**IN THE HIGH COURT OF FIJI**
**AT LAUTOKA**
**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 14 OF 2015**

**BETWEEN** : **NAINASO I RA HOLDING LIMITED** a limited liability company having its registered office at 33 Raojibhai Patel Street, Suva, P O Box 4132, Samabula Post Office, Suva.

**PLAINTIFF**

**A N D** : **RAJNEEL KARAN SINGH** of Samuel K Ram Lawyers, 2nd Floor, Kamel Building, Kings Road, Ba Town, Legal Clerk.

**1ST DEFENDANT**

**A N D** : **SAMUEL K RAM trading as SAMUEL K RAM LAWYERS**, a legal practice, duly established under the Legal Practitioners Decree, and having its registered office at 2nd Floor, Kamel Building, Kings Road, Ba, P. O. Box 3318, Ba.

**2ND DEFENDANT**

**A N D** : **MATAQALI NAINASO HOLDINGS LIMITED**, a duly incorporated private company having it registered office at 2nd Floor, Kamel Building, Kings Road, Ba, P. O. Box 3318, Ba.

**3RD DEFENDANT**

**A N D** : **YASAWA PROJECTS COMPANY LIMITED** a duly incorporated private company, having its registered office at 2nd Floor, Kamel Building, Kings Road, Ba. P. O. Box 3318, Ba.

**4TH DEFENDANT**

**A N D** : **CAPITAL GROUP INVESTMENTS (FIJI) LIMITED**, a duly incorporated private company having its registered office at Suva, Fiji, P O Box 15859.

**5TH DEFENDANT**

**A N D** : **ANWAR KHAN**, of Drasa, Lautoka, P. O. Box 5490, Lautoka Businessman.

**6TH DEFENDANT**

**A N D** : **KELEVI NABA**, of Drasa, Lautoka, Retired.

**7TH DEFENDANT**

**A N D** : **PATIMIO BACAIVALU**, of Drasa, Lautoka, Company Director.

**8TH DEFENDANT**

**A N D** : **WAISEA RATUBUSA**, of Vatuwaqa, Suva, Pharmacist.

**9TH DEFENDANT**

**Appearances** : Mr N. Kumar for the first defendant/applicant
Mr A. Rayawa for the plaintiff/respondent

**Date of Hearing** : 31 May 2019
**Date of Ruling** : 11 July 2019

# RULING

[on leave to appeal]

## Introduction

[01] This ruling concerns an application for leave to appeal an interlocutory ruling.

[02] By his summons filed in conjunction with an affidavit of Rajneel Karan Singh, the first defendant/applicant (*'the defendant'*) seeks the following orders:

1. Leave to appeal the ruling of the Court (my ruling) delivered on 18 April 2019; and

2. Stay on execution of all orders made pending determination of the appeal.

[03] The plaintiff/respondent (*'the plaintiff'*) did not file an affidavit in opposition. However, it made oral argument opposing the application.

**Background**

[04] The first defendant filed an application to strike out the plaintiff's claim against him on the ground that it discloses no reasonable cause of action, it is frivolous, vexatious and scandalous and/or is otherwise an abuse of process of the court.

[05] The application was heard in the absence of the plaintiff and having satisfied that the statement of claim as pleaded discloses a reasonable cause of action against the first defendant and that there are sufficient particulars in the claim as regards to the allegation it makes, the Court [I] struck out and dismissed it without costs on 18 April 2019. The first defendant now seeks leave to appeal that order.

**The law**

[06] The application is made under section 12 (2) (f) of the Court of Appeal Act (*"CA Act"*), Rule 26 (3) of the Court of Appeal Rules (*'CAR'*), O 59 of the High Court Rules 1988, as amended (*'HCR'*) and the inherent jurisdiction of the Court.

[07] There is no appeal without the leave of the Judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a Judge of the High Court (see CA Act, 8.12 (2) (f)).

[08] The CAR, R 26 (3) provides: wherever under these Rules an application may be made either to the court below or to the Court of Appeal it shall be made in the first instance to the court below.

[09] The HCR, O 59 (part 2) deals with appeal from the Master to a Judge of the High Court. This rule has no application to the current application as it relates to an appeal from an interlocutory decision of the Judge to the Court of Appeal.

[10] In the case of an appeal from an interlocutory order, an application for leave to appeal must be filed and served within 21 days, calculated from the date on which the judgment or order of the Court below was pronounced (see CAR, R 16 (a)).

**Governing principles**

[11] 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 Niemann 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:*
>
> *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."*

**Proposed grounds of appeal**

[11] The first defendant intends to appeal the interlocutory ruling on the following proposed grounds:

1. *The Learned Judge of the High Court erred in law by not striking out the statement of claim when the first respondent had not filed any affidavit in response and did not appear on the date of hearing to oppose the application for striking out.*

2. *The Learned Judge of the High Court erred in law by not ordering the first respondent to amend their statement of claim in light of the settlement between the first respondent and iTaukei Land Trust Board particularly when it is alleged in the current pleadings that iTaukei Land Trust Board:-*

   *2.1 colluded with all the other defendants; and*
   *2.2 had, after the winding up order, agreed with the first respondent not to re-enter the lease and did so in breach of it.*

3. *The Learned Judge of the High Court erred in law and in fact by not taking into account that the first respondent had not lost the alleged tourism lease and had transferred and/or assigned a portion of the tourism lease to the fourth respondent.*

4. *The Learned Judge of the High Court erred in law by deciding the application on the basis of Order 18 Rule 18 (1) (a) of the High Court Rules alone and in not considering the striking out application by reference to Order 18 Rules 18 (1) (b) and (d) which permitted the consideration of the uncontested evidence led on behalf of the Plaintiff to determine whether the claim was frivolous and/or vexatious and/or scandalous or otherwise an abuse of process of the court.*

5. *The Learned Judge of the High Court erred in law in not considering that the claim by the plaintiff was an alleged breach of duty by a law firm by an opposing party in a civil matter when under the adversarial system, there is no such contractual relationship or obligation as between a lawyer and the opposing party and the duty of a law firm acting in such circumstances is to advance the interests of their client to the best of their ability.*

6. *The Learned Judge of the High Court erred in law and in fact in holding that the pleadings disclosed a cause of action on the issue of whether the plaintiff lost their $20 million tourism lease as a result of the winding up application when;-*

   *6.1 There are no material facts pleaded to show that the winding up application and/or the winding up order caused the loss of the $20 million leasehold tourism property;*

6.2 *There is no disclosure or pleadings as to the settlement reached between the plaintiff and the iTaukei Land Trust Board (previously named as the 10th defendant) who allegedly held the leasehold tourism property as a result of the winding up application;*

6.3 *The Learned Trial Judge did not consider that the uncontested evidence clearly established that there was no lease issued in the name of the plaintiff;*

6.4 *The beneficial owners of the tourism leasehold property were the landowning unit and the First Respondent acted as their trustee. The leasehold property remained for the beneficial interest of the landowning unit whether it was held by the First Respondent or the iTaukei Land Trust Board.*

7 *The Learned Judge of the High Court erred in law in holding that it was an issue whether the presentation of a winding up petition itself amounted to fraud or misrepresentation when the law on civil fraud is very clear and that simply presenting a winding up petition does not amount to fraud.*

8 *The Learned Judge of the High Court erred in law by not taking into account that the issue of the regularity of the winding up order had been the subject matter of different proceedings and the claim is an abuse of process.*

9 *The Appellants may add further grounds of appeal upon receipt of the Record.*

**Discussion and decision**

[12] The first defendant applies to this court for leave to appeal the interlocutory ruling of this court pronounced on 18 April 2019. By that ruling, the court struck out the striking out application filed by the first defendant. The striking out application was filed to strike out the statement of claim on the basis that it discloses no reasonable cause of action against the first defendant, it is frivolous, vexatious and scandalous and/or is otherwise an abuse of process of the court. He had relied on grounds as in (a), (b) and (d) of Rule 18.

[13] The striking out application was considered in the absence of any objection being filed by the plaintiff. The plaintiff was not present at the hearing either.

[14] At the hearing, the court heard only the contention advanced by counsel who appeared for the first defendant.

[15] In this ruling, I will not consider the principles relating to a striking-out application. I would rather only look at the proposed grounds of appeal in order to determine whether there is a real prospect of success.

[16] Notably, there is reluctance in giving leave to appeal against interlocutory decision involving practice and procedure.

*Issue of general importance*

[17] Mr Kumar on behalf of the first defendant contends that the appeal raises an important question of law concerning the duties and liabilities as between a law firm (and its employees) and an opposing party.

[18] The statement of claim states that the first defendant as a law clerk of the second defendant's law firm swore an affidavit on behalf of an unincorporated company in support of a winding-up petition to wind up the plaintiff company thereby caused damages to the plaintiff company. It thus raises an arguable issue which needs to be determined at the trial.

[19] For the present purpose, I would say the above issue is not a general question of importance. This issue can be canvassed at the trial. It may be a triable issue for the first defendant, and it is not a pure question of law the determination of which would bring the proceedings into termination.

*Difficult question of law*

[20] The first defendant intends to appeal the interlocutory ruling which dismissed his application to strike out the plaintiff's statement of claim.

[21] It is trite law that the summary jurisdiction to strike out pleading will only be exercised where the cause of action is obviously and almost incontestably bad.

[22] In *Dyson v A-G* [1911] 1KB 410 at 414, Fletcher Moulden LJ said: *"it [summary jurisdiction to strike pleadings] should be confined to cases where the cause of action was 'obviously and incontestably bad'."*

[23] In *Nagle v Feilden* [1966] 1 All ER 689 at 697, it was held that: *'It is well settled law a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable.'*

[24] Having had a cursory look at the proposed grounds of appeal, I find that there is no difficult question of law.

*Substantive rights of the parties or either of them.*

[25] The ruling the first defendant intends to appeal did not decide the substantive rights of the first defendant. It struck out his application to strike out the statement of claim. The court found that the issues raised in the striking out application are triable issues.

*Presumption against granting leave to appeal interlocutory orders or judgments*

[26] 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 (see *Abdul Hussein v NBF,* above).

[27] By its interlocutory ruling, the court did not determine any substantive rights of either party. The issues raised in the striking out application could be taken at the trial. Then the court will determine those issues on the basis of evidence to be adduced by the parties.

**Conclusion**

[28] For the reasons set out above, I would conclude that the first defendant has failed to meet the criteria relevant to an application for leave to appeal an interlocutory ruling which does not determine the rights of either party. Therefore, I would refuse to grant leave to appeal the interlocutory ruling delivered on 18 April 2019. There will be no order as to costs.

[29] Since I have refused to leave to appeal, I need not consider the application for stay of proceedings pending determination of the appeal.

**The result**

1. Leave to appeal refused.
2. No order as to costs.

.....11/7/18.....

**M. H. Mohamed Ajmeer**

**JUDGE**


**At Lautoka**

**11 July 2019**

Solicitors:

For the applicant/ first defendant: Krishna & Co, Barristers & Solicitors

For the respondent/plaintiff: Rayawa Law, Barristers & Solicitors