

IN THE FIJI COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 041 of 2022
Suva High Court HBC: 38 of 2013

BETWEEN : **LESLIE GEE WAY WONG AND MARISSA WONG**

1st Appellant

: **MAKARE HOLDINGS LIMITED**

2nd Appellant

: **MAKARE INVESTMENT LIMITED**

3rd Appellant

AND : **BERNARD ROBERT EVANS AND VERA HERITAGE**
EVANS AKA VILA HERITAGE EVANS

Respondents

Coram : **The Honourable Justice Filimone Jitoko**

Counsel for the Appellants : **Mr. V. Filipe [Redwood Law]**

Counsel for the Respondents : **Mr. I. Fa (Jnr) [Fa & Co]**

Date of Hearing : **19 October, 2023**

Date of Ruling : **3 November, 2023**

RULING

1. On 21 July 2022, the Appellants filed their Summons for Leave to appeal the Decision of the High Court, Suva per Nanayakkara J, of 1 July 2022, striking out the Appellants Notice and grounds of appeal against the Ruling of the acting Master made on 15 February, 2022 striking out the Appellants' Writ of Summons against the Respondents under Order 18 r18 (1) (a) – (d) and furthermore, without leave of the Official Liquidator and the Court, having first being obtained.
2. More specifically, the High Court held that the Order by the acting Master was an interlocutory order and would need leave to appeal under Order 59 r.9 (b) of the High Court Rules which was not obtained. Furthermore, the Appellants, had not obtained the prior leave of the court under Order 6 of the Rules, to serve a Writ out of jurisdiction. As a result, the High Court struck out as “incompetent” the Notice of Appeal for want of leave. The Court further ordered the plaintiffs/appellants to pay costs of “\$1000.00 (*summarily assessed*) to the defendant within seven (07) days hereof.”
3. The critical issue is whether the decision of the acting Master on 15 February, 2022 was an interlocutory or a final decision. If it is the former, then leave is required from the Court before an appeal is filed. Alternatively, a final decision, does not require leave.
4. It is quite understandable that after the acting Master had delivered her Ruling on 15 February, 2022 and which she clearly in bold prints headed “*Interlocutory Ruling*”, the Appellant’s on 21 February, (six days later), filed an application before the High Court seeking leave to appeal. What is perplexing however, is the reason the Appellants on 8 March, 2022 filed a Notice of Discontinuance of the application for leave to appeal, and on the same day, filed its Notice of Appeal. When the matter was called on 31 March, 2023, the Counsel for the Appellants submitted that they had abandoned the leave to appeal application in favour of a Notice to Appeal. This change in the proceedings, Counsel submitted, was made after the Appellants were persuaded that the “*Interlocutory Ruling*”

by the acting Master of 15 February, 2022 was in fact a final decision, and therefore no leave was required.

Interlocutory vs Final Judgment

5. **Goundar v The Ministry of Health** [2008] FJCA 40; ABU 0075.2006S (9 July, 2008) is taken as authority on what constitutes an “*interlocutory judgment*” as opposed to a “*final judgment*”. At paragraphs 37 – 38 thereof, the Court stated:

“37...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.

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

6. The court proceeded to illustrate examples of interlocutory applications as follows:

- 1. an application to stay proceedings;*
- 2. an application to strike out a pleading;*
- 3. an application for an extension of time in which to commence proceedings;*
- 4. an application for leave to appeal;*
- 5. the refusal of an application to set aside a default judgment;*
- 6. an application for leave to apply for judicial review.”*

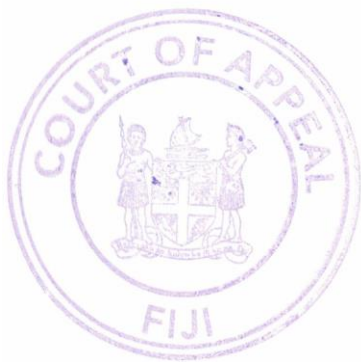
7. The “*application approach*” favoured by the Court of Appeal in **Goundar’s** Case (supra) is in keeping with the English Courts’ approach as determined in **White v Brunton** (1984) QB 570, and our Court of Appeal decisions in **Suresh Charan v Shah** (1955) 41 FLR 65 and **Shore Buses Ltd v Minister for Labour** FCA ABU 0055 of 1975. However, in **Jetpatcher Works (Fiji) Ltd v The Permanent Secretary for Works & Energy & Ors** [2004] Vol.1. Fiji CA 213, our Court of Appeal overruled **Suresh Charan** (supra) and **Shore Buses** (supra) and instead, favoured the Australian Courts “*order*” approach, until the **Goundar** (supra) judgment referred to above.

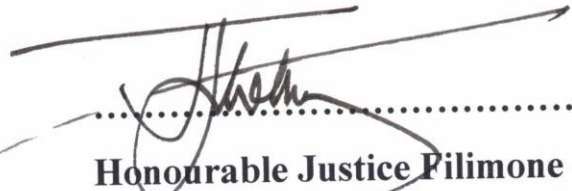
8. In support of the Summons for leave, Counsel for the Appellants submitted that the acting Master's "*striking out*" of Writ of Summons amounted to a "*final order*", as there was nothing outstanding before the Master thereafter. It follows, Counsel contended, that the Master's Order did not fall under Order 59 r.8 (2) that requires leave of a single Judge of the High Court, but rather, O 59 r.8 (1) instead. The "*Order Approach*" in **Cakaunitavuki v Colonial Fiji Ltd** [2021] FJCA 21; ABU 012.2020 (7 January, 2021) that is based on the nature of the ruling or order is preferred by the Appellants based on the premises that:
- (i) even if the ruling is interlocutory, but the ruling has the effect of a final ruling, it will be deemed a final ruling, and
 - (ii) if the substantive matter cannot proceed any further, then the ruling will be deemed final.

Analysis

9. The Counsel for the Respondent's had identified the issue for the determination of this Court to wit: whether leave should be granted to the Appellants to appeal the decision of Nanayakkara J who had struck out the Appellants' Notice of Appeal against the acting Master's Ruling, as being incompetent for want of leave to appeal.
10. Quite apart from the fact that the acting Master had clearly designated her Ruling as an "*Interlocutory Ruling*", the Respondent's application to strike out the Appellant's Writ of Summons, squarely falls under the "*application to strike out a pleading*", category of those examples that the Court of Appeal had, in **Goundar's Case** (supra) illustrated as interlocutory applications.
11. I am therefore satisfied that the acting Master's Ruling of 15 February, 2022 was an interlocutory ruling and leave under Order 59 r 8 (2) of the High Court Rules was required by the Appellant. This Court therefore agrees with the Decision of Nanayakkara J of 3 May 2022, in Striking Out the Appellant's Notice of Appeal against the Ruling as incompetent.

12. Finally, the Court notes with some concern, that the Appellants have continuously failed to pay the costs ordered by the Court as follows:
1. On 15 February, 2022, the Master ordered costs of \$1000.00 against the Appellants to be paid to the Respondents within 14 days, and
 2. On 1 July, 2022, the High Court ordered the Appellants to pay \$1,000.00 to the Respondents, to be paid within 7 days.
13. To date, the Appellants have not paid the \$2,000.00 costs ordered against them to the Respondents. It is well for the Appellants to bear in mind that first, these were interlocutory proceedings and that the Respondents are entitled to the costs awarded in the proceedings notwithstanding the outcome of the cause or matter (Order 62), and second, the costs are Judgement orders of the court and maybe enforced under Order 45.
14. **Orders**
1. *Leave to appeal is dismissed.*
 2. *Costs of \$2,500.00 in this proceedings against the Appellant to be paid to the Respondents within 14 days, in addition to the costs below.*




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Honourable Justice Pilimone Jitoko
PRESIDENT, COURT OF APPEAL