

In the High Court of Fiji
at Suva
Civil Jurisdiction
Civil Action No. HBC 38 of 2013

Leslie Gee Way Wong & Marissa Wong
First plaintiff

And

Makare Holdings Limited
Second
plaintiff

And

Makare Investment Limited
Third plaintiff

And

Bernard Robert Evans & Vera Heritage Evans aka Heritage
Defendants

Counsel: Mr S. Valenitabua for the plaintiffs

Mr I. Fa for the defendants

Date of hearing: 11th February, 2019

Date of Ruling: 18th March, 2019

Ruling

1. The plaintiff, in their statement of claim claims damages against the defendants for breach of agreement. The defendants denied the claim and alleged that the plaintiffs are indebted to them pursuant to a Loan and Acknowledgement of Debt Agreement.
2. The defendants filed a summons to strike out the writ and statement of claim. The affidavit in support of the summons filed by a law clerk in the firm of Fa & Co stated that the first plaintiff has a receiving order against them; the first and second plaintiffs are shareholders of the second plaintiff; the shareholding in the second plaintiff is now vested in the Official Receiver; the third plaintiff has been wound up by the High Court; and, the Official Receiver has withdrawn the consent initially granted to the plaintiffs to commence proceedings.

3. The first plaintiff, in his affidavit in answer said that the Official Receiver withdrew his consent of 6th June, 2011, but subsequently granted “*fresh*” consent on 9th July, 2015, to the first and third plaintiffs to proceed with this matter. Copies of the consent given by the Official Receiver are attached. He concluded that the summons to strike out must be struck out.
4. The Master, on 17th July, 2018, held that the plaintiff’s claim is yet to be heard. The defendants, at this stage of the proceedings cannot submit that the claim is scandalous in nature. The claim cannot be judged prima facie and summarily to be frivolous, vexatious or an abuse of process of the court. The defendants need to establish that the claim lacks merits. The Master also held that the affidavit of the law clerk in support of the striking out application is not admissible, as he deposes to the substance of the matter, which is not of his own knowledge.
5. By inter partes summons filed on 7th August, 2018, the defendants sought leave to appeal a Ruling of the Master. The defendants subsequently, filed an amended inter partes summons on 6th September, 2018, for enlargement of time to file leave to appeal.
6. The amended inter partes summons has been filed over one month after the Master’s Ruling of 17th July, 2018. Moreover, the defendants have not explained the reasons for their delay, as pointed out by Mr Valenitabua, counsel for the plaintiffs. There is no evidence before Court of any reason for their failure to seek leave to appeal within time.
7. In *Native Land Trust Board v Khan*, [2013] FJSC 1; CBV002.2013 (15 March, 2013) the President of the Court, His Lordship Gates CJ stated at paragraph 24:

It is necessary in order to enliven the court’s discretion in the applicant’s favour that the would be petitioner condescend to particulars in the supporting affidavit so as to explain the true reason for the lapse.
8. The defendants have to show that there are reasonable prospect of success in their appeal.

9. The defendants proposed grounds of appeal read as follows:
- i. The Master erred in law and in fact when he failed to take into account the reasons the Appellants made the strike-out Application.*
 - ii. That the Master, in reaching his decision, erred in law and fact when he noted that the Affidavit of Ashneel Joseph was made without the authority of the Appellants.*
 - iii. That the 1st Respondent have a receiving Order against them that has not been set aside which disqualifies them from filing the claim.*
 - iv. That the 1st -2nd Respondents are the shareholders of the 2nd Respondent and therefore their shareholding in the 2nd Respondent is now vested in the Official Receiver.*
 - v. That the 3rd Respondent has been wound up by the High Court.*
 - vi. That the Master failed to take into consideration relevant matters and took into account irrelevant matters when reaching his decision.*
10. The principal contention of the defendants, in their proposed grounds of appeal is that the Official Receiver has withdrawn the consent initially granted to the first plaintiff and the third plaintiff to commence these proceedings. However, the Official Receiver has subsequently granted the first and third plaintiffs consent to continue with these proceedings. That consent is attached to the affidavit in answer filed by the first plaintiff.
11. It is also contended that the Master erred when he noted that the affidavit of Ashneel Joseph was made without the authority of the defendants.
12. Ashneel Joseph, in his affidavit in support of the summons for striking out stated that the defendants are residing in Australia and he was authorized by his principal Mr I. Fa of Fa & Company to depose to the affidavit. I find that there is no authority annexed to the affidavit.
13. In my view, the grounds of appeal do not present a reasonable prospect of success.
14. The Ruling of the Master has not determined substantive rights. It follows that no prejudice would be caused to the defendants, if the case proceeds to trial.

15. It has been repeatedly held that leave to appeal will not be granted from an interlocutory order, which does not finally determine the matter in litigation, unless an injustice will occur.

16. Calanchini P in *Shankar v FNPF Investments Ltd* ,[2017] FJCA 26; ABU32.2016 (24 February, 2017) at paragraph 16:

The principles to be applied for granted leave to appeal an interlocutory decision have been considered by the Courts on numerous occasions. There is a general presumption against granting leave to appeal an interlocutory decision and that presumption is strengthened when the judgment or order does not either directly or indirectly finally determine any substantive right of either party. The interlocutory decision must not only be shown to be wrong but it must also be shown that an injustice would flow if the impugned decision was allowed to stand (Niemann –v- Electronic Industries Ltd[1978] VR 431). See: Hussein –v- National Bank of Fiji [1995] 41 Fiji LR 130. In the present proceedings the learned High Court Judge dismissed the striking out application made by Shankar under Order 18 Rule 18(1). The decision did not affect the substantive rights of either party..(emphasis added)

17. **Orders**

- a. The application of the defendants for leave to appeal out of time is declined.
- b. The defendants shall pay the plaintiffs costs summarily assessed in a sum of \$ 1000.



L. B. Brito-Mutunayagam

L.B. Brito-Mutunayagam

JUDGE

18th March, 2019