

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 362 of 2015

**BETWEEN:** LAND TRANSPORT AUTHORITY a body corporate established under the Land Transport Authority Act 1998, with its headquarters located at Lot 1, Daniva Road, Valelevu, Nasinu.

APPELLANT/DEFENDANT

**BETWEEN:** ASIA PACIFIC LOGISTICS (PTY) LIMITED & ANTHONY'S LOGGING a limited liability company and a firm respectively, whose registered office is at 68 Dilkusha Road, Nausori.

RESPONDENT/PLAINTIFF

**BEFORE:** Hon. Justice Vishwa Datt Sharma

**COUNSEL:** Ms. Prasad N. for the Appellant/Defendant  
Ms. Nayacalevu S. for the Respondent/ Plaintiff

**DATE OF DECISION:** Wednesday 31<sup>st</sup> May 2023 @ 9.30am

DECISION

*[Summons for Leave to Appeal and stay of proceedings pending determination of Appeal]*

**Introduction**

(1) The Appellant/Defendant filed a summons on 27<sup>th</sup> May 2022 and sought for the following orders:

- (i) That the Ruling delivered and Orders made by the Acting Master of the High Court on the 12 May 2022 and all further proceedings and execution of the same be wholly stayed pending determination of the appeal.
  - (ii) That leave be granted to the Appellant to appeal the Ruling and Orders made by the Acting Master of the High Court on 12 May, 2022.
  - (iii) That costs of this application be costs in cause.
  - (iv) Any other Order that this Honourable Court deems just and expedient.
- (2) The Appellant/ Defendant relied on the Affidavit in Support of Makitalena Drova deposed on 27<sup>th</sup> May 2022.
  - (3) The Respondent/ Plaintiff filed in their Affidavit in Opposition 23<sup>rd</sup> March 2023 and sought for an order to strike out the Appellants/ Defendants Summons for Leave to Appeal and stay of proceedings.
  - (4) By Consent of the Respondent/ Plaintiff to the proceedings, the Appellant/ Defendant was granted an order on 12<sup>th</sup> April 2023 to file and serve their Affidavit in Reply, which accordingly was filed in 13<sup>th</sup> April 2023.
  - (5) Both parties to the proceedings furnished Court with their respective written submission.

**Test for Leave to Appeal**

- (6) 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**.
- (7) **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.**
- (8) 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 Learned Master's Interlocutory Ruling of 21<sup>st</sup> January 2022 whenever the Learned 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.

- (9) 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 Learned Master [12 May 2022]

- (10) The Appellant/ Defendant now seeks that:
- (i) The Ruling delivered and orders made by the Learned Master on 12<sup>th</sup> May 2022 and all further proceedings and execution of the same to be wholly stayed pending determination of the appeal.
  - (ii) Leave to Appeal be granted to the Appellant to appeal the Ruling and Orders made by the Acting Master of the High Court on 12 May, 2022; and
  - (iii) Costs of the application.
- (11) The Learned Master in her Interlocutory Ruling of 12 May 2022 made the following observations and determination -
- (a) In the instance case, the parties have completed the preliminary requirements for trial. An Order 34 summon has been filed in April 2019 and the matter is ready for allocation to a Judge for trial. The current application was filed in May 2019.
  - (b) It is rather a very late stage that the Defendant has made this application. Furthermore, they have gone ahead and identified in the pretrial Conference Minutes the issues for determination by the court.

(c) Hence, I find this application to be frivolous and only a delay tactic to postpone the trial.

(d) Further, I wish to address on the issue of annexures to the Defendant's written submission [annexure 1-6]. These are evidence which cannot be led in through submissions.

Hence, this Court make Orders that those documents are to be expunged from the Court Records and has not been used whilst determining the Defendant's application.

(e) Accordingly, the Defendants application dated 10 May 2019 is dismissed and the Defendant is ordered to pay cost which is summarily assessed at \$850 and is to be paid within 14 days from to date.

(12) The essential issue in these proceedings is the consideration of the prospect of the intended Appeal.

(13) The Summons seeking for Leave to Appeal herein is from an Interlocutory Ruling of the Learned Master delivered on 21<sup>st</sup> January 2022 which obviously is not readily available.

(14) 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].

(15) 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."*

(16) The Appellant's/Defendant's contention are the following:

(i) *Leave to Appeal*

- That the Learned Master failed to address in the interlocutory Ruling of 12<sup>th</sup> May 2022 as to how the Plaintiff's action had a reasonable cause of action.
- That the application for striking out may even be made after close of pleadings, and/or the trial date set down.
- For Learned Master to dismiss the Plaintiffs Striking out application on the basis that the Defendant has made the application at a late stage, after the parties have completed the preliminary requirements for trial, that is order 34 being complied with and matter ready for allocation to a Judge for trial date to be fixed, seem unreasonable and unjust.
- The Learned Master failed to address in her Ruling what the serious legal questions were in the Plaintiff's Statement of Claim that would warrant the striking out but took into account irrelevant consideration such as delay by the Defendant in bringing this application for Striking Out.
- Failed to address the likely chances of success in the Appeal and and/or make any reference to the pleadings.
- Also failed to address in the ruling how the Plaintiff's Statement of Claim did not fall under any of the above mentioned factors, she failed to marry the facts of the case to the laws applied in the Ruling.
- Failed to give an analysis as to how the Learned Master arrived at her decision.

(ii) *Stay of Proceedings*

- The issue of stay cited in *Orix Holdings Ltd v Zou (2020) (supra)* where the Court held "the grant of refusal of a stay is a discretionary matter of the Court [*AG v Emberson (1889), 24 Q. B.D., pp 58, 59*]. It will be granted where the special circumstances of the case so require. In exercising its

*discretion the Court will weigh considerations such as balance of convenience and the competing rights of the parties before it [Emberson (supra)]. Also where there is a risk that if a stay is granted and the assets of the applicant will be disposed of, the Court may, in the exercise of its discretion refuse the application."*

#### **Facts of Substantive Case**

- (17) On 24<sup>th</sup> November 2015 the Plaintiff filed and commenced these proceedings against the Defendant, Land Transport Authority.
- (18) The Plaintiff was in logging business and had two (2) trucks which have been the subject of the Plaintiff's claim in the case.
- (19) The Plaintiff upon request was granted a *temporary exemption permit* to truck no. FX477 to *carry permissible excess gross weight of 26,400kg which was valid for 12 months.*
- (20) The Truck no. FX477 was booked by LTA on 3 occasions for *breaching the Temporary exemption permit prescription i.e. Carrying Excess load of 45,000kg and Exceeding 26,400kg as permitted.*
- (21) The Plaintiff wrote to the Defendant [LTA] to reconsider the decision of its delegate and *grant the Plaintiff temporary permit to carry above the Legal weight of 26,400kg and even to a weight in excess of gross weight of 32,000kg.*
- (22) The Defendant then informed the Plaintiff of its decision, reason and applicable laws.
- (23) However, the Plaintiff opted to file and commence proceedings against the Defendant, LTA.
- (24) Upon a careful perusal of the Plaintiffs writ and a Statement of Claim, it can be ascertained *prima facie* that there are *Legal and Triable issues* that need to be deliberated upon and determined upon at Trial with *Viva Voce* evidence and *documentary evidence* (if any) respectively.

- (25) The Substantive Legal issues arising herein cannot be dealt with summarily by an Interlocutory Summons seeking an order for the striking out of the substantive claim at hand as the Defendant had desired to approach the matter and to have it determine summarily.
- (26) However, it is appropriate that I make reference to the High Court Rules 1988 and deal with the procedural aspect of "Appeals from the Learned Master" by the dissatisfied Litigants.
- (27) *Order 59 Rule 9(b)* provides that the Appeal from an Interlocutory Order of the Learned Master shall be filed within 7 days from the date of the granting of Leave to Appeal.
- (28) Whereas, *Order 59 Rule 11* provides for **Application for Leave to Appeal** in an Interlocutory Order made by Summons and Affidavit filed and served within 14 days of the delivery of the order.
- (29) The Interlocutory Ruling of the Learned Master was delivered on 12<sup>th</sup> May 2022. However, the Appellant/Defendant filed its summons and the Affidavit in Support on 27<sup>th</sup> May 2022, some 15 days after the Interlocutory Ruling, and served onto the Respondent/ Plaintiff on 06<sup>th</sup> June 2022, some 23 days subsequent to the filing of the same.
- (30) Further, it is noted that the Appellant/ Defendant was aware of the fact that their Summons and Affidavit in Support was filed 15 days out of time of the requisite time frame in terms of the provisions of *Order 59 Rule 11* of the High Court Rules 1988, yet they failed to make a subsequent application to cure the defect and overcome the same by making another application to the Court and seek for an **Extension and/or enlargement of time to file and serve** the Respondent/ Plaintiff.
- (31) It cannot be disputed by the Appellant/Defendant that its Summons and Affidavit seeking an order for Leave to Appeal and Stay of Proceedings was not filed and served within the stipulated period of 14 days, after the delivery of the Interlocutory Ruling on 12<sup>th</sup> May 2022, rather filed after a lapse of 15 days and served after a lapse of 23 days on 06<sup>th</sup> June 2022.

- (32) Generally, Leave to Appeal is refused for Interlocutory decisions. This is mainly done to discourage abuse of process through Plethora of Leave to Appeal application relating to trivial Interlocutory determination.
- (33) However, Leave should not be granted as of cause without consideration of the Nature and circumstances of the particular case (per High Court in *Exparte Bucknell* [1996] HCA 67; (1936)56 CLR 221 at 224).
- (34) 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 Right.
- (35) There is no available remedy that can be found in order 59 of the High Court Rules 1988, on the basis if there was a failure by the Appellant/Defendant to file their Leave to Appeal application within the given time frame.
- (36) In *Singh v Singh & Ors* [2017] HBC 147 of 2013; the Court dismissed the Leave to Appeal application and made the following observation

"[19] Counsel for the plaintiff, Ms. V. Lidise, raising a preliminary issue, submits that the application is out of time and cannot be entertained and therefore should be dismissed. She cites and relies on the case authorities of: (i) *Panache Investments Ltd v New India Assurance* [2015] FJHC 523 and (ii) *Deo v Metal Works & Joinery Ltd* [2015] FJHC and (iii) *Hawkes Bay Hide Processors v CIR* (1990) 3 NZLR 313 at 315

[20] In *Panache* and *Deo* (above), the High Court held the failure to comply with the service requirement is fatal.

[21] Justice Cooke in '*Hawkes*' case (above) said:

*"The statute is unambiguous as to the time requirement. I can see no basis on which the Court could hold that the requirement is not mandatory. It does not seem to be legitimate to read into such provision any such words as "or within a reasonable time thereafter" and the doctrine of substantial compliance cannot apply to fixed time limit."*

[23] O.59, r.11 of the HCR dictates specific time limit within which an application for leave to appeal any interlocutory order with a supporting affidavit must be filed and served. The word "shall" in rule 11 denotes that the time limit prescribed therein is mandatory and must be complied with.

[24] As was held in *Hawkes* (above) the doctrine of substantial compliance cannot apply to the fixed time limit.

- (37) In the current case, the Learned Master whilst deliberating on her determination, in the Appellant/Defendant striking out Application, made the impugned order on 12<sup>th</sup> May 2022 dismissing the striking out application of the Appellant/Defendant.
- (38) I find that the Appellant/ Defendant has failed to comply with the requirements and/or time frame given within the provisions of order 59 Rule 11 of the High Court Rules 1980.
- (39) Noncompliance as to the specific time limit prescribed by the Rule "is fatal and cannot be cured by invoking order 2, rule 1 (1) of the High Court Rules 1988."
- (40) Further, I find that there is no application filed seeking for the Extension/Enlargement of time frame [Order 59, Rule 10] to file Leave to Appeal application.
- (41) I also uphold the Interlocutory Ruling of the Learned Master delivered on 12<sup>th</sup> May 2022 wherein the Learned Master correctly determined:
- (i) That from Learned Master Ruling of 12<sup>th</sup> May 2022
- In the instance case, the parties have completed the preliminary requirements for trial. An Order 34 summon has been filed in April 2019 and the matter is ready for allocation to a Judge for trial. The current application was filed in May 2019.
  - It is rather a very late stage that the Defendant has made this application. Furthermore, they have gone ahead and identified in the pretrial Conference Minutes the issues for determination by the court.
  - Hence, I find this application to be frivolous and only a delay tactic to postpone the trial.
  - Further, I wish to address on the issue of annexures to the Defendant's written submission [annexure 1-6]. These are evidence which cannot be led in through submissions.

- Hence, this Court make Orders that those documents are to be expunged from the Court Records and has not been used whilst determining the Defendant's application.
- Accordingly, the Defendants application dated 10 May 2019 is dismissed and the Defendant is ordered to pay cost which is summarily assessed at \$850 and is to be paid within 14 days from to date.
- This file is to be allocated to a Judge for Trial.

(ii) The Defendant's application dated 10 May 2019 is dismissed.

#### **Stay of Proceedings and Execution**

(42) Since the appellant/defendants leave to appeal application is dismissed for the reasons as stated hereinabove, I have no alternative but proceed to dismiss the stay of proceedings and the execution of the order sought herein by the appellant/defendant.

#### **Costs**

(43) The Application for Leave to Appeal and Stay of proceedings and execution proceeded to full hearing with parties furnishing court with their respective written submissions coupled with making oral submissions to the court, it is only just and fair that I grant the Respondent/Plaintiff, Asia Pacific Logistics Pty Limited a sum of \$1,000 as summarily assessed costs accordingly.

(44) The Order 34 Summons to enter the action for trial was already filed on 23<sup>rd</sup> April 2019 before the Appellant/Defendants striking out summons filed on 10<sup>th</sup> of May 2019.

(45) The final interlocutory striking out summons has been dealt with coupled with the current leave to appeal application and the stay of proceedings and execution application filed on 31<sup>st</sup> May 2023, against the Ruling of the Learned Master delivered on 12<sup>th</sup> May 2022.

(46) I proceed to grant the order 34 summons and enter the substantive action for trial and the file to be allocated to an Honourable High Court Judge accordingly.

**Orders**

- (i) The Applicant/Defendants Leave to Appeal Application is hereby dismissed.
- (ii) The Stay of Proceedings and Execution order sought herein is also accordingly dismissed.
- (iii) The Appellant/Defendant, Land Transport Authority is ordered to pay the Respondent/Plaintiff, Asia Pacific Logistics Pty Limited a sum of \$1,000 as a summarily assessed costs within 14 days timeframe.
- (iv) The substantive action is now entered to trial in terms of order 34 summons and the same to be allocated to an Honourable High Court Judge for trial and determination.

Dated at Suva this 31<sup>st</sup> day of May, 2023.



Vishwa Datt Sharma  
JUDGE

CC: The Land Transport Authority, Valelevu Nasinu  
Shekinah Law, Suva.