



## **Cause and Grounds**

1. The Appellant/Defendants seeks Leave to Appeal the decision of the High Court delivered on 18 March 2024 for the following:
  1. The Appellant/Defendant are ordered to pay the Respondent/Plaintiff the sum of \$5,000 being costs thrown away plus \$14, 865.75 for wasted travel costs incurred by the Plaintiff as a result of postponement of the Trial dates in October 2022.
  2. Total costs to be paid within 21 days of this Ruling.
2. The Appellant/Defendants relies upon the following grounds:
  1. The learned judge erred in law and in fact in his decision to hold the Defendants responsible for the payment of the Plaintiffs wasted costs which had not been proven to have arisen as a result of the adjournment.
  2. The learned judge erred in law and in fact when he Ordered the Defendants to pay wasted hearing fees of \$5,000 and wasted travel fees of \$14, 865.75 to the Plaintiff for the following reasons:
    - a. Application for adjournment had been made on 15 September 2022 and the Plaintiff had ample notice of the trial being asked to be vacated;
    - b. The Plaintiff has chosen Fiji as the forum to litigate his dispute with the Defendants and has acquiesced and accepted that he must bear the cost of te litigation regardless of which country he lives in;
    - c. The plaintiff had consented to the trial dates being vacated which showed that he was not ready for the Trial and the dates being vacated were not prejudicial to his interests.
    - d. The October 2022 Trial would not have happened as the file was not ready for hearing as shown from the further Orders of Justice Levaci made on 18 March 2024 for filing of a Summons for Directions orders for discovery and for compliance with the High Court rules.

e. The Plaintiff had consented to Trial dates being vacated 3 times in 2020 and his solicitors had prepared better on the 3 times that the Trial had been vacated and no further trial preparation costs were warranted.

f. The Plaintiff was travelling on tickets which were refundable and had not shown that he was actually suffering that loss to be entitled to the sum of \$14, 865.75 ordered by the Court.

g. In the circumstances of the case, the costs ordered by the Honorable court were punitive to the Defendants and disregarded the consent of the Plaintiff to vacate the Trial date which was evidence that the Plaintiff himself if wanted the dates vacated and would not have proceeded for the Trial in any event on those dates.

3. The learned Judge followed the incorrect principles of law in assessing costs thrown away for hearing fees and travel costs.
4. Such further and/or other grounds as may be apparent from the Court records.

### **Affidavits**

3. In his Affidavit the Appellant/Defendants deposes that the Plaintiff had consented to the Trials being vacated on 4 occasions knowing he was not prepared to conduct the trial.
4. That the application for vacation on October 2022 was made 19 days prior to hearing of the matter and the Respondent/Plaintiff was travelling on non-refundable tickets.
5. Solicitors for the Respondent/Plaintiff knew of the application for vacation from October 2022 and consented to trial dates knowing they were not prepared for trial.
6. On 18 March 2024 the Court ordered parties to comply with High Court rules by filing the required discoveries and completing all pre-trial matters. The matter was never ready for trial even on the 3 dates it was set in 2020.
7. There were important issues of law involved in the present leave application and the Court had penalized the applicant for having trial vacated.

## **Law and Analysis on application for Leave to Appeal and for Costs**

8. Section 12 (2) (f) of the Court of Appeal Act provides that an application for appeal against an interlocutory decision of the Court can be made provided that leave is granted.
9. In Goundar -v- Ministry of Health [2008] FJCA 40; ABU 0075.2006S(9 July 2008) Byrne, Powell and Khan JJA had this to say about an interlocutory ruling of the High Court:

“This is the position. Where proceedings are commenced in the High Court in the Court’s original jurisdiction and the matter proceeds to hearing and judgment and the judge proceeds to make final orders or declarations, the judgment and orders are not interlocutory.

Every other application to the High Court should be considered interlocutory and a litigant dissatisfied with the ruling or order or declaration of the Court needs leave to appeal to that ruling order or declaration.”

10. The decision for which leave to appeal is made against, stems from an application for adjournment of trial in which the Respondent/Plaintiff applied for and was granted which the Appellant/Defendant argued are exorbitant costs.
11. In the case of Herffernan -v- Byrne CA. ABU 00027 of 2008 held that :

“I am mindful of what the Court of Appeal for Botswana said in ***Lerumo Mogobe Legal Practitioners v Fencing Center (Pty) Ltd*** [2000] 1 B.L.R. 128; [2000] BWCA 10, as per Steyn JA at pages 14-15 (with whom Amissah P and Lord Weir JA agreed):

"This court must not be seen to encourage parties to appeal only against costs orders, save when they are clearly wrong. Secondly, and more importantly, [the] appellant's conduct as an officer of the court was most reprehensible and deserving of censure. The court in demonstrating its disaffection concerning such conduct, should not be confined to expressions of disapproval only but also, in proper cases, by way of appropriate orders as to costs. For these reasons we propose to order that the costs of appeal should also be paid on an attorney and own client scale [that is, indemnity costs]."

12. For the purposes of costs, Order 62 Rule 3 of the High Court Rules provides a brief explanation of costs thrown away as :

“Costs thrown away” Where proceedings or any part of them have been ineffective or have been subsequently set aside, the party in whose favour this order is made shall be entitled to the costs of those proceedings or that part of the proceedings in respect of which it is made;

13. In Shankar -v- Shankar [2015] FJHC 552; HBC 229.2001 (24 July 2015) Tuilevuka J when discussing the appropriateness of awarding costs thrown away stated:

“Where the judgment is set aside, it will usually be on payment by the party in default of the costs of the day (“which include all costs thrown away by reason of the trial becoming abortive,” Jessel M.R. *Burgoine v. Taylor* (1878) [1878] UKLawRpCh 135; 9 Ch. D. 1, P.5 and of the application to restore (*Cockle v. Joyce* [1877] UKLawRpCh 278; (1878) 7 Ch. D. 56; *Wright v. Mills* (1889) 60 L.T. 887). An affidavit of merits is not usually necessary though the Judge may require one in his discretion (*Sorrell v. Clarke* (1965) 109 S.J. 354, C.A.; *Bracken v. Gilpin* [1921]W.N. 274).”

14. When considering the principles for applying costs, court considers the case of Follies International Limited -v- Honeymoon (Fiji) Ltd [2021] FJHC 200; HBC 225.2007 (26 March 2021) where Stuart, J stipulated the following:

#### “14.2 Principles applying to determination of costs

(1) The following general principles apply to the determination of costs:

(a) the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds:

(b) an award of costs should reflect the complexity and significance of the proceeding:

(c) costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application:

(d) an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application:

(e) what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by

the solicitor or counsel involved or on the costs actually incurred by the party claiming costs:

(f) an award of costs should not exceed the costs incurred by the party claiming costs:

(g) so far as possible the determination of costs should be predictable and expeditious.

and these principles (some of which are not dissimilar to the principles prescribed in O.62., r13 to guide the Taxing Officer in taxing a bill of costs) operate as guidelines in the judicial exercise of the court's discretion. It is clear from the Schedule of Costs filed by the first defendant that the costs have been calculated on the basis of an hourly rate of \$300.00, and although there has been no evidence as to the reasonableness or otherwise of this rate, there has been no evidence put forward by ILTB to the effect that the rate is not reasonable."

## **Submissions by Parties**

### ***Submission by Appellant/Defendant***

15. The Appellant/Defendant submitted that in the Affidavit in Support filed on 3 October 2022 which was referred in paragraph 22 of the Ruling, the award of \$14,865.75 for wasted travel costs was incurred by the Respondent/Plaintiff as a result of a postponement to the trial on 3 October 2022. Reference was made to the Affidavit of the deponent relied upon by the Respondent/Plaintiff which lists expenses of wasted flights and lodgment whilst awaiting flight at \$23,864.39.
16. The Appellant/Defendant argued that the Respondent/Plaintiff was well aware of the application for adjournment 19 days prior to the matter being called up. They took the risk to obtain their witness despite having knowledge of the adjournment.
17. The air transport Bill on the deponent's affidavit relied upon by the Respondent/Plaintiff states that the air transport bill is \$2, 026.84 Fjd. However the Fiji Airline Bill is in Fijian dollars which the deponent converted into USD and then back to Fjd \$4, 821.22. There are errors in the calculation of the air transport bill by the Court.
18. Furthermore at the hearing, a proforma account was tendered without the list of itemized taxable items. The proforma account amounted to \$8998.64 which did not establish what and how they had earned the said monies. Therefore the Respondent/Plaintiff was awarded \$5000 costs for an amount which he had not incurred.

19. The recommended amount should have been \$6, 729.84.

### ***Submissions by Respondent/Plaintiff***

20. Counsel for the Respondent/Plaintiff argued that leave to appeal is granted only on exceptional circumstances to discourage appeals referring to the cases of Chan Sui Qui -v- The Hong Kong Construction Co and the South African case of Zuma -v- The Office of the Public Protection and Ors. which expanded the principles that are applicable and stated by Court of Appeal to that of exceptional circumstances.
21. There was nothing in the Grounds of Appeal highlighting the discrepancies in the calculation of fees and also the basis of the legal costs.
22. The Respondent/Plaintiff also argued that the adjournment application was consented to but not for costs and that costs were to be determined by Court.
23. Furthermore, most of the grounds of appeal dealt with findings of facts of the judge and not discretionary matters to be determined at leave stage. The Court applied the cost thrown away principle and referred to the case of Follies (Supra) 2/3 of costs was awarded rather than the gross sum.
24. The Respondent/Plaintiff therefore submitted there was no error in principle for which the Court has powers to exercise leave to grant appeal and that any error in the sums of monies awarded could be corrected by this Court.

### ***Reply Submissions***

25. In reply the Appellant/Defendant argued that there are costs awarded for which was not incurred in travel, accommodation and allowances and that the Plaintiff has provided this as grounds in Appeal in Ground No. 1.
26. That there are exceptional circumstances that render the ruling of judge Qica in error and wrong requiring the Appellate court to consider the Ruling.

### ***Analysis***

27. The Court has considered the Affidavit evidence before it as well as the submissions by parties to determine whether there are exceptional circumstances to render this Court to grant Leave to Appeal.

28. The application for Leave and Grounds of Leave have been available to Court. The Grounds of Appeal raised that address the submissions that have been made into Court.

### ***Exceptional Circumstances***

29. There are indeed errors in the manner in which the calculation was made on the air travels claimed by the Plaintiff.
30. Furthermore, the Court considered whether the Grounds of Appeal raised an arguable case in light of the decision in Follies (Supra).
31. Argument by the Defendants/Respondent is that the amount claimed should be evidenced when aligned to a taxable costs.
32. There is nothing to infer that these costs were incurred as the taxable tabled costs did not properly itemize the particulars that gave rise to solicitor costs as per the Standard Taxable solicitors costs provided in the Schedule in the High Court Rules.
33. The Court finds there are points of argument on the incurred costs and expenses that cannot be cured by a correction in the Ruling and require the determination of the Appellant court.

### ***Is there substantial injustice***

34. When considering the costs and the basis for awarding costs, the Court finds that there will be substantial injustice if the court does not grant leave as the current costs require further consideration on Appeal given the manner in which the high Court had considered the submission for costs by both parties.
35. The Appellant/Defendant will be required to make payments for costs. However, the quantity as well as the justification for awarding costs is the issue in contention they seek to appeal against.
36. The Respondent/Plaintiff will also not be prejudiced as the Appellant/Defendant is not denying the payment of costs, the amount of costs to be awarded should rightfully be considered by the Appellate Court.
37. There are indeed exceptional circumstances that require the Court on Appeal to consider the decision in light of the grounds of Appeal and submissions made into Court.



## **Court Orders**

38. Court will therefore Order that:

- (i) **The Court will grant Leave to Appeal;**
- (ii) **Party bear its own costs.**



A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a horizontal line and a tail.

Senileba LTT Waqainabete-Levaci  
Puisne Judge