IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No: HBC 202 of 2022

IN THE MATTER of an Application for Committal under Order 52 of the High Court Rules.

BETWEEN: **THE ATTORNEY – GENERAL OF FIJI** of Level 4-8, Suvavou House, Victoria Parade, Suva.

APPLICANT

A N D: **RICHARD KRISHNAN NAIDU**, Legal Practitioner, Duncan Road, Domain in Suva C/- Munro Leys, Level Pacific House, Butt Street, Suva.

RESPONDENT

Appearance : Ms. Gul Fatima for the Applicant
Mr Martin Daubney K.C with Mr. John Apted for the Respondent

Hearing : Monday, 3rd October, 2022 at 10.30am

Decision : Friday, 14th October, 2022 at 10.30am

DECISION

[A]. INTRODUCTION

[1]. There are two applications before me. One for leave to appeal from the interlocutory decisions handed down on 01.09.2022 and 02.09.2022, the other for stay of the proceedings pending the outcome of the appeal.

[2]. The respondent filed two notices of motion on 22nd and 23rd September 2022 respectively for:

(a) Leave to appeal to the Fiji Court of Appeal against the Court's decision delivered on 1 September 2022 ***(First Decision)*** *and*

(b) Leave to appeal to the Fiji Court of Appeal against the decision delivered on 2 September 2022 ***(Second Decision)***

(c) Stay of these proceedings pending appeal.

[3]. The Notices of Motion, so far as relevant seek the following reliefs:

Notice of Motion – First Decision

(a) The respondent may be granted leave to appeal to the Fiji Court of Appeal from the interlocutory ruling of his Lordship Justice Jude Nanayakkara, delivered on 1 September 2022 wherein the Court dismissed the Respondent's application by Summons dated 29 July 2022 (Oral Hearing Summons) for an oral hearing of his summons to set aside the grant of leave to issue committal proceedings, for cross-examination and other orders (Decisions).

(b) The time for bringing such appeal be extended by 7 days from the date on which the order granting leave may be made and

(c) These proceedings be stayed pending the outcome of the appeal

(d) The costs of this Motion be costs in the cause.

Notice of Motion – Second Decision

(a) The respondent may be granted leave to appeal to the Fiji Court of Appeal from the interlocutory ruling of his Lordship Justice Jude Nanayakkara, delivered on 2 September 2022 wherein the Court dismissed the respondent's Summons dated 15 July 2022 (Setting-Aside Summons) for an oral hearing of his summons to set aside the grant of leave to issue committal proceedings, for cross-examination and other orders (Decision).

(b) The time for bringing such appeal be extended by 7 days from the date on which the order granting leave may be made and

(c) These proceedings be stayed pending the outcome of the appeal.

(d) The costs of this Motion be costs in the cause.

[4]. Each application is supported by affidavits of Ronal Singh dated:

(a) 22 September, 2022 (First Singh Affidavit) in respect of the Notice of Motion concerning the First Decision

(b) 23 September 2022 (Second Singh Affidavit) in respect of the Notice of Motion concerning the Second Decision.

(B). **THE PRELIMINARY POINTS *IN LIMINE***

[5]. At the commencement of the hearing before the court, counsel for the Attorney General, (Ms) Fatima raised two preliminary objections to the respondent's two notices of motion for leave to appeal to the Fiji Court of Appeal against the court's decisions handed down on 01.09.2022 and 02.09.2022.

[6]. Ms. Fatima, counsel for the Attorney-General relying on Rule 16 of the Court of Appeal Rules submitted that respondent should have sought leave and filed notice of appeal before expiration of 21 days of the interlocutory decision and not file application for leave to appeal on the twenty-first day.

[7]. As correctly pointed out by Mr. Daubney KC counsel for the respondent, the Rule 16 of the Court of Appeal Rules 1949 was amended by Rule 2 of Court of Appeal (Amendment) Rules 2018 and made provision for application for leave to appeal to be filed within 21 day period and not just notice of appeal. For the sake of completeness, Rule 2 of the Court of Appeal (Amendment) Rules 2018 is reproduced below in full.

Rule 16 Amended

2. *The principal rules are amended by-*

(a) After "every notice of appeal", inserting "or application for leave to appeal"; and

(b) In paragraph (a) after "notice of appeal", inserting "or an application for leave. "

[8]. Therefore, I dismiss the first preliminary point raised by Ms. Fatima, as devoid of any merits and substance.

[9]. Next Ms. Fatima argued that the notices of motion for leave to appeal has been filed out of time.

[10]. Rule 16 of the Court of Appeal Rules 1949 is in the following terms:

Time of appealing

16. *Subject to the provisions of this Rule, every notice of appeal or application for leave to appeal shall be filed and served under Rule 15(4) within the following period* ***[calculated from the date on which the judgment or order of the court below was pronounced)****, that is to say –*

(a) In the case of an appeal from an interlocutory order, 21 days.
(b) In any other case, 6 weeks.

[Emphasis added]

[11]. Under Section 12(2)(f) of the Court of Appeal Act 1949 leave is required from any interlocutory order or decision and under Rule 16 the time for applying leave is 21 days from the date on which the judgment or order of the court below was signed, entered or otherwise perfected.

[12]. The first interlocutory decision was handed down on 01.09.2022. The second interlocutory decision was handed down on 02.09.2022.

[13]. As noted first interlocutory decision was handed down on 01.09.2022. The respondent's notice of motion for leave to appeal and stay against the first interlocutory decision was filed on 22.09.2022. The second interlocutory decision was handed down on 02.09.2022. The respondent's notice of motion for leave to appeal and stay against the second interlocutory decision was filed on 23.09.2022. Therefore, the both notices of motion for leave to appeal and stay were filed on the 21st day.

[14]. The nub of the procedural dispute is that; (1) whether 01.09.2022 is the intended start date of the filing of notice of motion for leave to appeal against the first interlocutory decision (2) whether 02.09.2022 is the intended start date of the filing of notice motion for leave to appeal against the second interlocutory decision.

[15]. As to the first interlocutory decision, if the correct interpretation is the 01.09.2022 then the notice of motion has been lodged late, out of time by 1 day. If 02.09.2022 is the commencement date, then the notice of motion was lodged within time.

[16]. Mr. Apted citing the Interpretation Act submitted that the day of the decision is to be excluded.

[17]. Ms. Fatima, counsel for the Attorney-General alleged that both notices of motion for leave to appeal are nullity because they were filed out of time by one day.

[18]. The short answer to the argument advanced on behalf of the Attorney-General lies in Section 51(a) of the Interpretation Act 1967 which is in the following terms:

Computation of Time

(51) In computing time for the purpose of any written law, unless a contrary intention appears: -

(a) a period of days from the happening of an event or the doing of any act or thing should be deemed to be exclusive of the day on which the event happens or the act or thing is done.

[19]. Rule 16 of the Court of Appeal Rules 1949 is not phrased as 21 **clear** days. The day of the decision therefore is to be excluded - Section 51(a) of the Interpretation Act: **Howey and Co. Pty Ltd v Creative Projects International Pty Ltd**[1]

[1] 1973] NSWLR 898.

[20]. I agree with the submissions of Mr. Apted. The date of the decision is to be excluded. I conclude that both notices of motion for leave to appeal have been lodged within time.

(C) **SUBMISSIONS**

[21]. In his written submissions in support of the application for leave from the first interlocutory decision the respondent submitted that all or most of the respondent's grounds of appeal are strongly arguable and indicate that the first decision was attended with sufficient doubt to justify the grant of leave.

[22]. The respondent contended that the first interlocutory decision affected the respondent's substantive constitutional and common law rights in that it has affected:

- *His right to an oral hearing of the setting-aside summons.*
- *His right to be represented by counsel of his choice at the oral hearing of the setting aside summons.*
- *His right to remain silent and the prohibition against drawing adverse inferences from the exercise of that right.*
- *His right to challenge the evidence presented against him by way of cross examining the applicant.*

[23]. The respondent also contended that as a result, he was denied the opportunity to be heard in a procedurally fair manner, consistent with his constitutional rights, on the setting aside summons which, if properly heard, could have been decided in his favour with the result that these proceedings would have been terminated.

[24]. Next the respondent submitted that leave to appeal should be granted from the second interlocutory decision because:

- *In light of the grounds of appeal the decision is attended with sufficient doubt to justify grant leave to appeal.*

- *Substantial injustice would be done by leaving the decision unreversed.*

[25]. The respondent contended that the second interlocutory decision altered or affected the respondent's substantive constitutional and common law rights in that it has altered or affected his right to present affidavit evidence both in support of the setting aside summons and in support of his defence in the substantive proceedings.

[26]. The respondent also contended that the court in its second interlocutory decision made findings in respect of the respondent's constitutional rights largely unsupported by authority. The respondent contends that they go to the question of whether or not the grant of leave should have been made. They accordingly alter or affect the substantive rights of the respondent and to the extent that the court has disregarded them for the purposes of the setting aside summons, result in a substantial injustice.

[27]. Counsel for the Attorney-General opposed the two applications for leave to appeal and stay contending that:

- *The application for leave to appeal and stay are deceptive and misleading.*

- *The two interlocutory judgments are plainly right.*

- *No substantial injustice would be done by allowing the interlocutory judgments to stand.*

(D) **CONSIDERATION**

[28]. This is a two-fold application, first for leave to appeal from the interlocutory decisions of this court handed down on 01.09.2022 and 02.09.2022, and secondly stay of proceedings pending the outcome of the intended appeals.

[29]. The granting or refusing of a stay of proceedings pending the determination of the intended appeals will depend on whether or not I grant leave to appeal.

[30]. I propose, therefore, to deal with the two applications for leave to appeal first.

[31]. The 01.09.2022 decision dealt with the respondent's summons seeking oral hearing orders for cross-examination and for related orders.

[32]. The 02.09.2022 decision dealt with the respondent's summons seeking setting aside of the ex parte order.

[33]. In the notice of motion for leave to appeal from the first interlocutory decision (01.09.2022), the respondent lists (16) appeal grounds. (Annexure RJS-8 referred to in the affidavit of Ronal Jasvindra Singh sworn on 22.09.2022). The grounds of appeal set out in the notice of motion run to (9) pages.

[34]. In the notice of motion for leave to appeal from the second interlocutory decision (02.09.2022), the respondent lists (32) appeal grounds and they run to (13) pages. (Annexure RJS-2 referred to in the affidavit of Ronal Jasvindra Singh sworn on 23.09.2022).

[35]. The hearing of the leave applications occupied considerably more court time (more than six hours) than ordinarily allowed on an application such as this. The general practice on leave applications is to limit counsel to 50 minutes. In most cases, the cost of a leave application should be a small proportion. The applicant and the respondent were accorded an indulgence which might not have been available in ordinary circumstances where several cases are fixed for hearing. In the usual course, if an applicant is unable to satisfy the court that a grant of leave is warranted within the usual period, the application will be refused. With respect, the entitlement of the parties to justice is not unconditional, but is dependent upon the resources of the court made available by the government and the appropriate allocation of resources for each case.

[36]. Generally, leave to appeal is refused for interlocutory decisions. This is mainly done in order to discourage abuse of process through plethora of leave to appeal applications relating to trivial interlocutory decisions.

[37]. The leading authority on the principles applicable to leave to appeal against an interlocutory decision is **Kelton Investments Ltd v Civil Aviation Authority Fiji Ltd**[2] where Sir Moti Tikaram emphasized that leave to appeal will rarely be granted. His Lordship said :

[2] [1995]FJCA 15

I am mindful that Courts have repeatedly emphasised that appeals against interlocutory orders and decisions will only rarely succeed. As far as the lower courts are concerned granting of leave to appeal against interlocutory orders would be seen to be encouraging appeals (see Hubball v Everitt and Sons (Limited) [3]

Even where leave is not required the policy of appellate courts has been to uphold interlocutory decisions and orders of the trial Judge - see for example Ashmore v Corp of Lloyd's [4] *where a Judge's decision to order trial of a preliminary issue was restored by the House of Lords.*

The following extracts taken from pages 3 and 4 of the written submissions made by the Applicants' Counsel are also pertinent:

> *'.....*
>
> *5.2 The requirement for leave is designed to reduce appeals from interlocutory orders as much as possible (per Murphy J in Niemann v. Electronic Industries Ltd (1978) VR 431 at 441-2). The legislature has evinced a policy against bringing of interlocutory appeals except where the Court, acting judicially, finds reason to grant leave (Decor Corp v. Dart Industries [1991] FCA 655; 104 ALR 621 at 623 lines 29-31).*
>
> *5.3 Leave should not be granted as of course without consideration of the nature and circumstances of the particular case (per High Court in Exparte Bucknell [1936] HCA 67; (1936) 56 CLR 221 at 224).*
>
> *5.4 There is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. The appellant contends the Order of 10 May 1995 determines substantive rights.*

[38]. Mr. Daubney KC, counsel for the respondent in the course of his oral submissions on the present applications, cited extensively the decision by the Full Court in **"Niemann v Electrical Industries Ltd"**[5]. Mr. Daubney expressed the following as to the applicable principles on an application for leave to appeal. He said that the leave should be granted where:

> *(a) The decision was attended with sufficient doubt to justify granting leave, and in addition.*

[3] [1900] 16 TLR 168
[4] [1992] 2 All ER 486
[5] [1978] VR 431

(b) Substantial injustice would be done by leaving the decision unreversed.

[39]. Mr. Daubney KC submitted that all or most of the respondent's grounds of appeal are strongly arguable and indicated that both interlocutory decisions were attended with sufficient doubt to justify the grant of leave. He further submitted that the proposed grounds of appeal also indicate that they alter or affect substantive rights, and unless reversed on appeal will cause substantial injustice.

[40]. With respect, I cannot agree with the submissions of Mr. Daubney KC as to the principle that should guide this court in deciding whether the court should grant or refuse leave to appeal from the interlocutory decisions.

[41]. **It is important to note that the judge who makes the interlocutory order or judgment is in a different position, when considering whether to grant leave to appeal from his order or judgment from that in which the Court of Appeal finds itself when considering a similar application.**

[42]. Under Section 12(2)(f) of the Court of Appeal Act 1949 leave may be obtained from the judge in the court below or from the Court of Appeal. Pursuant to Rule 26(3) of the Court of Appeal Rules leave should ordinarily be sought in the first instance from the judge in the court below. If leave is refused, then the application may be renewed in the Court of Appeal.

[43]. **The issue at the moment is whether leave to appeal should be granted by the High Court. The considerations to be applied by the High Court for leave to appeal from the interlocutory order or judgment is different from the considerations apply in the Court of Appeal when the matter comes before the Court of Appeal on a motion for leave to appeal from the interlocutory order or judgment.**

[44]. In **Niemann v Electric Industries Ltd** *(supra)*, the considerations were expressed by Murphy J as follows[6]:

> *Likewise in Perry v. Smith (1901), 27 V.L.R. 66 and the Darrel Lee Case, {1969} V-R. 401, the Full Court held that leave should only be granted to*

[6] At p 441-442

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 effect a substantial injustice by its operation.

It appears to me that greater emphasis therefore must lie 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 more easily be seen that leave to appeal should be given.***

Indeed, this approach seems to have been adopted in the Darrel Lea Case.

It also seems to me important to note that the judge who makes the interlocutory order or judgment may be in a different position, when considering whether to grant leave to appeal from his order or judgment from that in which the Full Court finds itself when considering a similar application.

He has tried the case, whatever it may be, he has made the interlocutory order or given the interlocutory judgment. He could not be expected, when considering whether or not to grant an application for leave to appeal, to say that his order or judgment was clearly wrong and that substantial injustice would follow if it went undisturbed. If those criteria had in all cases to be established, leave would never be granted by the primary judge.

In practice, he may consider (1) whether the issue raised is one of general importance or whether it simply depends upon 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 the 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.

When the matter comes before the Full Court on a motion for leave to appeal from the interlocutory order or interlocutory judgment, it seems to me that different considerations should apply.

Those considerations are expressed in Perry v Smith (1901), 27 V.L.R. 66, and the Darrel Lea Case, [1969] V.R. 401, in clear terms, although. The use of the word "wrong" in the first test may allow of some debate.

On an application for "leave" the Full Court ought not, in my opinion, to be required, before granting leave, to determine-the issue in question, or to decide whether the primary judge's discretion miscarried. That would be to duplicate the work of the Court. The requirement for leave is designed to reduce appeals from interlocutory orders as much as possible. If leave can only be granted, following an examination of the merits of the matter and a decision that the order made by the primary judge was "wrong", and the matter goes then to be decided on the merits by another Full Court, the object of the legislature is negated, and absurdity is the result. Cf. Lane v. Esdaile, [1891] A.C. 210, per Lord Halsbury L.C. at p. 212.

It therefore appears to me that in using the word "wrong" in Perry v. Smith and in the Derrel Lea Case, ***the Full Court must have used it in a sense which included decisions "attended with sufficient doubt", to use the Privy Council phrase, from which decisions substantial injustice flowed.***

[Emphasis added]

[45]. Therefore, the matters which this court takes into account in deciding whether the court should grant or refuse leave to appeal from the two interlocutory decisions are: (Murphy J in Niemann (supra) at p441):

(A) Whether the issue raised is one of general importance or whether it simply depends upon the facts of the particular case.

(B) 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".

(C) Whether the decisions given have the effect of altering the substantive rights of the parties or either of them.

(D) Whether the decisions given do either directly or by their practical effect finally determine any substantive rights of either party.

[46]. **To determine whether the decisions were attended with sufficient doubt, it would necessarily involve a consideration of the merits of the grounds of appeal. That is not the function of the judge who made the interlocutory order or given the interlocutory judgment. Equally, it is not the function of the judge who made the interlocutory order or given the interlocutory judgment to determine whether substantive injustice would follow if his interlocutory judgment went undisturbed. That is the function of the Court of Appeal when considering an application for leave from an interlocutory order or interlocutory decision of a primary judge.**

[47]. **Therefore, I do not propose to enter upon an assessment of merits in the grounds of appeal in the intended appeals against my two interlocutory decisions. I do not propose to form a view on the grounds of appeal which would necessarily involve a consideration of the merits.**

[48]. I traversed the grounds of appeal set out in the affidavit of Ronal Singh. Having regard to the appeal grounds the first question is **whether the issues raised is one of general importance or whether it simply depends upon the facts of the particular case?**

[49]. The respondent submitted that the following questions are involved in the intended appeal against the decision of 01.09.2022.

(a) Whether an application for leave to commence committal proceedings is subject to a legal test and if so what legal test (prima facie or strong prima facie case)

(b) The circumstances in which a litigant is entitled to an oral hearing.

(c) The extent to which, in contempt of court proceedings, the court is required to accommodate a respondent's wish to be represented by counsel of choice in setting a hearing date for determining the proceedings.

(d) Whether a litigant is required to produce to the court evidence of the appointment of counsel when seeking an oral hearing date.

(e) The extent to which contempt proceedings brought under O.52 of the High Court Rules must be heard expeditiously (when balanced against the respondent's constitutional and common law rights).

(f) Whether cross-examination may be permitted on an affidavit filed in support of leave to issue committal proceedings.

(g) The extent to which a respondent in contempt proceedings is required to deny, explain, justify or rationalize any alleged contempt in light of the constitutional rights to silence and the prohibition against drawing adverse inferences from the exercise of that right.

(h) Whether the court on an application by the Attorney-General to issue committal proceedings may consider his true purpose in bringing the proceedings.

[50]. The respondent submitted that the following questions are involved in the intended appeal against the interlocutory decision of 02.09.2022.

a). whether an applicant (in this case the Respondent) in an interlocutory application must swear a "founding affidavit" and if so, where the applicant has a constitutional right to silence, whether such a requirement still applies

b). whether different rules as to the making of affidavits apply to "Action" "Applications" and "Inquiries"

c). whether a deponent of an affidavit in an "Application" (in this case an application to set aside) who is not a party must:

i). "say in the body of the affidavit in which Capacity and under what authority the affidavits are filed in court with the application"

ii). specify whether they are "witness affidavits" to an application and if so declare in the affidavit that

(A) "[they] have read and understood the matters of the application and

(B) *"[they] have personal knowledge of the facts related to the application of the respondent filed in court"*

d). *whether O.52, r.2 of the High Court Rules must be construed literally and narrowly or whether an application for leave to commence committal proceedings is subject to a legal test; and if so what legal test (prima facie or strong prima facie case)*

e). *whether the case of **Ratu Kaliova Dawai [2014] FJCA 194** (in relation to the test for the grant of leave in committal proceedings) was applicable*

f). *whether the Court may refuse leave to issue committal proceedings for contempt of court if the material before it indicates that an applicant (including the Attorney-General) is abusing the process of the Court.*

g). *whether the Applicant when making an ex parte application for leave to issue committal proceedings must make full and frank disclosure of all material facts that will allow the Court to determine at the leave stage whether he is acting for a legitimate purpose and within the scope of contempt proceedings or is abusing the process of the Court.*

h). *whether, under the Constitution of Fiji, the Attorney-General, when applying in his official capacity for the committal of a person for contempt of court as representative of the public interest and on behalf of the State, Can only act as a member of the Executive branch of Government and must therefore be exercising executive powers which are subject to s.16 of the Constitution of Fiji.*

i). *the extent to which the protection in s.16 of the Constitution of Fiji are "not absolute" and may be limited*

j). *the extent to which the safeguards in the Bill of Rights in Chapter 2 of the Constitution of Fiji protecting persons charged with offences apply in contempt of court proceedings because of the sui generis nature of such proceedings.*

k). *the extent to, and circumstances in which a person's rights to political participation under s.23 of the Constitution of Fiji may be limited.*

[51]. The respondent contended that the issues raised in the two intended appeals are one of general importance. The counsel for the Attorney-General takes issue with this and submitted that the grounds of appeal are baseless.

[52]. I reject the contention that the issues raised a matter of significant public importance. The thrust of the respondent's submission and the allegation is that the contempt proceedings including the application for leave is motivated only by personal vendetta. This is the basis of the respondent's submissions seeking cross-examination and setting aside ex parte leave.

[53]. In stark contrast to this initial stance, Ronal Jasvindra Singh says the following in paragraph (12) of his affidavit sworn on 23.09.2022 in support of the notice of motion for leave to appeal;

Injurious effect or prejudice to Applicant

12. *The Applicant is not prejudiced or injuriously affected by a stay. The Applicant in his official capacity (unlike the respondent) has no personal interest in the proceedings. Although in these proceedings the Applicant represents the Court, the Court itself will not be injuriously affected or prejudiced by a stay. There is no evidence of any continuing harm or further alleged contempt.*

[54]. Mr. Daubney replied that what the respondent alleges is that the Attorney – General's motivation in his personal capacity and not the Attorney –General's motivation in his official capacity. Leave that aside for a moment, most of the issues sought to debate are fundamentally one of facts which turned upon the particular facts of this case and arose between the parties and therefore the interlocutory decisions given by this court did not affect a large section of the public. They have no general importance to the public at large. Besides, each and every question of law arising between the parties cannot be a question of general importance. That being so, there can be no justification for a grant of leave.

Whether there are involved in this case difficult questions of law, upon which different views have been expressed from time to time?

[55]. The respondent **could not** demonstrate to this court that the issues involved in the intended appeals raise difficult questions of law upon which different views have been expressed by the judicial decisions from time to time. This is a factor weighing heavily against a grant of leave.

Whether the decisions given have the effect of altering the substantive rights of the parties or either of them?

[56]. The respondent contends that the grounds of appeal indicate that the interlocutory decisions of this court alter or affect substantive rights of the respondent. The respondent submitted that the first interlocutory decision puts the respondent to the time, cost and reputational loss of having to continue the proceedings, instead of having them set aside.

[57]. Respondent further submitted that he should not have to go through the time, cost and reputational loss of defending substantive proceedings if he is able to show that these proceedings should be set aside.

[58]. As to the second motion for leave to appeal, the respondent's complaint is that the second interlocutory decision alters or affects the respondent's substantive constitutional and common law rights in that it has altered and affected his right to present affidavit evidence both:

(a) In support of the setting aside summons.
(b) In support of his defence in the substantive proceedings.

[59]. The respondent further contended that the court has made findings in respect of the respondent's constitutional rights, largely unsupported by authority. The respondent contends that they accordingly alter or affect the substantive rights of the respondent and, to the extent that the court has disregarded them for the purpose of setting aside summons, result in a substantial injustice. The counsel for the Attorney – General takes issues with this and submitted that the grounds of appeal are baseless. Counsel also emphasized that application for leave does not meet any of the principles on which leave to appeal may be granted.

[60]. I am **not** satisfied in the present case that it has been satisfactorily shown that the interlocutory decisions handed down by the court has the effect of altering the substantive rights of the respondent.

[61]. The court in the exercise of the discretion, on 01.09.2022 primarily decided that the court should not allow the respondent to cross-examine the Attorney-General at the hearing of the respondent's summons for the setting aside of the granting ex-parte leave for committal dated 27.06.2022.

[62]. The court in the exercise of the discretion, on 02.09.2022, primarily decided that the court should not set aside the granting ex-parte leave for committal dated 27.06.2022.

[63]. The interlocutory decisions did **not** finally dispose of the contempt proceedings. The interlocutory decisions did not result in a final determination of the substantive matter at issue between the parties. The court has not decided the contempt proceedings. Contempt proceedings do not automatically ensue whenever a court order is breached or whenever a statement is made scandalizing the court. Normally the alleged contemnor is given an opportunity to show cause.

[64]. It must be borne in mind that according to the clear wording of the provisions of Order 52, which governs the procedure relating to contempt proceedings, the **respondent had no right or entitlement as of right under Order 52 to set aside the granting ex parte leave to apply for committal order.**

[65]. The respondent had only a right to apply for the exercise of the **judicial discretion under a general provision of the High Court Rules**. It is the general provision contained in Order 32, Rule 6, the respondent relied on to set aside the granting of ex-parte leave to apply for committal order. Of course the respondent had a right to have that said discretion exercised in accordance with the law and that discretion was exercised against the respondent and it follows from what I have said that even assuming for a moment in the respondent's favour, if there was an error on the part of the court in the exercise of that discretion (**which I am not by any means saying**) that error at most deprived the respondent not any substantive right or entitlement as of right given under Order 52 but of an opportunity or chance under the general provisions of the High Court rules to obtain an order to set aside the ex-parte leave granted to the Attorney-General to apply for the order of committal and therefore in my view,

it cannot be substantiated, for that reason, that any substantive right or entitlement given under Order 52 would be affected by the interlocutory decisions permitting to stand. The effect of the interlocutory decisions have not changed or deprived the respondent of any of his substantive legal rights or entitlement as of rights relevant to the substantive proceedings provided by Order 52 of the High Court Rules, 1988. Therefore, there can be no justification for grant of leave.

[66]. Both applications for leave to appeal were filed on the 21st day. If substantive legal rights of the respondent were taken away from the effect of the interlocutory decisions, why did the respondent wait till the last day (21st day) to file an application for leave to appeal?. If there is something exceptional in the effect of the order, why did the respondent wait till the last day to file the application for leave? **It appears to me reasonable to conclude that the absence of bona fide on the part of the respondent is obvious from the timing of applications for leave to appeal.**

[67]. An application for leave is not a proceeding in the ordinary course of litigation but a preliminary procedure[7].

[68]. The idea that injustice may be measured on a scale reflects a number of underlying considerations. First, the ability to assess the existence of an injustice in a preliminary proceeding, such as a leave application, is limited. In assessing the merit of a proposed appeal, the Court may well apply a vague criterion, such as whether the judgment below is attended by "sufficient doubt". Secondly, injustice involves a balancing exercise. The delay and cost of further litigation will constitute a form of injustice to the successful party below, whatever the outcome of the appellate process. Thirdly, the entitlement of the parties to justice is not unconditional, but is dependent upon the resources of the court made available by the government and the appropriate allocation of resources by the parties, which may depend upon their individual assessments of the importance of the issues in dispute. The parties may well make disparate assessments in a particular case[8].

Conclusion

[1]. The Attorney – General's preliminary objections to the respondent's notices of motion are **overruled** as devoid of merits and substance.

[7] Collins v The Queen [133] CLR 120 at 122
Coulter v The Queen [164] CLR 350 at 356
[8] Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das [2012] NSWCA 164

[2]. The respondent's applications for leave to appeal to the Fiji Court of Appeal are **refused** because:

(A) The interlocutory decisions involved **no** issues warranting determination by the Fiji Court of Appeal in any broader interest than that of the parties; and

(B) The interlocutory decisions involved **no** difficult questions of law, upon which different views have been expressed from time to time or as to which has been 'sorely troubled' ; and

(C) The interlocutory decisions and the effect of the orders did **not** finally determine any substantive rights of either party of the substantive proceedings ; and

(D) Finally, the interlocutory proceedings have already consumed significant time and significant costs and to allow the intended appeal to proceed would be to permit the parties to continue to incur additional costs (for a potentially uncertain result) which are disproportionate to the importance and complexity of the subject matter in issue.

[3]. The application for stay of proceedings is refused.

[4]. The respondent to pay the Attorney-General's costs of these proceedings summarily assessed in the sum of FJ$ 3000.00 which is to be paid within Seven (07) days hereof.

Jude Nanayakkara
JUDGE

High Court – Suva
Friday, 14th October, 2022