

---

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 227 of 2018

BETWEEN: VIJAY NISCHAL RAJ t/a ACE CIVIL & BUILDING CONTRACTORS, of  
Field 40, Lautoka.

APPELLANT/ DEFENDANT

AND: BASIC INDUSTRIES LIMITED, a limited liability company having its  
registered office at Lot 1, Jai Hanuman Road, Vatuwaqa, Suva

RESPONDENT/ PLAINTIFF

BEFORE : Hon. Justice Vishwa Datt Sharma

COUNSEL : Mr Moapa E. -for the Appellant/Defendant

No Appearance of - the Plaintiff/Respondent

DATE OF DECISION: 16<sup>th</sup> March, 2023 at 9-30am.

DECISION

*[Leave and extension of time to Appeal and striking out]*

### Introduction

1. The Appellant /Defendant filed a Summons on 10<sup>th</sup> February 2022 and sought for the following orders:
  - (i) That leave be granted to the Applicant to appeal the ruling of the Master dated 21<sup>st</sup> January 2022.
  - (ii) That the Applicant is to file grounds of appeal within 14 days from the date of granting this order for leave.
  - (iii) Alternatively, leave be granted to the Applicant to extend time, if necessary, for leave to appeal and to appeal the said ruling of the Master.
  - (iv) That Cost of this application be in the cause.
2. The Application was filed pursuant to *Order 59 Rule 10 and 11 of the High Court Rules 1988*.
3. The Respondent/ Plaintiff filed an Affidavit in Opposition on 01<sup>st</sup> August 2022.
4. Subsequently, the Respondent/ Plaintiff filed a Summons to strike out on 29<sup>th</sup> March 2022 and sought for the following orders:
  - (i) Summons for Leave to Appeal the ruling of the Master dated 21<sup>st</sup> January 2022 be struck out.
  - (ii) Cost in favour of the Plaintiff
  - (iii) Any other Orders that this Honourable Court deems just and fair.

On the following grounds:

- (a) The Application for Leave to Appeal was filed and served out of time;
  - (b) The Application was filed on 10 February 2022;
  - (c) The Plaintiff was served on 22 February 2022;
  - (d) The Defendant had 14 days from the delivery of the judgement to file and serve the application;
  - (e) The 14 days accorded to the Defendant expired on 3 February 2022;
5. Both Summons were scheduled for hearing and determination in 01<sup>st</sup> March 2023.
  6. The Counsel representing the Appellant /Defendant argued his Summons for Leave to Appeal with oral submission and sought for the striking out of the Respondent/Plaintiff's Summons seeking for striking out the Summons for Leave to Appeal on foot before this Court.
  7. There was no appearance and/or any representatives by the Respondent/Plaintiff and/or by Counsel.

**Test for Leave to Appeal**

8. The test when considering whether or not to grant Leave to Appeal an Interlocutory Order or Judgment is that whether that Appeal, if Leave is granted, has a **Real Prospect of Success**.
9. The Appellant must demonstrate that his Case has some prospect of success in the sense that there is a **Substantial Question** to be argued in the Appeal.
10. As far as this Court is concerned, it is only required at the Leave stage to determine and make a decision whether Leave should be granted to Appeal the Master's Interlocutory Ruling of 21<sup>st</sup> January 2022 whenever the Master dismissed the Appellants'/Plaintiffs' Summons of 23<sup>rd</sup> May 2019 seeking for Setting Aside of Default Judgment and Stay of Execution of the Default Judgement.

11. At this stage of the proceedings, I am not required to delve myself in analyzing the success of the Proposed grounds of Appeal filed with the Leave application, but merely whether there is a real Prospect of Success.

**Ruling of the Master [21<sup>st</sup> January 2022]**

12. The Appellant/ Defendant sought for the Setting Aside of the Default Judgement and Stay of Execution of the Ruling of the Master of 21<sup>st</sup> January 2022.
13. The Master found that the proper provisions of Law that should have been applied by the Appellant/ Defendant Application should have been Order 13 Rule 10 and not Order 19 Rule 9 of the High Court Rules, 1988.
14. The Master also found that the Default Judgment entered against the Appellant / Defendant was regular.
15. On the reasons for delay, the Master found that the Appellant/ Defendant has not provided genuine reasons for the delay in making the current application before the Master.
16. The Court also found that there was no Defence on merits and accordingly made the following order-

*"(31) The Defendant's (Appellant) application dated 22<sup>nd</sup> May 2019 is dismissed with costs. Any interim stay so granted is set aside forthwith.*

*(32) The Defendant shall pay the Plaintiff costs of this application which is summarily assessed at \$1,000.00 and is to be paid within 14 days upon delivering of this Judgement."*

17. The essential issue in these proceedings is the consideration of the prospect of the intended Appeal.

18. The Summons seeking for Leave to Appeal herein is from an Interlocutory Ruling of the Master delivered on 21<sup>st</sup> January 2022 which obviously is not readily available.
19. Further, it is trite Law that Leave will not be generally granted unless the Court determining the Application for Leave to Appeal seen that substantial injustice will be done and/or caused to the Appellant [Defendant].
20. I make reference to the case of *Totis Inc. Sport (Fiji) Ltd v John Lennard Clerk & another* Fiji Court of Appeal No. ABU 35 of 1996s wherein the Fiji Court of Appeal expressed the following:

*"It has been long settled law and practice that Interlocutory Order and Decisions will seldom be amendable to appeal. Courts have repeatedly emphasized that appeal against Interlocutory Orders and Decisions will only rarely succeed. The FCA has consistently observed that above principle by granting Leave only in the most exceptional circumstances."*
21. The Appellant's (Defendant's) contention is that the Respondent was overcharging the Appellant when he supplied construction materials on Credit in 2017 to the Defendant.
22. This was the very reason he says as to why the Appellant denied the Respondent's claim in his proposed statement of Defence. However, the Draft Statement of Defence filed herein in the current application does not tend to show and establish any meritable Defence per se that could be taken into consideration by this court to accede to the Appellant/Defendant's application seeking for leave.
23. The Appellant says further that he was not served with the sealed Judgment by default obtained by the Respondent on 21<sup>st</sup> January 2019 against him. The Judgement by default is irregular since no Assessment on Indemnity Costs and Interest of 8% Judgment was obtained against him.
24. That Substantive injustice has been caused to the Appellant in obtaining the Judgement by default against him.
25. The Appellant has not mentioned anything in is Affidavit in Support of the Summons with regards to the Service of the Writ of Summons onto him filed in 03<sup>rd</sup> August 2018.

26. The Service was effected onto the Appellant via Advertisement in the Fiji Times of Wednesday December 05, 2018 after the Respondent could not locate him at the given address of Field 40, Lautoka.
27. However, the Appellant failed to appear before the Master of the High Court, on the Returnable date of the Summons. As a result Default Judgement was entered against him accordingly.
28. The Appellant upon learning or after being informed by the Respondents (Plaintiff) employees that there was an order against the Appellant to pay the Plaintiff the debt, that he engaged his Solicitors to file a Summons and seek the Setting Aside of the Default Judgment entered against him on 21<sup>st</sup> January 2019 and he be given unconditional Leave to defend the written Action.
29. The Master of the High Court upon hearing both parties found on 21<sup>st</sup> January 2019 that "the Defendant has invoked the wrong provisions of the law and failed to provide Court with a genuine reason for the delay in making the application and there being no defence on merit, she found the Application ought to be dismissed.
30. Upon a very careful consideration of the Appellant's/Defendant's application coupled with the Affidavits in Support of the Summons together with the oral submissions, I do not find any exceptional circumstance that has been shown to this court in the Appellant's Summons seeking for Leave to Appeal the Ruling delivered by the Master on 21<sup>st</sup> January 2019 and/or in the alternative, leave to be granted for Extension of time.
31. For the aforesaid rational, I have no alternative but proceed to disallow the Appellants Summons filed on 10<sup>th</sup> February 2022 seeking for leave to Appeal and in the alternative Leave to be granted for the Extension of time to Appeal and accordingly Dismiss the Summons.
32. Further, the Respondent's Summons to Striking out the Appellant's Summons for Leave to Appeal is likewise accordingly dismissed.

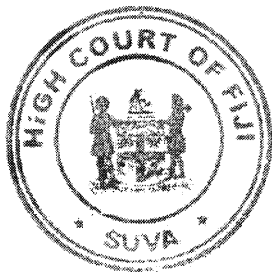
**Costs**

33. The Appellant's Summons proceeded to hearing with Appellant's/Defendant's Counsel representing making oral submissions.
34. However, there was no appearance by the Respondent (Plaintiff) and/or his Counsel at the hearing.
35. It is only appropriate, just and fair that I will not order any Costs against either parties at the Courts Discretion accordingly.

**ORDERS**

- i. The Appellants Summons filed on 10<sup>th</sup> February 2022 seeking for Leave to Appeal the Master's decision delivered on 21<sup>st</sup> January 2022 and in the in the Alternative Leave for Extension of time to Appeal is hereby Dismissed.
- ii. Likewise the Respondents [Plaintiffs] Summons seeking for the Striking Out of the Appellants Summons is also accordingly Dismissed.
- iii. There will be no order as to Costs against either parties at Court Discretion

Dated at Suva this 16<sup>th</sup> day of March, 2023.



Vishwa Datt Sharma  
JUDGE