In the High Court of Fiji at Labasa
Civil Jurisdiction

HBC 79 of 2006
Fred Wehrenberg
Plaintiff
vs
Sekaia Suluka, Crime Officer
First defendant
Tao, Police Officer, Rakiraki
Second defendant
Eparama, Police Officer, Rakiraki
Third defendant
Commissioner of Police
Fourth defendant
And
The Attorney General
Fifth defendant

COUNSEL : The plaintiff in person
Mr. J. Pickering for the defendants
Date of hearing : 11th April, 2017
Date of Ruling : 3rd August, 2017

Ruling

1. The plaintiff applies for leave to appeal my Ruling of 27 February,2017, declining his interlocutory applications:(i) to join his wife as second plaintiff, (ii) to subpoena a former court clerk, and, iii) use at the trial the combined affidavit(evidence-in-chief) of the plaintiff and Walburga Wehrenberg filed on 4th November,2011, and the supplementary affidavit(evidence-in-chief) of the plaintiff and Walburga Wehrenberg filed on 2nd August, 2012,"*as ordered by the Court on 1.7.2011 and 6.3.2012 which contain references to United Nations Conventions, the 1997 Constitution and the law*".The plaintiff also moves that no trial date be fixed, until determination of the appeal.

The affidavit in support

2. In his affidavit in support of his application, the plaintiff states that :
   (a) He and his wife suffered severe human rights abuse by Police Officers between 1991 and 2004, as confirmed in HBC 227/96L, HBC 223/03 and upheld by the Court of Appeal in ABU 19/2007 and ABU 24/2007.

(b) He can rely on section 43 of the Human Rights Decree 2009, which states that the Court must act according to equity, good conscience and the substantial merits of the case, without regard to technicalities, as the Human Rights Commission investigated the incident of 8 May,2003, described in his amended writ in this action and the Commissioner gave him permission "*to take his own action*".

(c) He has suffered "*great injustice*" due to the dismissal of his three interlocutory applications, in particular as his wife is now barred from being joined as second plaintiff. He feels that he has not been afforded equity during the hearing on 13 February,2017. It appears that his "*uncontradicted affidavits*" have not been read, nor most of his submissions. Most of his "*submissions were not even brought into court, until 30 minutes before the hearing ended*" nor has any creditability been given to his sworn statements which were not contradicted by the defendants, in relation to orders of "*previous Judges*" of 1 July,2011,and 6 March, 2012.The hearing and the subsequent Ruling has not been fair.

(d) He has good prospect of success on his grounds of appeal.

The affidavit in opposition

3. The Director Legal of the Fiji Police Force in his affidavit in opposition filed on behalf of the first, second, third, fourth and fifth defendants opposes the plaintiff's application and states that the plaintiff's wife is not a necessary party for the determination of his claims. His claims are personal and not vested jointly with her, as contemplated by Or15,r(6)(6)(b). The plaintiff and defendants were given an equal opportunity to argue their preliminary applications. The Ruling was fair. The plaintiff has failed to state the great injustice he will suffer nor advanced substantial reasons in his affidavit.

The affidavit in reply

4. The plaintiff, in his detailed affidavit in reply states that the dismissal of his three applications was highly unfair and reiterates that he has suffered great substantive injustice. The dismissal do directly or by their practical effect finally determine his substantive rights. The grounds of appeal raise some questions of law of general importance to be determined by the Court of Appeal.

5. The plaintiff states that he cannot recover damages for the mental anguish and distress caused to his wife nor the travel and accommodation expenses incurred by her to accompany him to CWM Hospital for treatment of the injuries he received. His claim is personal and is also vested jointly with his wife under Or 15r(6)(6)(b).

6. The affidavit in reply continues to state that I did not consider his "*uncontradicted affidavit*" to subpoena the court clerk and his "*uncontradicted affidavit*" of 10 May,2016, which contains very important background evidence and annexed agreed documents ordered by Wickramasinghe J on 1 July,2011, nor the important supplementary affidavit, for which leave was given by Nawana J on 6 March, 2012, since I have "*very unfairly ruled*" that the affidavits do not arise for consideration as the Orders do not provide for filing of same. He has not been awarded his costs to subpoena the court clerk nor to reply and rebut the defendants' application titled "Preliminary Issues".

The determination

7. The plaintiff argues that the dismissal of his three interlocutory applications was highly unfair and he has suffered great substantive injustice. He contends that the dismissal determines his substantive rights and raise questions of law of general importance to be determined by the Court of Appeal.

8. The proposed grounds of appeal attached to his affidavit in support read as follows:

   i. *That the learned Judge erred in law and in fact when he declined Appellant's notice of motion filed on 25 November, 2014 to join his wife as 2nd Plaintiff.*
   The Judge failed to apply Order 15, r 6 (6) (b) of the High Court rules correctly in regard to the relationship between this cause of action and the intended party to be joined. (Compare paragraph 8 of Appellants affidavit filed on 25 November, 2014 with paragraph 26 of the ruling.)
   The Judge also failed to apply the common law principle in regard to an entirely uncontradicted affidavit filed with his motion, because the Respondents refused to file a reply, in which case its contents must therefore be taken to be true. The Supreme Court of Ireland case of ***O Maicin -v- Ireland & ors [2014] IESC 12*** *held:..*
      (1) The factual evidence of the appellant and of his expert witness, Dr. O Giollagain, which was put before the Court on affidavit, is entirely uncontradicted. The contents of these affidavits must therefore be taken to be true."

ii. *That the learned Judge erred in law and fact when he declined Appellant's notice of motion filed on 13 January, 2015 to subpoena the court clerk and refused to award costs to the Appellant.*
The Judge failed again to apply the common law principle in regard to an entirely uncontradicted affidavit filed with his motion because the Respondents refused to file a reply in which case its contents must therefore be taken to be true.

iii. *That the learned Judge erred in law and in fact when he declined Appellant's notice of motion filed on 10 May, 2016 seeking leave pursuant to Order 41 rule 4 of the High Court Rules to use the combined affidavit and the supplementary affidavit which were ordered for the trial on 1 July, 2011 and 6 March, 2012 but make references to UN Convention and the Constitution and the law.*
The Judge erred in law and fact in concluding in paragraph 15 of his ruling dated 27 February, 2017 that the said affidavits do not arise for consideration. The Judge failed again to apply the common law principle in regard to an entirely uncontradicted affidavit filed on 10 May, 2016 with his motion, in which case its contents must therefore be taken to be true.

iv. *That the learned Judge failed to apply during the hearing and in his ruling dated 27 February, 2017 Section 43 9a) of the Human Rights Decree 2009 which states that the Court must act according to equity, good conscience and the substantial merits of the case, without regard to technicalities.*
The Appellant has not been afforded equity during the hearing on 13 February, 2017 as most of his affidavits and submissions have not been read and the unjustified dismissal of his 3 interlocutory applications has caused great injustice to the Appellant.

9. The first ground proposed contends that I erred in declining the appellant's notice of motion of 25th November,2014, for leave to join his wife as second plaintiff and failed to apply Or 15,r 6(6)(b) correctly, in regard to the "*relationship between this cause of action and the intended party to be joined*".

10. I declined the application for joinder, since the plaintiff's claims founded as it is on the torts of torture and malicious prosecution are personal and not vested jointly with his wife, as contemplated by Or 15,r6(6)(b) read with Or 15,r6(5), which enables the addition of a party after the expiry of the relevant period of limitation.

11. In my view, my finding does not determine the substantive rights of the plaintiff nor raise an important question of law.

12. The second proposed ground of appeal argues that I erred in declining the appellant's notice of motion to subpoena the court clerk to testify in regard to the proceedings of 1st July,2011, before Wickremasinghe J.

13. I find it inexpedient to deal with this contention, as that application cannot be entertained in a court of law.

14. Next, it is urged that I erred in declining the plaintiff's notice of motion of 10 May, 2016, seeking leave to use the combined affidavit and supplementary affidavit.

15. The plaintiff, in his notice of motion had sought leave to use at the trial the combined affidavit (evidence-in-chief) of the plaintiff and Walburga Wehrenberg filed on 4th November,2011, and supplementary affidavit(evidence-in-chief) of the plaintiff and Walburga Wehrenberg filed on 2nd August,2012, "*as ordered by the Court on 1.7.2011 and 6.3.2012 which contain references to United Nations Conventions, the 1997 Constitution and the law*".

16. I found that the Orders relied on do not provide for the filing of combined and supplementary affidavits.

17. The plaintiff argues that I failed to apply the common law principle in regard to his "*uncontradicted*" affidavits, which must be taken to be established. In my view, the affidavits filed by the plaintiff did not call to be controverted by the defendants.

18. In ***Thomas Bishop Ltd v Helville Ltd,***[1972] 1 All ER 365 as cited by the plaintiff, the defendant had made an allegation of fact which was required to be refuted in order to establish the contrary.

19. On the matter of costs, I awarded the plaintiff costs of $ 500 in respect of the defendants' application titled "*Preliminary Issues*". I awarded costs in the cause in respect of the plaintiff's three applications, which I declined, as is the practice in interlocutory matters: Buckley LJ in ***Scherer and another v Counting Instruments Ltd and another***, [1986] 2 All ER 529 at pg 536.

20. On the ultimate proposed ground of appeal, I need hardly state that proceedings in a trial in the High Court are governed by the High Court Rules.

21. The plaintiff was given more than an adequate opportunity to present his case at the hearing before me on 13th February,2017. On 17th February,2017,I postponed the delivery of my Ruling, as the plaintiff moved to file written submissions in reply to the supplementary written submissions filed by the defendants, all of which were duly considered by me.

22. The Court of Appeal of Fiji has repeatedly held that it is only in exceptional circumstances that leave to appeal will be granted from interlocutory orders of a trial judge.

23. In ***Kelton Investments Ltd & Another v CAAF & Another,*** (Civil Appeal ABU0034 of 1995) Sir Moti Tikaram said:

> ***I am mindful that Courts have repeatedly emphasised that appeals against interlocutory orders and decisions will only rarely succeed. As far as the lower courts are concerned granting of leave to appeal against interlocutory orders would be seen to be encouraging appeals****(see Hubball v Everitt and Sons (Limited) [1900] 16 TLR 168).*
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> *Even where leave is not required the policy of appellate courts has been to uphold interlocutory decisions and orders of the trial Judge - see for example Ashmore v Corp of Lloyd's [1992] 2 All ER 486 where a Judge's decision to order trial of a preliminary issue was restored by the House of Lords.* (emphasis added)

24. In ***K R Latchans Brothers Limited v Transport Control Board and Tui Davuilevu Buses Limited,***(Civil Appeal 12 of 1994) a full Court of Appeal declared:

> *The granting of leave to appeal against interlocutory orders is not appropriate except in very clear cases of incorrect application of the law. It is certainly not appropriate when the issue is whether discretion was exercised correctly unless it was exercised either for improper motives or as result of a particular misconception of the law...*
> *We do not agree that the intended question for the Court of Appeal involves a point of law of any great significance. The control of proceedings is always a matter for the trial Judge. We adopt what was said by the House of Lords in Ashmore v Corp of Lloyd's [1992] 2 All E R 486 –*

> ***"Furthermore, the decision or ruling of the trial judge on an interlocutory matter or any other decision made by him in the course of the trial should be upheld by an appellate court unless his decision was plainly wrong since he was in a far better position to determine the most appropriate method of conducting the proceedings."***(underlining mine)

25. Calanchini J(as he then was) in ***NBF Asset Management Bank v Taveuni Estates Ltd and Others,***(HBC 543 of 2004) stated:

> *It is trite law to say that only in exceptional circumstances will leave be granted to appeal an interlocutory order. Leave will not normally granted unless some injustice would be caused. In* ***Niemann v Electronic Industries Ltd*** *[1978] VR 431 Murphy J at page 441 noted:*
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> > ***"Even if the order is seen to be clearly wrong, this is not alone sufficient. It must be shown in addition, to effect a substantial injustice by its operation".***

26. On interlocutory orders that relate to procedure, the judgment of the High Court states:

> *The courts have also traditionally drawn a distinction between interlocutory orders that relate to practice and procedure and orders that affect a party's substantive rights. In re The Will of F.B. Gilbert (deceased) (1946) 46 S.R. NSW 318 Jordan CJ at page 323 stated:*
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> > ***"There is a material difference between an exercise of discretion on a point of practice of procedure and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon interference with the orders of judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases would be delayed interminably and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercise of discretion in interlocutory applications from a judge in Chambers to a Court of Appeal."***

27. The following oft quoted passage from the judgment of Murphy J ***Niemann v Electronic Industries Ltd*** ,(1978) VR 431 at page 441 summarises the principles to be considered in an application for grant of leave to appeal against interlocutory orders:

> 1) *whether* ***the issue raised is one of general importance*** *or whether it simply depends upon the facts of the particular case;*
> 2) *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";*
> 3) *whether the order made has the effect of* ***altering substantive rights of the parties*** *or either of them; and*
> 4) ***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***. (emphasis added)

28. The cases that I have cited enunciate that an interlocutory decision of a trial judge in the course of trial will be upheld on appeal, unless some injustice will result as otherwise, the disposal of cases would be delayed interminably with disastrous consequences to the administration of justice. In the present case, the writ was filed in the High Court of Lautoka on 23rd March,2006.

29. In my judgment, there are no exceptional circumstances in the instant case to grant leave to appeal. My Ruling does not affect the plaintiff's substantive rights nor raise important issues of law.

30. The application for leave is declined.

31. ***Orders***

(a) The application of the plaintiff for leave to appeal my Ruling of 27 February,2017, declining the plaintiff's interlocutory applications, is declined.

(b) The plaintiff shall pay the defendants costs summarily assessed in a sum of $ 750.

(c) The parties will be notified of the date this case will be called before the Master in the High Court of Labasa, to fix a date for hearing.

A.L.B.Brito-Mutunayagam
Judge
3rd August, 2017
At Suva