

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION No. HBC 30 OF 2012

BETWEEN : PETER ALLAN LOWING of Nadi, Fiji Islands.
PLAINTIFF

AND : DAVID GRAHAM BLOXHAM of Wailoaloa, Nadi
Businessman
DEFENDANT

Appearance : Ms Seru for the Plaintiff
Ms Samantha for the Defendant

Date of Hearing : 13 December 2019

Date of Judgment : 30 January 2020

DECISION

1. On 23 October 2019 the plaintiff by inter partes summons sought leave of the Court pursuant to section 12(2)(f) Court of Appeal Act 1949 to appeal against my decision dated 2 October 2019 in which the plaintiff was ordered to provide security for costs in the sum of \$35,000. That application for leave is opposed by the defendant, and was heard before me on 13 December 2019.
2. The plaintiff's application asked for the following specific orders:
 - i. *The plaintiff be granted leave forthwith to appeal to the Court of Appeal of Fiji from the interlocutory ruling including all orders arising therefrom of the Honourable Mr Justice A.G. Stuart in these proceedings pronounced on 2 October 2019.*
 - ii. *In the event that leave is granted to appeal the within interlocutory ruling and all orders arising therefrom, the within proceedings, the interlocutory ruling and all orders arising therefrom be wholly stayed forthwith pending the determination and delivery of the judgement of the Court of Appeal on any appeal brought pursuant to such leave.*
 - iii. *Time for bringing the appeal from the within interlocutory ruling and all orders arising therefrom to the Court of Appeal be extended until such time as this Court determines the plaintiff's application for leave to appeal if necessary.*
 - iv. *Time of service of this application be abridged if necessary.*
 - v. *Costs of this application be borne by the defendant or alternatively costs in the cause.*

vi. *Any other or further order that the court deems just and appropriate.*

3. The plaintiff requires leave to appeal because of the terms of s12(2) Court of Appeal Act 1949, which states:

12(2) *No appeal shall lie-*

(f) *without leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge of the High Court, ...*

Clearly an order for security for costs is an interlocutory judgment (as the plaintiff acknowledges), and hence leave to appeal is required.

4. Rule 26(3) of the Court of Appeal Rules provides:

Wherever under these Rules an application may be made either to the Court below or to the Court of Appeal it shall be made in the first instance to the Court below.

5. Section 12(2) of the Act refers to leave from 'the judge', which I take to mean that leave to appeal must be given by the judge who gave the judgment appealed from. That can be quite confronting both for the applicant and the judge.

6. The grounds for the proposed appeal are set out in the draft Notice of Appeal that is attached to the summons for leave to appeal. They are:

i. *The Learned Judge erred in law and in fact in taking into account irrelevant matters which were not available to him including inter alia that the filing of the Appellant/Plaintiff's action may attract an award for costs higher than would otherwise be appropriate on the basis that inter alia the claim may well be seen as an attempt to intimidate the defendant from persisting with his complaint. In doing so, the Learned Judge failed to exercise his discretion fairly to both parties.*

ii. *The Learned Judge erred in law and in fact in setting the security for costs at an excessive amount of FJD\$35,000. In doing so the Learned Judge failed and/or neglected to give adequate consideration to inter alia:*

a. *the applicable legal principles in respect of security for costs in Fiji.*

b. *the sum of \$45,000 claimed by the Respondent/Defendant was based upon actual costs incurred which is only recoverable from a plaintiff in rare circumstances;*

c. *the lack of evidence in support of the likelihood of the Respondent/Defendant recovering costs on an indemnity basis or on high scale against the Appellant/Plaintiff;*

d. *the argument put forward by the Appellant/Plaintiff to the effect that 'malice' was in any event pleaded.*

iii. *The Learned Judge erred in law and in fact when he took into account the lack of evidence of the Plaintiff about his ability to pay security in determining the high amount of security to be paid.*

7. I readily accept that I may have erred in the decision referred to in all or any of the ways raised in the draft notice of appeal, but that is not really the issue. The reason leave is required to appeal against interlocutory rulings is that these judgments are generally procedural only, and seldom have an impact on the ability of the parties to have their substantive dispute adjudicated on by the court. If they do, the issue can usually be dealt with on appeal against the substantive decision – when that is eventually given. Hence the view is taken that the progress of substantive proceedings to hearing should not be delayed by unnecessary appeals (or indeed unnecessary interlocutory applications).
8. This thinking has been expressed in Fiji on numerous occasions in decisions of the Court of Appeal and the Supreme Court. In **Kelton Investments Ltd v Civil Aviation Authority of Fiji** [1995] FJCA 15; ABU 34 of 1995, 18 July 1995 Tikaram P had cause to visit this issue and in doing so referred to the reasoning of Murphy J in **Nieman –v- Electronic Industries Ltd** [1978] V.R. 431 at page 441:

... the Full Court (of the Victorian Supreme Court) held that 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 deemed to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to affect a substantial injustice by its operation.

Tikaram P went on in the same case to make the point:

If a final order or judgment is made or given and the Applicants are aggrieved they would have a right of appeal to the Court of Appeal against such order or judgment. Therefore no injustice can result from refusing leave to appeal.

9. More recently in **Shankar v FNPF Investments Ltd and Anr.** [2017] FJCA 26; ABU 32 of 2016, 24 February 2017 Calancini P had this to say on the subject (at paragraph 16):

The principles to be applied for granting leave to appeal an interlocutory decision have been considered by the Courts on numerous occasions. There is a general presumption against granting leave to appeal an interlocutory decision and that presumption is strengthened when the judgment or order does not either directly or indirectly finally determine any substantive right of either party. The interlocutory decision must not only be shown to be wrong it must also be shown that an injustice

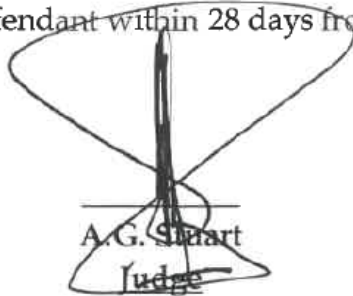
would flow if the impugned decision was allowed to stand. (*Nieman v Electronic Industries Ltd* [1978] V.R. 431 and *Hussein v National Bank of Fiji* (1995) 41 Fiji L.R. 130).

and these principles have been affirmed and applied again by the Court of Appeal in its even more recent decisions in **Housing Authority of Fiji v Bulileka Hire Services Ltd** [2019] FJCA 136; ABU0041.2016 (27 June 2019) and **Parshotam Lawyers v Dilip Kumar (trading as Bianco Textiles)** [2019] FJCA 176; ABU13.2019 (25 September 2019).

10. The present case provides an excellent example of how proceedings can be delayed and I have referred to the history of the dispute and of this litigation in paragraphs 2 and 3 (which I note has been wrongly numbered '2') of my judgment of 2 October.
11. The order against which the plaintiff seeks to appeal is an order that he is to provide security for costs. This is quintessentially an interlocutory order, and it does not impact in any way on the outcome of the plaintiff's substantive claim. The authorities referred to above make it clear that leave to appeal should be granted in such a case only if the prospective appellant is able to show that the effect of the order for security for costs will be to cause him substantial injustice. In the case of security for costs (where the amount paid in security remains in Court and will be repaid to the plaintiff in its entirety if his claim is successful) it is hard to see how substantial injustice might be caused by the order, which simply requires the plaintiff to provide security in some form to the value of \$35,000. Injustice is only likely to occur if the amount of the order is such that he cannot (as opposed to chooses not to) pay it, so that the requirement for it to be paid effectively prevents him from pursuing his claim. This suggestion is not raised by the plaintiff in his application for leave (which was not supported by an affidavit) and was not addressed in submissions by counsel at the hearing of the application. Furthermore, as I commented in the judgment of 2 October (see paragraph 7(ii) in particular) the plaintiff provided no evidence about his ability to pay security other than to say that an order for payment of security of \$116,479.92 (the figure optimistically sought by the applicant/defendant) would *prevent [him] from pursuing the claim any further*. The affidavits filed on the application for security showed that the defendant had initially asked – in correspondence - for \$45,000 as security. There was no comment by the plaintiff at that time about his ability or inability to pay that amount, and what is known about the plaintiff (an experienced solicitor now practicing in Papua New Guinea, but formerly a partner in practice at Nadi) provides no reason to believe that he cannot pay or provide the security ordered.

12. I am not persuaded that the plaintiff will suffer substantial injustice from the making of the order for security for costs. I urge the parties to get on with hearing the substantive claim so that this long-standing matter can be resolved one way or the other.
13. The application for leave to appeal is refused. The plaintiff is ordered to pay costs of \$2,000 to the defendant within 28 days from the date of this ruling.




A.G. Stuart
Judge

At Lautoka this 30th day of *January* 2020
SOLICITORS:
Lowing Lawyers – Plaintiff
AK Lawyers - Defendant