IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0011 OF 2022
[Suva Probate Action NO: 11 of 2020]

BETWEEN : **ATISH CHANDRA BIDESI**

Appellant

AND : **UDESH CHANDRA BIDESI**

Respondent

Coram : **Hon. Justice Filimone Jitoko, President Court of Appeal**

Counsel : **Mr Ronald Singh for the Appellant**
Mr D. Sharma for the Respondent

Date of Hearing : **11 August 2023**

Date of Decision : **19 August 2024**

DECISION

Introduction

[1] This matter was heard on 11 August 2023 by my predecessor, Dr. Justice Guneratne and the Decision was on Notice. Following his retirement soon after, the matter has remained in abeyance, until 20 February, 2024 and 21 March 2024 mentions where following the unsuccessful efforts by the parties to settle, this Court, after consulting with both Counsel, considered whether it could proceed to a decision on the strength of the parties'

submissions or, alternatively, require Counsel for re-submissions. On 5 August 2024, the Court decided, with the parties consent, to proceed to decide the Summons on the strength of the submissions already filed by Counsel for the Parties.

Background

[2] This is the Applicant's Summons for leave to appeal the Ruling of the Suva High Court of 4 October, 2021 that had refused to strike out the action by the Respondent seeking the transfer of some properties and assets from the Executor and Trustee of the estate of the deceased to a beneficiary, under the Will of the testator. The testator, Surya Munidial Bidesi, ("*SM Bidesi*"), was a well-known figure of Suva City, and he invested in a few properties around the city and its suburbs.

[3] In his Will dated 29 August, 2012 S M Bidesi, appointed Atish Chandra Bidesi, the Applicant/ Original Defendant, as the Executor and Trustee of his estate. The Applicant and the Respondent/Original Plaintiff, Udesh Chandra Bidesi, are brothers, nephews to S M Bidesi, and both beneficiaries under the Will. S M Bidesi died on 24 November 2013.

[4] Under the terms of the Will, the Respondent stood to inherit valuable assets, including real estate, proceeds from sale of property, percentage of residue held in overseas (New Zealand) account, and cash payment of NZ$500,000.00. These inheritance are all set out at paragraphs 10 – 14 of the Will.

[5] The time of distribution is also specified at paragraph 4 of the Will which inter alia, states:

> *"…the distribution is to be effected anytime within 5(five) years after my death. I hereby give my Executor the complete and absolute discretion to effect the distribution anytime within the timeframe that has been outlined."*

[6] The Applicant concedes that as the Executor of the estate he has not been able to fulfil the requirements in the Will for distribution of the assets of the estate to the beneficiaries to be done within 5 years of the death of the testator. He referred to the court proceedings

challenging the grant of probate, and when the challenges were overcome after 3 years delay, the Applicant was finally granted the Probate on 11 November, 2016. However, the distribution he stated, still could not be done as there were tax issues to be cleared with the tax authority, and then there was the time spent on the sealing of the probate in New Zealand.

[7] The only bequest that the Respondent has so for far secured, is the cash payment of NZ$500,000.00 paid on 28 November, 2018, four (4) days overdue from the 5 years time frame prescribed under the Will.

[8] In respect of the other bequests, the Applicant is yet to fulfil the testators wish for the transfer of real property and/or distribution of monies and proceeds from sale of property for reasons he explained, that there are legal impediments to transfer land, referred to as "*failed gifts*" by the Applicant, and difficulties in finding purchasers of the land, and tax related issues as well as "*marketing and selling costs*."

[9] It is in these circumstances that the Respondent filed his Writ (Probate Action No. 11 of 2020) in February 2020, generally seeking orders for the enforcement of the distribution of the bequests under the Will, by the Executor, the Applicant, the accounting of all the assets of the estate under the Chief Registrar's supervision, and other ancillary reliefs including the removal of the Executor, if he should fail to comply with the Orders sought and if granted.

[10] The Applicant on 13 May 2020 filed his application to strike out the claim with supporting Affidavit. The responding Affidavit by the Respondent was deposed by the solicitor's law clerk, Lemeki Sevutia. On 1 July, 2020, the Applicant filed an application by Summons, to expunge the Respondent's Affidavit, on the ground inter alia, that it disclose confidential materials that relate to private discussions on proposal for settlement that should not have been disclosed.

[11] The Summons was heard on April 2021 and the Ruling of the High Court handed down on 4 October, 2021. The Summons had sought the following orders from the Court:

1. The Affidavit of Lemeki Sevutia sworn and filed on 18th June, 2020 be wholly removed and expunged.
2. Alternatively, that paragraphs 17, 31 (d), (e), (f), (g), 33 (e), 34 (aa, ac(iii), 37 (g, h, I, ab), 45 (c), as well as annexures "B" and "E" of the affidavit of Udesh Chandra Bidesi sworn on 18th June, and marked as annexure "A" in the Sevutia Affidavit, be removed and/or expunged from the record.

[12] In support to his prayers above, the Applicant contended that the disclosures of the private negotiations for a settlement between the parties were confidential and should have been treated under the "*without prejudice privilege"* rule as its disclosure was highly prejudicial to the Applicant and therefore should be expunged.

The Proceedings in the High Court

[13] The Applicant's Summons of 9 July, 2020 as per paragraph [10] above, sought the affidavit of Lemeki Sevutia to be wholly removed and expunged, or, in the alternative, certain paragraphs and annexures to the affidavit of the Respondent of 18 June 2020 and marked as annexure "*A*" in Sevutia's affidavit, be removed and/or expunged from the court record.

[14] The summons further sought that;

"(3) The plaintiff file an affidavit in response in accordance with the Rules of the High Court within 14 days after the Order; and
(4) The Court extends the time for the defendant to file his affidavit in reply (which is due on 10th July, 2020) to 21 days after the plaintiff files his affidavit in response or after his application is determined by the Court."

[15] The application relies on Order 41 rule 6 of the High Court Rules 1988 which provides that:

"6. The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive."

[16] The Applicant's submissions in support of the Summons is premised on the general principle relating to *"without prejudice*" communication and specifically on the rule of evidence that communication between the parties which are for the purpose of a settlement of a dispute cannot be put in evidence without the consent of both parties. It is the Applicant's contention that the discussions he held with the Respondent including information the latter requested of, and the Applicant provided, on various properties of the estate, and the contents of the Deed, prepared by MC Lawyers and sent to the Respondent, were privileged and greatly prejudiced to the position of the Applicant as executor and trustee of the estate of S.M. Bidesi, when disclosed.

[17] The "*without prejudice*" element the Applicant contended, allows both parties to engage in confidential yet candid negotiations protecting their discussions from being used against them in Court.

[18] The High Court, after carefully analysing the submissions by Counsel, and the relevant considerations in the determination whether the communication between the Applicant and the Respondent may not be put in evidence without the consent of both parties, and guided by the judgment in **Naigulevu v. National Bank of Fiji** [2008] FJHC 14; Civil Action 598 of 2007 (15 February 2007), refused the Orders sought by the Summons and struck out the application.

[19] In its 4 October, 2021 Ruling the Court found, inter alia, that:

(i) the affidavit deposed by the law clerk, Lemeki Sevutia, was neither scandalous, or oppressive, but relevant, as the disclosed materials were in his knowledge,

(ii) the requirement of genuine effort by both parties towards, settlement, before "*without prejudice*" privilege can be invoked, did not exist.

(iii) from the actions of the Applicant in his capacity as the Executor of the Will, he appeared lethargic in failing to administer the estate in strict compliance with the time frame set out in the Will.

(iv) the Applicant cannot rely on the principles in **Slaveski v. Economakis [2006] VSC 244** as he had failed to convince the Court that he took reasonable steps to pursue settlement.

The Appeal

[20] In this application for leave to appeal against the interlocutory Ruling of the High Court, refusing to grant, and striking out the Applicant's Summons of 9 July 2020, to wholly remove and expunge or, alternatively, remove or expunge paragraphs in the affidavit of Lemeki Sevutia, the Applicant's grounds are as follows:

(1) the Court erred in law and fact by considering irrelevant matters and in any case the Respondent's affidavit was irrelevant or scandalous or oppressive and in breach of the "without prejudice" privilege.

(2) the Court erred in law and fact in not expunging the whole or part of Lemeki Sevutia's affidavit as the facts he deposed of were not within his knowledge.

(3) the contents of the affidavit by the Respondent and reproduced as annexures in the Sevutia's affidavit, are not facts within his knowledge, notwithstanding that the original affidavit by the Respondent was being couriered later.

(4) the Court erred in fact and in law, when it concluded that there was no genuine effort by the parties to settle the matter.

Were the Matters in the Affidavit Scandalous and/or relevant?

[21] For the affidavit to be struck out under Order 41 Rule 2, the Court must be satisfied that the matter contained in it, including any conduct, was *"scandalous, irrelevant, or otherwise oppressive."* The High Court stated at paragraph [23] in response, stated:

"[23] Scandalous statement is a statement that is irrelevant and abusive. There is no allegation of dishonesty in the plaintiff's affidavit . . ."

[22] Further allegations by the Respondent, of dishonesty or outrageous conduct by the Applicant and set out in the affidavit are not scandalous conduct, if they are relevant to the issue before the Court: **Everett v. Prythergch** [1841] 12 sim.363; **Rubery v. Grant** [1872] LR 13, Eq.443. The Court in **Christie v. Christie** [1873] LR 8 Ch. App.449 per Lord Selbourne LC (at p.503) added:

> *"The sole question is whether the matter alleged to be scandalous, would be admissible in evidence to show the truth of any allegation in the pleading which is material with reference to the relief prayed."*

[23] The allegation by the Respondent had failed to administer the estate in accordance with the testator's wishes and that seeking the legal advise or counsel of Munro Leys would be of assistance to the Applicant as executor of the estate are relevant not irrelevant or oppressive as alleged by him.

Was there a genuine attempt to settle?

[24] The High Court had taken into account the various meetings held between the parties, where it is accepted, there were discussions towards a settlement. Emphasis was placed on the draft Deed prepared by the solicitors of the Applicant already signed by the Appellant and sent to the Respondent for his signature. According to the Respondent, he had not agreed to the terms under the Deed and in his view, the Applicant had attempted to force him, by the provisions of the Deed to surrender various bequests from his late uncle's Will.

[25] Counsel for the Applicant submits that there was a genuine attempt to settle the dispute and alluded to two (2) different occasions referred to in his Affidavit in Support to his Summons at paragraph 54 – 55 respectively:

(i) The Munro Leys October, 2019 meeting and,

(ii) Through MC Lawyers, the Deed sent to the Respondent an attempt to resolve the "*failed gifts"* issues under the Will.

[26] Further, Counsel contended that the fact the Applicant had signed the Deed of Settlement, was a clear evidence of his intention to resolve the issues and other communication, the 18 October 2019 meeting to discuss settlement, were measures of the Applicant's genuine desire to settle. Counsel referred to **Chase Corporation Limited v. Minister for Works and Energy** Civil Action No. 285 of 2005 to support the argument that even in instances where the words "*without prejudice*" is omitted from a letter written with settlement in mind, it is still deemed *"without prejudice*", as per John O'Hare & Robert N Hill: Civil Litigation 5th Edition, 1990 pp 36 – 37 and therefore cannot be adduced in evidence.

[27] The Applicant further refers to **Star Printery Ltd v. UB Freight (Fiji) Ltd** 2013 FJHC 271, and a more recent case of **Shankaran (trading as Roshea Works) v. Eltech Ltd** [2021] FJHC as authorities for the proposition that any communication or settlement offer made during settlement discussions in an effort to resolve the dispute are protected by "*without prejudice*" privilege, regardless whether the other side accepts it or not.

[28] Counsel for the Applicant referred to paragraph 24/5/45 of the Supreme Court Practice 1999 Vol. 1 which summarizes very well the nature of "*without prejudice"* communications as follows:

> 24/5/45 "Without prejudice communications – The "*without prejudice*" rule governs the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish (*Cutts v. Head* [1984] Ch. 290; [1984] I All E. R. 597, CA). The rule applies to exclude all negotiations genuinely aimed at a settlement, whether oral or in writing, from being given in evidence. The purpose of the rule is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement. "Without prejudice" material will be admissible if the issue is whether or not negotiations resulted in an agreed settlement (*Walker v. Wilsher* (1889) 23 Q.B.D. 335), but in relation to any other issue an admission made in order to achieve a compromise should not be held against the maker of the admissions or received in evidence; moreover an admission made to reach a settlement with a party, even if such proceedings are within the same litigation (*Rush & Tompkins Ltd v. Greater London Council* [1988] 3 W.L.R 939; [1988] 3 All E. R. 737, HL). The right to discovery and production of documents does not necessarily depend upon the admissibility of documents in evidence (*O'Rourke v. Darbishire* [1920] A. C. 581, HL), but the general public policy that applies to protect genuine negotiations from being admissible in evidence is also extended by the Courts to protect those negotiations from being discoverable to third parties (*Rush & Tompkins Ltd v. Greater London Council (above).* Any discussions between the

> parties for the purpose of resolving the dispute between them are no admissible, even if the words "without prejudice" or their equivalent are not expressly used (*Chocoladefabriken Lindt & Sprungli A. G. v. Nestle Co. Ltd* [1978] R. P. C. 287). It follows that documents containing such material are themselves privileged from production.

[29] But equally, as noted in the same paragraph 24/5/45 of the White Book above, by the same token:

> *"…the heading "without prejudice" does not conclusively or automatically render privileged a document so marked. If privilege is claimed, but challenged, the Court has to examine the document in question and determine its nature: South Shropshire District Council v. Amos [1986], WLR 127; [1987] 1 All ER 340 CA.*

[30] It is in this regard that the High Court looked and examined closely the documents in question and in the end made a determination as to whether they could claim "*without prejudice"* and hence privileged documents. The Court found, in the first instance, that the Sevutia Affidavit disclosed nothing more than information within the clerk's own knowledge, and it distinguished on the facts **Paul v. Director of Lands** [2020] FJSC 03, which was relied upon by the Applicant.

[31] More importantly the Court emphasized the prerequisite of the motive behind the efforts towards a settlement. As outlined in the White Book paragraph 24/5/45 above, the negotiations must be genuinely aimed at a settlement. This is well settled in **Naigulevu v. National Bank of Fiji** (supra) where the Court stated (at paragraph 3.48):

> *"…There is a rule of evidence that communications between parties which are genuinely aimed at settlement of a dispute between them cannot be put in evidence without the consent of both parties in the event that the dispute is not settled. This rule is called "without prejudice privilege".*

[32] In order for the privilege to operate, it is essential that there must be some person in dispute or negotiation with another person, and the statement which it is sought to exclude from evidence must have some bearing on negotiations for a settlement of that dispute.

[33] The mere use of the words "*without prejudice*" in the communication does not operate to attract the rule, or privilege. The Court is required to consider the statement in its context and decide for itself whether the privilege applies. Thus a letter marked "*without prejudice"* which is not in fact a genuine attempt to settle a dispute, will not be privileged from being produced in evidence, and a letter which is so aimed will be privileged even if it is not marked "*without prejudice*."

The Sevutia Affidavit

[34] Much is made as to the Court's reception of the Affidavit with the submission by the Applicant that it failed the test of Order 41 Rule 5 in that, it deposed of facts and matters that were outside Sevutia's knowledge as Senior Litigation clerk. The Court had accepted that Sevutia was only deposing to the facts within his own knowledge as the litigation clerk. Technically, Mr Sevutia has not fallen foul of Order 41 Rule 5 as he has deposed to only matters known to him and that the Annexure he attached to his affidavit, he had not, at any stage, confessed that he had knowledge of the contents and was able to prove. The affidavit did affirm that the original affidavit deposed by the Respondent, who was in New Zealand and could not travel due to Covid, was being couriered to the Respondent's solicitors, and would be filed into Court upon receipt. This Court accepts the interpretation of the High Court as set out at paragraph 11 of its Ruling.

[35] It is conceded that the Court could have, as submitted by the Applicant, examined the objection to the Respondent's affidavit, as containing communication that the Applicant claim, belonging to "*without prejudice privilege."* This argument must be taken in the context of the Court's eventual findings that the communication did not, based on the grounds that it failed the "*genuine and serious aim at settlement*" test.

[36] Notwithstanding the submissions by Counsel on the genuine desire by the Applicant to settle, there is some doubt, borne out in the evidence from the Respondent, that there existed a genuine desire by the Applicant to fulfil the wishes of the testator as set out in his Will. In this regard, the assertion by the Applicant in his communication with the Respondent, including the provisions in the Deed, does not, in my view, amount to an

offer to negotiate a settlement, but instead is an assertion of his rights or the Company's, over the "*failed gifts*." As stated in **Buckinghamshire County Council v. Moran** [1989] 2AllER 255 CA:

> *"A letter stated by a party to be written without prejudice which amounts not to an offer to negotiate but merely to an assertion of that party's rights or an attempt to argue that his case, is well founded, is not privileged."*

[37] In the correspondent between the parties, and including the reference to "*failed gifts"* and the Deed of Settlement, the Applicant still claimed and asserted his right as the *"sole shareholder of the company"* to be the owner of the two(2) properties that are specifically bequeathed in the Will to the Respondent. As such as stated in Buckinghamshire Country Council (supra) the communication that merely asserts a party's rights, or an attempt to argue his case, does not amount to an offer to negotiate and cannot claim to be an offer to negotiate and therefore is not privileged.

[38] The "*failed gifts"* claim as well as the issue of whether the Respondent had challenged the Will and therefore, forfeit his inheritance, under paragraph 4 of the Will, are matters before the High Court.

Time for Leave to Appeal

[39] Under Rule 16(a) the Applicant is required to file and serve his Notice of Appeal from the interlocutory order of the Court, within 21 days after the Ruling was delivered. This Court notes that Appellant solicitors served the Respondent solicitors 42 days after the delivery of the Ruling.

[40] The law is clearly laid down by the Supreme Court in **Ponsami v. Dharam Lingam** [1992] 42 FLR 160 warning that unless there are special circumstances present, non-compliance may prove fatal to the application. In this instance, 42 days would be deemed, in the light of the circumstances of the case and especially the nature of the High Court

proceedings, a considerable delay, preventing the Respondent from prosecuting his claims before the Court.

[41] Even if the Summons was filed on time, the grant of leave would be subject to the four(4) conditions and principles governing it, as usefully summarised in **Niemann v. Electronic Industries Ltd** [1978] VR 431 and adopted by our court in **Abdul Hussein v. National Bank of Fiji** [1995] FLR 130 and are as follows (at p.133, 134):

> *"(1) whether the issue raised is one of general importance or whether it simply depends on the facts of the particular case;*
> *(2) whether there are involved in the case difficult questions of law, upon which different views have been expressed from time to time or as to which he has been "sorely troubled";*
> *(3) whether the order made has the effect of altering substantive rights of the parties or either of them; and*
> *(4) that as a general rule, there is a strong presumption against granting leave to appeal from interlocutory orders or judgments which do not either directly or by their practical effect finally determine any substantive rights of either party."*

[42] There is some merit in the Applicant's argument that the communication between the parties raised an issue of general importance, as to whether they fell in the category of "*without prejudice privilege*", especially when it is claimed, they were made for the purpose of settlement and resolving the dispute. However, the Court having examined the documents in question and the response of the Respondent, concluded that there was no genuine effort by the Applicant to settle the dispute and therefore "*without prejudice*" privilege did not apply. In any event, as the Respondent submitted, the communication was between brothers and as well as between a beneficiary and executor and trustee of the estate on the bequests of the beneficiary under the Will of their late uncle.

[43] As to the remaining principles this court agrees with the Respondent that appeal does not involve difficult questions of law and neither has the interlocutory Ruling alter in a substantial ways the rights of the parties, and in particular that of the Applicant. These rights remains to be addressed in the substantive action before the High Court in Probate Action No.11 of 2020.

[44] Leave may only be granted to appeal interlocutory orders where the determination of the preliminary issue will put an end to the action. As the court state in **Dunstan v. Simmie & Co. Pty Ltd** [1978] VR.649 at paga.670:

> *"_ _ _ _ although the discretion to grant leave cannot be fettered, leave is only likely to be given in a case where the determination of the preliminary issue puts an end to the action or at least to a clearly defined issue or where, to use the language of the Full Court in **Darrel Lea (Vic) Pty Ltd v. Union Assurance Society of Australia Ltd.** [1969] VR 401, substantial injustice would result from allowing the order which is sought to be impugn, to stand."*

[45] In this instance, the determination of the preliminary issue whether the communication between the parties should be expunged from the Affidavit of the Respondent, on the ground that they command "*without prejudice privilege*" would not put an end to the action.

[46] In all the circumstances, leave to appeal the interlocutory Ruling of the High Court of 4 October 2021 is refused and Orders are made as follows:

Orders:

(1) Application for leave to appeal against the interlocutory Ruling of 4 October 2021 is refused;

(2) Costs is summarily assessed at $1,500.00to be paid within 21 days hereof.

HON. JUSTICE FILIMONE JITOKO
PRESIDENT, COURT OF APPEAL