

**IN THE HIGH COURT OF FIJI**  
**AT LABASA**  
**CIVIL JURISDICTION**  
**CIVIL ACTION NO. HBC 5 OF 2018**

**BETWEEN:**                               **SHAKTI CONTRACTING LIMITED**                               **1<sup>ST</sup> PLAINTIFF**

**AND:**   **SHAKTI PRASAD BIRBAL**                               **2<sup>ND</sup> PLAINTIFF**

**AND:**   **FIROZ KHAN**   **DEFENDANT**

**Appearance:** Plaintiffs           -        Mr. Sen A  
  Defendant       -        Mr. Sharma S. S.

**Date of Hearing**           :        16<sup>th</sup> July, 2019  
**Date of Judgment**       :        18<sup>th</sup> July, 2019

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**JUDGMENT**

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**Introduction**

[1] Plaintiff instituted this action against Defendant by way of writ of summons on 13.2.2018, for a liquidated sum. Defendant did not file acknowledgment and or statement of defence within stipulated time under High Court Rules and default judgment was entered. Then, Defendant sought setting aside of default judgment and it was granted after a hearing. The ruling of Master on 23.11.2018 set aside default judgment and Defendant was ordered to file a statement of defence by 4.12.2018 but the statement of defence was filed on 30.1.2019, and a reply was filed on 12.2.2019. So, one year had lapsed to complete pleadings and this is a factor Master needs to take in to consideration. Abuse of court process, through delay of the proceedings should not be allowed. Summons for directions were filed 5.3.2019 and Plaintiff was granted 7 days to file and serve a list of documents and file affidavit verifying such list and the Defendant was granted another 7 days to do the

same and this action was mentioned on 10.4.2019. Further time was granted for compliance with summons for directions. Plaintiff had filed their list of documents on 16.4.2018 but Defendant did not file their list when matter was mentioned for review on 26.4.2019. So Plaintiff asked for costs, and the Master had ordered a cost of \$150 to the Defendant before filing their affidavit verifying list of document and given a further time till 30.4.2019 to file their affidavit verifying list of documents and the matter was mentioned on 1.5.2019 but there was no minute on that day the matter was mentioned. Even as late as 6.5.2019 there was no affidavit verifying list of Defendant filed. There was no appearance for the Defendant before Master on 6.5.2019, but again 'further and final adjournment 'was granted to Defendant to affidavit verifying list of documents by 8.5.2019 subject to payment of cost of \$150. Defendant was also imposed a guillotine order and wasted (appearance) cost of \$150 was also ordered on 6.5.2019. Defendant had filed summons seeking leave to appeal against the order 26.4.2019 on 8.5.2019 and had filed their affidavit verifying list on the same day.

### **Analysis**

- [2] The impugned order was made on 26.4.2019 and summons for leave to appeal was filed on 8.5.2019. So the summons for leave to appeal was filed within 14 day time period in terms of Order 59 rule 11 of High Court Rules of 1988.
- [3] The law on leave to appeal an interlocutory order was set out in Bank of ***Hawaii v Reynolds*** [1998] FJHC 226 by Pathik, J. Referring to the case of Ex Parte Bucknell [1936] his lordship stated in the judgment that:

*'At the same time, it must be remembered that the prima facie presumption is against appeals from interlocutory orders, and, therefore, an application for Leave to Appeal under s5 (1) (a) should not be granted as of course without consideration of the nature and its circumstances of the particular case. It would be unwise to attempt on exhaustive statement of the considerate which should be regarded as a justification for granting Leave to Appeal in the case of an interlocutory order, but it is desirable that, without doing this, an indication should be given of the matters which the court regards as relevant upon an application for leave to appeal from an interlocutory judgment'*

- [4] The Court in ***Ex parte Bucknell*** went on to state at page 225:

*'But any statement of the matters which would justify granting leave to appeal must be subject to one important qualification which applies to all cases. It is this. The Court will examine each case and, unless the circumstances are exceptional it will not grant leave if it forms a clear opinion adverse to the success of the proposed appeal.'*

- [5] In ***Gosai v Nadi Town Council*** [2008] FJCA 1; ABU 116.2005 (decided on 22 February 2008) Court of Appeal dealt the issue of granting leave to appeal against interlocutory decision and discussed the authorities as follow;

*"In coming to the decision that the appeal should be refused, the Court has also had reference to the High Court's decision in Heffernan v. Byrne and Ors HCF Civil Action No. HBM 105 of 2007 ((19 February 2008). There, in refusing leave to appeal against an interlocutory decision, His Lordship set out a comprehensive collocation of the authorities, referring to Kelton Investments Limited and Tappoo Limited v. Civil Aviation Authority of Fiji and Motibhai & Company Limited [1995] FJCA 15, ABU 0034d.95s; Edmund March & Ors v. Puran Sundarjee & Ors Civil Appeal ABU 0025 of 2000; and KR Latchan Brothers Limited v. Transport Control Board and Tui Dvaulevu Buses Limited Civil Appeal No. 12 of 1994 (Full Court).*

29. As His Lordship observed, in *Edmund March & Ors* this Court said:

*As stated by Sir Moti Tikaram, President Fiji Court of Appeal in Totis Incorporated, Sport (Fiji) Limited & Richard Evanson v. John Leonard Clark & John Lockwood Sellers (Civ. App. No. 33 of 1996 p. 15):*

*It has long been settled law and practice that interlocutory orders and decisions will seldom be amenable to appeal. Courts have repeatedly emphasised that appeals against interlocutory orders and decisions will only rarely succeed. The Fiji Court of Appeal has consistently observed the above principle by granting leave only in the most exceptional circumstances.*

30. Further, as His Lordship also noted, in *KR Latchan Brothers Limited a Full Court of Appeal (Tikaram, Quillam and Savage JJ.)* said:

*... The control of proceedings is always a matter for the trial Judge. We adopt what was said by the House of Lords in *Ashmore v. Corp. of Lloyd's* [1992] 2 All ER 486 –*

*Furthermore, the decision or ruling of the trial judge on an interlocutory matter or any other decision made by him in the course of the trial should be upheld by an appellate court unless his decision was plainly wrong since he was in a far better position to determine the most appropriate method of conducting the proceedings."*

- [6] Lord Woolf MR said in ***Swain v Hillman*** [2001]1 All ER 91 that a 'real' prospect of success means that prospect of success must be realistic rather than fanciful. The court considering a request for permission is not required to analyse whether the proposed grounds of appeal

will succeed, but merely there is a real prospect of success (Hunt v Peasegood (2000) The Times, 20 October 2000).

- [7] Master had ordered costs to the Defendant who had delayed this action from the inception, by not filing a statement of defence within stipulated time period. It took one year to complete pleadings, as the statement of defence was not filed on time. The Plaintiff's claim is a liquidated claim.
- [8] Even when default judgment was set aside and time was granted to file the statement of defence, it was not done on the date specified in the order of Master and statement of defence was filed nearly two months after date stipulated in the order delivered on 23.11.2018.
- [9] So the delay of Defendant in this action was not an isolated incident but a systemic conduct which is contumelious. Master is the person who is in best position to gauge the conduct of the parties prior to the action is set for trial and it is the duty of Master to take control of an action, in order to prevent abuse of process, through inordinate delay.
- [10] In a recent UK Supreme Court decision of Revenue and Customs Commissioners v BPP Holdings Ltd and others[2017] 4 All ER 756 (Per Neuberger P) cited the following quote with authority to emphasize the importance of case management .

*"It is appropriate to state the words of Lawrence Collins LJ in Fattal v Walbrook Trustee (Jersey) Ltd [2008] EWCA Civ 427, [2008] All ER (D) 109 (May) (at [33]):*

***'[A]n appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge.'***(emphasis added)

- [11] On 26.4.2019, Defendant had indicated that he had received Plaintiff's affidavit verifying list of documents, but had stated that Defendant was away and that was the reason for not filing theirs. This is not a valid reason as Defendant had ample time to get prepared and the matter is inordinately delayed due to the conduct of Defendant. So, Master in the exercise of discretion for case management had applied correct principles in awarding a cost. When considering the amount of cost awarded, it is clear that the intention was to exhort, while awarding some compensation for the Plaintiff for appearance. In my mind there is no incorrect application of principles by Master in ordering a cost of \$150 to Defendant on 26.4.2019 and extending time for them to file their affidavit verifying list of documents on 30.4.2019. Defendant had neither paid the cost nor complied with filing of the affidavit ordered on 26.4.2019 even as late as 6.5.2019. This is very unsatisfactory conduct which had resulted in guillotine order being made on that day. So there is no merits in this application for leave to appeal. Summons for leave to appeal struck off. Cost of this application is summarily assessed at \$250.

**Final Orders**

- a. Leave to appeal is refused and summons seeking leave is struck off.
- b. Cost is summarily assessed at \$250.



  
Deepthi Amaratunga  
Judge