IN THE HIGH COURT OF FIJI AT LAUTOKA
CIVIL JURISDICTION

ACTION NO. HBC 71 OF 2022

BETWEEN	:	**SANGEETA DEVI KUMAR** of Natokowaqa, Lautoka, Senior Educator. Presently unemployed. **PLAINTIFF**
AND	:	**AVITESH REDDY of Sonaisali, Nadi-Chef.** **DEFENDANT.**
BEFORE	:	A.M. Mohamed Mackie -J.
COUNSEL	:	Mr. R. Chaudhary – for the Plaintiff / Respondent.
	:	Mr. R. Gordon- for the Defendant / Applicant**.**
DATE OF HEARING	:	On 9th December 2024.
WRITTEN SUBMISSION	:	Filed by the Plaintiff on 11th October 2024.
	:	Filed by the Defendant on 09th December 2024.
DATE OF RULING	:	On 07th March 2025.

RULING

A. INTRODUCTION:

1. This Ruling pertains to the hearing held before me on 9th December 2024 in relation to the summons ("the application") dated 1st August 2024 and filed by the Defendant/Applicant ("the applicant"), seeking the following reliefs;

1. *That leave be granted to the Defendant to appeal the order(s) and/or ruling and/or decision of the purported Master Azhar made and/or pronounced on 18 July 2024 in Lautoka High Court Civil Action Number 71 OF 2022 together with the and/or necessary and required consequential procedural and/or ancillary orders.*

2. *That the time within which to file the Notice of Appeal be enlarged so that the Notice of Appeal be filed within 21 days of grant of such leave together with the and/or any necessary and required consequential procedural and/or ancillary orders.*

3. *That the order(s) and/or ruling and/or decision of the purported Master Azhar made and/or pronounced on 18 July 2024 in Lautoka High Court Civil Action Number 71 of 2022 be forthwith stayed pending the hearing and determination of this Summons/Application and the hearing and determination of the and/or any substantive appeal.*

4. *An order that the costs of this application be costs in cause.*

2. In support of this application, the applicant relies upon the affidavit sworn on 29th July 2024 by **Ms**. **FEHRIN NAFISA ALI**, a case Manager at the Accident Compensation Commission Fiji ("ACCF") and filed along with the application.

3. This application states that it is made pursuant to and under Order 59 Rules 8, 9, 10, 11 and 16 of the High court Rules 1988 and under the inherent jurisdiction of this Court.

4. The application being supported before me inter-parte on 17th September 2024, learned Counsel for the Plaintiff/ Respondent ("the respondent"), who vehemently opposed the same, opted to file written submission on the question of leave. Accordingly, direction being given, both parties have filed their respective written submissions as stated above. I thank both the counsel for the same.

B. BACKGROUND:

5. This is an action filed by the respondent on 16th March 2022 seeking damages from the applicant for personal injuries caused to her when she was a passenger in the Motor Vehicle bearing Registration No-DY-911 driven by her husband along Queen's Road, Navo, Nadi. She alleges that the Motor Vehicle bearing Registration No-EW 539 driven by the applicant, which also was travelling along Queen's Road, Navo Nadi, towards Sigatoka, collided with the vehicle she was travelling in.

6. The respondent alleges that the applicant negligently, carelessly and recklessly drove his vehicle as particularized in paragraph 3 of the SOC.

7. What seems to have prompted the applicant's Solicitors to file a Summons before the Master on 7th April 2022 to strike out the respondent's action, was the contents of the averments found in paragraph 4 of the statement of claim, which reads as follows.

> ***4.*** *That, the defendant has been charged with the offence of Dangerous Driving Causing Grievous Bodily Harm in Nadi Traffic case number 350 of 2019 and the same is pending and progressing through the court system in the Nadi Magistrate's Court. The said charge is relevant to the accident in the within action.*

8. This Summons was filed on behalf of the Accident Compensation Commission Fiji (ACCF), which has taken the task of defending the action on behalf of the applicant.

9. The Master on 5th March 2024, apparently, having decided to dispose the hearing by way of written submissions, on the request of the junior Counsel for the applicant, who had failed to file same in time, gave further 14 days for the applicant to file their written submission, when the respondent had already filed her initial written submission and supplementary written submissions on 01st August 2023 and 09th May 2024 respectively. However, no written submission was filed on behalf of the applicant before the Master.

10. Accordingly, the Master by his impugned Ruling dated 18th July 2024 dismissed the applicant's striking out application that had been filed on 6th April 2022. It is against this Ruling; the applicant is before this

Court by way of Summons filed on his behalf on 30th July 2024 seeking leave to Appeal and Stay on the following grounds of appeal.

C. GROUNDS OF APPEAL:

11. On behalf of the applicant, the following Grounds of Appeal have been adduced, as per the annexure marked as "FNA-2" to the supporting affidavit.

1. *The Learned purported Master erred in law and/or in fact in pronouncing and/or delivering a ruling in the matter when he no longer had jurisdiction to consider the application made by the Defendant and/or to consider the submissions in the matter and/or to give and/or pronounce a ruling in the matter.*

2. *The Learned purported Master erred in law and /or in fact in failing to conduct a proper hearing of the Defendant's application/summons to strike out and thereby denied the Defendant procedural fairness and natural justice.*

3. *The Learned purported Master erred in law and/or in fact:*

    3.1. *When he failed to make findings or otherwise address or respond in any way to the Defendant's application / assertion / submission that the pleading of a charge of criminal nature, in the absence of a conviction in relation to the same, was improper and/or not permitted by the High Court Rules 1988 and/or the common law and/or the Civil Evidence Act 2002. The Learned purported Master thereby denied the Appellants procedural fairness and natural justice; and*

    3.2. *When he incorrectly interpreted and/or failed to correctly interpret Order 1 rule 10 and Order 18 rules 6, 18 and 21 of the High Court Rules 1988; and*

    3.3. *When he incorrectly interpreted and/or failed to correctly interpret Section 17 of the Civil Evidence Act 2002; and*

    3.4. *When he failed to expunge and/or strike paragraph 4 of the plaintiff's statement of claim; and*

    3.5 *When he failed to expunge and/or strike out the plaintiff's statement of claim and writ of summons; and*

    3.6. *When he incorrectly interpreted and/or failed to correctly interpret and/or apply Prasad v Lata [2005] FJCA 39; ABU0026J.2004 (4 March 2005); [2005] FJLawRp 10; [2005] FLR 56 (4 March 2005) and Venkatamma v Ferrier Watson 1995 [1995] 41 FLR 258.*

4. *The Learned purported Master erred in law and/or in fact when he incorrectly interpreted and/or failed to correctly interpret Order 18 Rule 18 of the High Court Rules 1988.*

5. *The Learned purported Master erred in law and/or in fact when he ordered costs summarily assessed in the sum $1,000.00 against the Defendant contrary to established principles of awarding of costs.*

6. *The Learned purported Master erred in law and/or in fact when he had no jurisdiction and/or power and/or authority to make the orders he made and/or pronounced on 18 July 2024.*

7. Such further or other grounds as may be applicable upon a receipt of the Record of proceedings.

D. LAW & GOVERNING PRINCIPLES:

12. This application is made pursuant to and under Order 59 Rules 8, 9, 10, 11 and 16 of the High Court Rules 1988 and under the inherent jurisdiction of this Court.

13. The principles relevant to an application for leave to Appeal against interlocutory decisions were discussed in ***Abdul Hussein v NBF [1995] FLR 130, where Pathik J referring to Murphy J's statement in "Niumann*** " said:

"A useful summary of some of the matter which a judge may in practice consider on an application for grant of leave is to be found in the judgment of Murphy J in Niemann at p.141 which I adopt and they are as follows:

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 order made has the effect of altering substantive rights of the parties or either of them; and

d. 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."

14. In ***Niemann v. Electronic Industries Ltd. [1978] VicRp 44; [1978] V.R.431*** at page 441 where Supreme Court of Victoria (full Court) held as follows;

"…. 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 seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to affect a substantial injustice by its operation.

It appears to me that greater emphasis is therefore must be 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 be more easily seen that leave to appeal should be given"

15. In the case of ***Khan v. Suva City Council [2011] FJHC 272; HBC 406.2008 (13th May 2011)*** the following observations were made in regard to application for leave to appeal;

It is trite law that leave will not generally be granted from an interlocutory order unless the court sees that substantial injustice will be done to the applicant.

Further, in an application for leave to appeal, it is incumbent on the applicant to show that the intended appeal will have some realistic prospect of succeeding.

16. In ***Kelton Investment Ltd & Tappoo Ltd v Civil Aviation Authority of Fiji and Motibhai and Company*** Limited- Civil Action No. ABU 0034 of 1995, the Court of Appeal observed as follows.

"The Courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence leave to appeal are not readily given. Having read the affidavits filed and considered the submissions made I am not persuaded that this application should be treated as an exception. In my view the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted".

E. CONSIDERATION:

17. The impugned ruling pronounced by the Master on 18th July 2024 is an interlocutory decision. The application for leave to appeal was filed on 30th July 2024 within 14 days from the date of impugned Ruling. Thus, it was within the time period prescribed for that purpose. The parties hereof are not at variance in this regard, and in relation to the applicability of Order59 Rules 8 to 11 and 16 of the HCR that was employed by the applicant for the purpose of making this application before this Court.

18. Learned counsel for the applicant in his oral and written submissions has submitted that there has been a substantial injustice caused to the applicant, and his proposed grounds of appeal have merits.

19. As correctly alluded to by the applicants' Counsel, this Court, at this juncture, is not required to take an in-depth look and analyze the grounds of appeal as it would be done at the stage of proper Appeal subsequent to granting of leave and adherence to the necessary formalities thereafter.

20. However, this Court, at this leave stage, is not precluded from considering whether the proposed grounds of appeal are prima-facie meritorious warranting the intervention of this Court by way of an appeal.

21. For this purpose, it is the duty of the counsel for the applicant to demonstrate that the proposed grounds are with merits, there are serious questions to be tried and if the impugned Ruling is allowed to stands as it is, substantial injustice would be caused to the applicant.

Merits of Grounds of Appeal:

22. The first and foremost ground adduced on behalf of the applicant is that the "purported Master" erred in Law and/or in fact in pronouncing and/or delivering a ruling in the matter when he no longer had jurisdiction to consider the application made by the applicant and/ or to consider the submissions in the matter and/ or to give and / or pronounce a ruling in the matter. I find that the purported grounds No- 6 is also raised on the same basis.

23. The crux of the argument advanced by the Counsel for the applicant on the said grounds No. 1 and 6 is THAT;

a. When the application was decided by the Master, he was no longer a Master,
b. He therefore had no jurisdiction to deal with the matter as a judge, in the manner he did as a purported Master.
c. He ought to have referred the matter to a Master or dealt with it as a judge,

d. By dealing with it as a Master, when he no longer was a Master but a judge, was an error on his part.

24. It is not in dispute that when the relevant Master heard the applicant's Summons on 3rd October 2022 he was functioning as a Master clothed with necessary jurisdiction to do so. The pertinent question that would arise for consideration in appeal, if this Court grants leave, is whether the same Master had jurisdiction to consider the matter, write the ruling and pronounce it as he did on 18th July 2024 when he had become a judge of the High Court.

25. In this regard, I don't see any serious issue to be gone into, with leave being granted, since the appointment of former Master as a judge was on an acting basis and his substantial post as a Master of the High Court still remains as it was at the date of hearing the matter in question. The fact that he was appointed only as an acting judge is conceded by the applicant's Counsel in his written submissions.

26. So, there could not have been any impediment for the then Master (being an acting Jude) to deal with the matter and pronounce the impugned Ruling in the capacity of the Master. Since his substantive post as a Master remained as it was, he has correctly signed the said Ruling as the "Master of the High Court". Even after his present acting appointment as a judge is made permanent, he will, as a judge, still be clothed with necessary jurisdiction to dispose the matters heard by him by "sitting as a Master" and signing it to the effect "Judge sitting as the Master".

27. Thus, in view of the above, the purported grounds 1 and 6 above will hold no water and do not essentially warrant the leave of this court to appeal.

28. By the proposed ground No-2, it is alleged that the Master erred in law and/ or in fact in failing to conduct a proper hearing and/or consideration of the applicant's application/ summons filed on 7th April 2022 and thereby denied the applicant procedural fairness and natural justice.

29. On careful perusal of the record, I find that when the natter had come up before the Master on 14th June 2022 for the inter-parte hearing of the applicant's Summons, the Respondent's Counsel, who did not want to file any Affidavit in opposition, moved to fix the matter for hearing, on which the Master fixed the matter to be mentioned on 29th November 2022 to fix a hearing date and accordingly, on 29th November 2022 the matter was fixed for hearing on 02nd August 2023.

30. As the Master did not sit on 2nd August 2023 , the matter was adjourned to mention on 10th August 2023 and when the matter came up on 10th August 2023, the applicant was given further time to file the written submissions before 31st August 2023 and the matter was fixed to be mentioned on 4th September 2023

on which date the matter was adjourned to 12th October 2023, thereafter to 8th November 2023 and finally for 29th January 2024, on which date the applicant was granted further time to file his written submissions before 26th February 2024 and the matter was fixed to be mentioned on 5th March 2024.

31. Accordingly, when the matter had finally come up on 5th March 2024 as no written submissions had been filed by the applicant, on the application of the counsel for the applicant for further 14 days to file their written submissions, the Master granted time till 19th March 2024 and fixed the matter for ruling on notice. It is observed none of the parties, particularly, the Counsel who appeared for the applicant, had insisted for a hearing date. The Master in his Ruling has stated that the parties had agreed to have the matter disposed by way of written submissions.

32. Accordingly, on 18th July 2024, the Master pronounced the impugned Ruling dismissing the applicant's Summons for striking out. It is to be observed that though the applicant's Solicitors were given several opportunities to file their written submissions, they failed and neglected to file the same or to have an oral hearing date fixed for the applicant's Summons for striking out. It was the applicant, who moved the Court to strike out, should have acted diligently and file their written submission as per the direction and moved the court to have a date fixed for an oral hearing.

33. Having failed to do so, the applicant's Solicitors cannot be heard to say now that the Master failed to conduct a proper hearing into the applicant's Striking out application and thereby denied the procedural fairness and natural justice as alleged through the proposed ground No-2. This ground, in my view, is with no merits. Even if there was an oral hearing, from what I understand on perusal of the Rulings, I am certain that the applicant would not have succeeded in his strike out application. Even the written submission subsequently filed before this Court for the purpose of this application, does not contain any valid argument to fortify the proposed ground No-02. Thus, the proposed ground 2 does not warrant any consideration.

34. The applicant's Counsel in paragraphs 42 and 43 of his written submissions has alleged to the effect that since the Master got elevated as Acting judge, he wanted to hastily deliver all his pending rulings and thus he did not properly consider the applicant's application for striking out.

35. This Court cannot agree with the above position taken by the applicant's Counsel to fortify the proposed grounds of appeal. The contents of the impugned ruling clearly demonstrate that it is a well-considered one, with sufficient time being taken in preparation of it and there has not been any semblance of haste or rush on the part of the Master to dispose the matter as alleged by the applicant's counsel. This allegation/ observation, in my view, is unwarranted.

36. The proposed grounds under No.3 mainly revolve around the propriety of the pleadings, particularly in relation to paragraph 4 of the statement of claim, which reads as follows;

> "4. *That, the defendant has been charged with the offence of Dangerous Driving Causing Grievous Bodily Harm in Nadi Traffic case number 350 of 2019 and the same is pending and progressing through the court system in the Nadi Magistrate's Court. The said charge is relevant to the accident in the within action".*

37. I totally agree with the stance taken by the learned Counsel for the applicant that what is relevant in pleadings for an action of this nature is the conviction of the defendant (diver) and not the fact that he has been charged at the Magistrate's Court as pleaded above. However, any averments therein to the above effect, though may not be relevant, is not necessarily going to prejudice the applicant, misdirect the Court or give an advantage to the respondent. The trial Court will rely on the proof of negligence on the part of the applicant, where the conviction, if any, by the Magistrate Court may become relevant in the decision making by the trial judge.

38. Further, so far in this matter, no statement of defence (SOD) has been filed and the Pre-trial Conference (PTC) formalities are yet to be attended, which would culminates with the recording of agreed facts and the agreed issues to be tried. Eventually, the matter will proceed for trial only on the agreed issues, and the pleadings will rescind or go to the back-seat, while the trier or judge will be driven only by the issues during the trial and the final decision will be based on the evidence led targeting the issues framed.

39. The inclusion of certain facts about the proceedings in the Magistrate Court, unless it is on the conviction of the defendant, will not necessarily mean that there will be an issue on it. The contents of paragraph 4 in the SOC in this matter, on the pending Magistrate Court proceedings, need not prejudice the applicant as argued by the counsel for the applicant.

40. The applicant in his statement of defence can take this up and see that the issues are framed accordingly in order to avoid any prejudice to him. The mere pleading that the applicant has been charged at the Magistrate Court for a traffic offence will not itself bring home a judgment in the respondent's favor. He has the onus of proof on preponderance of evidence that the applicant was negligent.

41. The learned defence counsel in his written submissions alleges that the sole purpose and motive of the respondent in pleading a charge is to prejudice and/ or taint and/or poison the mind and /or reasoning process of a judicial officer. A trial judge will not be so susceptible to be misdirected or carried away by such averments in the pleadings. The contention of the applicant's counsel that the judge will fully depend on the pleadings, is without merits, as the issues will supersede the pleadings.

F. <u>CONCLUSION:</u>

42. The Master has not decided on any substantive issues. No prejudice has been caused to the applicant by the impugned decision of the Master. I don't find any reason in the impugned ruling or merits in the proposed grounds of appeal to warrant the intervention of this Court by way of an appeal with leave being granted. The paragraph 4 of the statement of claim need not have warranted the striking out of the respondent's action as moved by the applicant's counsel. Striking out on such a trivial matter will be a harsh punishment and would have prejudiced the respondent.

43. The Order for costs made by the Master in a sum of $1,000.00 payable by the ACCF to the respondent appears to be reasonable in the circumstances surrounding the application before the Master. However, I do not wish to impose any costs on this application. None of the proposed grounds adduced by the applicant

warrants the consideration of leave. Since the leave is being refused, no necessity arises for the consideration of the application for Stay.

G. FINAL ORDERS:

a. The Summons for leave to appeal and stay fails.

b. The Summons filed on behalf of the defendant/applicant on 30th July 2024 seeking leave to appeal and stay is hereby dismissed.

c. No costs ordered and the parties shall bear their own costs.

d. The matter be mentioned before the present Master on 24th April 2025 for further directions.

On this 07th Day of March 2025 at the High Court of Lautoka.

HIGH COURT OF FIJI
LAUTOKA

A.M. Mohamed Mackie.
Judge
High Court.
Lautoka.

SOLICITORS:

For the Plaintiff- Messrs. CHAUDHARY & ASSOCIATES – Barristers & Solicitors.
For the Defendant: Messrs. GORDON & Co- Barristers & Solicitors.