

IN THE HIGH COURT OF FIJI AT LABASA

CIVIL JURISDICTION

Civil Action No. HBC 62 of 2016

BETWEEN

ABDUL SAHEED HUSSAIN of Valebasoga, Labasa, Fiji, Carpenter.

PLAINTIFF / INTENDED APPELLANT

AND

JADURAM INDUSTRIES LIMITED a limited liability company having its
registered office at JNJ Limited Building, Rosawa Street, Nasea,
Labasa, Fiji.

DEFENDANT

Counsel : Mr. A. Sen for the Plaintiff
Mr. A. Kumar for the Defendant

Date of Hearing : 07th May, 2018

Date of Ruling : 28th May, 2018

RULING

(On the application for Leave to Appeal)

- [1] The plaintiff instituted these proceedings against the defendant claiming damages for the injuries sustained during the course of employment.
- [2] The defendant filed summons on 13th October, 2017 seeking the following orders:
 - (a) PACIFIC ENGINEERING PROJECT LIMITED of 47 Bau Street, Suva be joined as the 2nd additional Defendant in the action;
 - (b) That the Plaintiff be ordered to file an amended Writ of Summons and Statement of Claim accordingly and the defendants to file an amended Statement of Defendant thereafter;
 - (c) That the costs of this application be costs in the cause.
- [3] After hearing the parties the learned Master of the High Court granted the orders sought in the summons and the plaintiff sought leave to appeal.
- [4] Order 59 rule 9 provides that an appeal from an order or judgment must be filed and served within 21 days from the delivery of the order or judgment and in the case of an interlocutory order or judgment, within seven days from the date of granting of leave to appeal.
- [5] The present application is for leave to appeal and leave to appeal out of time made pursuant to Order 59 rules 10 and 11 of the High Court Rules.
- [6] Order 59 rules 10 and 11 of the High Court Rules provide as follows:

Rule 10 – (1) An application to enlarge the time period for filing and serving a notice of appeal or cross-appeal may be made to the Master before the expiration of that period and to a single judge after the expiration of that period.

(2) An application under paragraph (1) shall be made by way of an inter-parte summons supported by an affidavit.

Rule 11 – Any application for leave to appeal an interlocutory order or judgment shall be made by summons with a supporting affidavit, filed and served within 14 days of the delivery of the order or judgment.

[7] This application was made on the 22nd February, 2018 after seven from the expiration of the period prescribed by Order 59 rule 11. The plaintiff explaining the delay in making the application averred that the ruling sought to be appealed against was delivered on 2nd February, 2018 by it was handed over to his solicitor only on 15th February, 2018 at 3.15 p.m. This summons was filed on 22nd February, 2018.

[8] The learned counsel for the defendant objected to this application. However, the delay in filing the application was not raised as a ground. It was his submission that the delay is not too long and it was a matter of few days. However, in my view the plaintiff has sufficiently explained the delay in making this application.

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

The Courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence leave to appeal are not readily given. Having read the affidavits filed and considered the submissions made I am not persuaded that this application should be treated as an exception. In my view the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted.

In **Niemann v. Electronic Industries Ltd.** [1978] V.R. 431 at page 441 where Supreme Court of Victoria (Full Court) held as follows:

".....leave should only be granted to appeal from an interlocutory judgment or order, in cases where substantial injustice is done by the judgment or order itself. If the order was correct then it follows that substantial injustice could

not follow. If the order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to affect a substantial injustice by its operation.

It appears to me that greater emphasis is therefore must be on the issue of substantial injustice directly consequent on the order. Accordingly if the effect of the order is to change substantive rights, or finally to put an end to the action, so as to effect a substantial injustice if the order was wrong, it may be more easily seen that leave to appeal should be given.

[10] In the case of **Khan v Suva City Council** [2011] FJHC 272; HBC406.2008 (13th May 2011) the following observations were made in regard to applications for leave to appeal;

It is trite law that leave will not generally be granted from an interlocutory order unless the Court sees that substantial injustice will be done to the applicant.

Further in an application for leave to appeal, it is incumbent on the applicant to show that the intended appeal will have some realistic prospect of succeeding.

[11] Before applying the above principles the court must consider whether the grounds of appeal relied on by the party seeking to appeal from an interlocutory order can successfully decide in a final appeal after the judgment is delivered on the substantive issues of the case. There are certain issues that can wait to be determined at the stage of the final appeal but there are some issues that should be determined before the matter reached the stage of the hearing of the substantive matter.

[12] By her order the learned Master of the High Court has directed the plaintiff to file an amended writ of summons and amended statement of claim disclosing a cause of action against the party who has been joined as a defendant by the order of the court. It is the position of the plaintiff that he has no cause of action against the party who was joined by the order of the court, for him to file a statement of claim.

[13] This in my view is a serious question to be considered in appeal which cannot wait until the final determination of the substantive matter. The plaintiff is entitled to have a ruling on this matter before the action proceeds any further and if leave is not granted grave injustice will be done to the plaintiff.

[14] Orders of the court:

1. Application for leave to appeal out of time is granted.
2. The plaintiff must file and serve notice and grounds of appeal within 14 days from the date of this ruling
3. Costs in the cause.



28th May, 2018


Lyone Seneviratne

JUDGE