
3. *That the Learned Judge erred in law in failing to give due consideration and weight to the Appellant's substantial assets in the jurisdiction that are available to satisfy costs.”*


- [9] The immediate issue that is properly before the Court of Appeal at the leave stage is whether any of the grounds of appeal raise an error of law alone. To that end the issue is whether the learned judge has applied the correct test for determining whether Morgan should be granted leave to appeal the Master's interlocutory Ruling. This is not the same as the question whether the learned Judge has applied the test for granting leave correctly. The first question does not involve the exercise of a discretion and is a question of law only. The second question does raise the issue whether there has been an error in the exercise of the discretion whether to order security for costs and my opinion involves mixed law and fact.
- [10] The grounds of appeal do not raise the issue whether the correct test was applied by the High Court refusing leave. The grounds seek to re-argue the issues that were before the Master. This is not an appeal from the Master's decision. This is an application for leave to appeal the decision of the High Court judge refusing leave to appeal the Master's decision. This Court is only concerned with the question whether the High Court judge was wrong when he refused the applicant leave to appeal the Master's decision. That issue can only be considered if the grounds for attacking the decision involve errors of law alone. Since it is not alleged that the learned judge applied the wrong test, the appeal does not raise an error of law alone.
- [11] However, even if a contrary view is taken in relation to the grounds of appeal, then, in my opinion the application for leave should be refused for two reasons. The first is the long established view expressed in this and other jurisdictions that an appellate court will not readily grant leave to appeal from an interlocutory Ruling arising from the exercise of a discretion: **Fong Sun Development -v- Minson Fiji Ltd** [1998] FJSC 3; CAV 7 of 1997, March 1998). Secondly, there is authority for the proposition that even if it is shown that the interlocutory decision was wrong, it will not be overturned unless substantial injustice would result should it be allowed to stand: **Nieman -v- Electronic Industries Ltd** [1978] VR 431.

- [12] I should also comment that on the material that was before the learned Judge I am not satisfied that his conclusion was wrong. The existence of a work permit cannot be regarded as evidence that the recipient of the permit is ordinarily resident in Fiji. That there is an address at which Morgan stays when he is in Fiji, that he is a director of a company registered in Fiji and that there are assets either in his name or in the company's name do not necessarily indicate that the person ordinarily resides in Fiji.
- [13] Counsel for the Appellant conceded that there was no evidence adduced based on Morgan's American passport, as to how many days in any given year Morgan actually stayed in Fiji.
- [14] Finally I am not satisfied that the order for the refusal to grant leave, if allowed to stand, would result in a substantial injustice to the Appellant.
- [15] For these reasons the application for leave to appeal is refused and the Appellant is ordered to pay \$2,000.00 costs to the respondent within 28 days from the date of this Ruling.

Order:

1. *Application for leave to appeal is refused.*
2. *Appellant to pay costs of \$2,000.00 to the Respondent within 28 days from the date of this Ruling.*





Hon Mr Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL