IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION
CIVIL ACTION NO. HBC 44 OF 2018

BETWEEN: **VANUALEVU HARDWARE (FIJI) LIMITED**

PLAINTIFF/APPELLANT

AND: **MOHAMMED FAIZ ALI**

FIRST DEFENDANT/RESPONDENT

AND: **LABASA TOWN COUNCIL**

SECOND DEFENDANT/RESPONDENT

Appearance: Plaintiff/Appellant - Mr. A. K. Singh
Defendants/Respondents - Mr. S. S. Sharma

Date of Hearing : 18th July, 2019 (9.30 am)
Date of Judgment : 18th July, 2019 (3pm)

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JUDGMENT

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Introduction

[1] This is an appeal from the decision of Master delivered on 7.6.2019 striking out the claim against first Defendant and award of cost. Plaintiff in the statement of claim seeking damages and also certain declarations. The declarations are that first Defendant had abused the office of CEO of second Defendant, (sic) declaration that Defendants immediately stop booking the Plaintiff's servants or interfering with their loading and unloading goods, second Defendant had misrepresented to the Plaintiff, second Defendant has a legal duty to provide loading and unloading by to Plaintiff. Plaintiff is the landlord of a premises where a third party is conducting a business and second Defendant is local government body and first Defendant is its CEO. Plaintiff's claims against first Defendant, are for abuse of office, but sued personally. (See paragraph4 of statement of claim). Master had struck off the claim

against first Defendant on 7.6.2019 in terms of Order 18 rule 18 (1)(a) of High Court Rules of 1988. Plaintiff is seeking leave to appeal against the said decision.

Facts

[2] Plaintiff had rented its premises to a business entity in 2016, and said tenancy agreement had a clause that obliges the landlord to provide loading bay.

[3] There was no traffic sign prohibiting loading and unloading along Naoi lane which is one lane adjoining boundary of the premises rented.

[4] On 26.10.2017 second Defendant had written to the tenant not to use loading and unloading of vehicles along Jaduram Street No Stopping Zone and along Nasoi Lane. Said letter advised the tenant to utilize off street on site loading and unloading bay provided by the Plaintiff, in order to prevent inconvenience caused to other road users or motorists.

[5] Abovementioned letter also warned tenant that traffic infringement notices would be issued to vehicle drivers parked in violation of Land Transport Act, 1998 and its regulations.

[6] Plaintiff stats that it cannot provide off street on site loading bay to tenant and first Defendant is interfering with the tenant and had directed Land Transport Authority to issue Traffic Infringement Notice to the General Manager of tenant for parking in Nasoi Lane.

[7] Plaintiff states that first Defendant had allowed other businesses to load and unload along Nasoi and Jaduram Street.

[8] In the statement Defence of the Defendants stated that Nasoi Lane is under the Fiji Roads Authority and second Defendant has no mandate to provide loading bays along the said streets.

[9] Nasoi Lane is a no stopping lane from both sides, in terms of gazette No 1 issued on 18.01.1991.

[10] There is no reply to the statement of defence filed by Defendants.

[11] Summons was filed seeking strike out of first Defendant from action as there was no reasonable cause of action disclosed in the statement of claim.

[12] Having heard the said summons Master struck off claim against first Defendant.

Analysis

[13] Master in the decision of 7.6.2019 struck off the claim against first Defendant on the basis that statement of claim does not disclose a reasonable cause of action.

[14] It should be noted at no stage did Plaintiff sought to amend the stamen of claim when the matter was before Master and it should be assumed that Plaintiff had pleaded cause of action against first Defendant based on fact pleaded for misfeasance.

[15] It should also be noted that if an amendment can cure the defect, striking out is not allowed and court may order an amendment.

[16] Plaintiff had filed summons seeking leave to appeal on 11.6.2019 and this is in compliance with Order 59 rule 11 of High Court Rules of 1988.

[17] In terms of Court of Appeal decision ***Goundar v Minister for Health*** [2008] FJCA 40; ABU0075.2006S (decided 9 July 2008), decision of Master was a result of summons filed by first Defendant to strike out the claim against him which was an interlocutory application. According to the ratio of Court of Appeal decision mentioned earlier a decision resulting from such an interlocutory application is also to be considered as interlocutory decision.

[18] Plaintiff needs to obtain leave to appeal against such interlocutory decision. Plaintiff had procedurally complied with the requirements. So whether leave should be granted needs to be considered.

[19] In ***Gosai v Nadi Town Council*** [2008] FJCA 1; ABU 116.2005 (decided on 22 February 2008) Court of Appeal dealt the issue of granting leave to appeal against interlocutory decision and discussed the authorities as follow

"In coming to the decision that the appeal should be refused, the Court has also had reference to the High Court's decision in Heffernan v. Byrne and Ors HCF Civil Action No. HBM 105 of 2007 ((19 February 2008). There, in refusing leave to appeal against an interlocutory decision, His Lordship set out a comprehensive collocation of the authorities, referring to Kelton Investments Limited and Tappoo Limited v. Civil Aviation Authority of Fiji and Motibhai & Company Limited [1995] FJCA 15, ABU 0034d.95s; Edmund March & Ors v. Puran Sundarjee & Ors Civil Appeal ABU 0025 of 2000; and KR Latchan Brothers Limited v. Transport Control Board and Tui Dvauilevu Buses Limited Civil Appeal No. 12 of 1994 (Full Court).

29. As His Lordship observed, in Edmund March &Ors this Court said:

As stated by Sir Moti Tikaram, President Fiji Court of Appeal in Totis Incorporated, Sport (Fiji) Limited & Richard Evanson v. John Leonard Clark & John Lockwood Sellers (Civ. App. No. 33 of 1996 p. 15):

It has long been settled law and practice that interlocutory orders and decisions will seldom be amenable to appeal. Courts have repeatedly emphasised that appeals against interlocutory orders and decisions will only rarely succeed. The Fiji Court of Appeal has consistently observed the above principle by granting leave only in the most exceptional circumstances.

30. Further, as His Lordship also noted, in KR Latchan Brothers Limited a Full Court of Appeal (Tikaram, Quillam and Savage JJ.) said:

... 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 ER 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."

[20] Lord Woolf MR said in ***Swain v Hillman*** [2001]1 All ER 91 that a 'real' prospect of success means that prospect of success must be realistic rather than fanciful. The court considering a request for permission is not required to analyse whether the proposed grounds of appeal will succeed, but merely there is a real prospect of success (***Hunt v Peasegood*** (2000) The Times, 20 October 2000).

[21] In the affidavit in support of the summons seeking leave to appeal, there is no annexed document to indicate prospective grounds of appeal to consider merits of the appeal. At the hearing counsel for the Plaintiff said once leave is granted, he would submit grounds of appeal. If leave is granted he must file grounds of appeal, and if not his appeal will be deemed abandoned.

[22] At the hearing of summons seeking leave Plaintiff should satisfy that their prospective appeal against Master's decision has a 'real' prospect of success.(see ***Swain v Hillman*** [2001] 1 All ER 91) . For Plaintiff is required to file prospective grounds of appeal as an annexed and if not at least indicate what are the errors in the Master's decision.

[23] In the submissions filed following grounds of appeal are stated as follows:

"a. That being dissatisfied with the learned Master's decision to strike out the Plaintiff's claim against the 1st Defendant, the Plaintiff is seeking leave to appeal that decision. The reason being that the 1st Defendant had abused his office and that can only be decided after full hearing of the evidence. The issue whether there had been an abuse of office can only be determined through full hearing and summarily.

b. The learned Master failed to consider that the action of the 1st Defendant had inflicted economic losses to the Plaintiff that is one of the elements of Misfeasance in a Public Office.

c. That the learned Master erred in law when she summarily struck out the Plaintiff's claim against the 1st Defendant without allowing the Plaintiff to provide oral and other evidence to Court.

d. That the learned Master erred in law when she failed to uphold that the Plaintiff's cause of action against the 1st Defendant is Misfeasance in a Public office.

e. That the learned Master erred in law and facts when she failed to uphold that the 1st Defendant being a public officer abuses his office, either by an act of omission or commission, and the consequence of that cause injury to the Plaintiff, an action may be maintained against such public officer."

[24] I will briefly consider each of the above appeal grounds to consider 'real' prospect of success of each of the appeal ground. For convenience I have followed above order for easy reference (i.e. (a) – (e) Appeal grounds are dealt below in same order).

a. First defendant filed summons seeking strike out claim against him inter alia for non-disclosure of reasonable cause of action. This is in terms of Order 18 rule 18(1)(a) of High Court Rules 1988. In terms of Order 18 rule 18(2) of High Court Rules 1988 " no evidence shall be admissible on an application under paragraph (1)(a). So, it is clear that if the court is striking out a claim for non-disclosure of reasonable cause of action no affidavit and or evidence can be relied upon and it should only be confine to pleadings. Misfeasance and abuse of office can be struck off for non-disclosure of reasonable cause of action (see ***Three River District Council v Bank of England*** (No3)[2001] 2 All ER 513.

b. i) Plaintiff's claim against Defendants did not inflict any Economic loss to Plaintiff, it was based on future event if tenant leaves the premises, because Plaintiff could not provide a loading bay. This is not an element of misfeasance and elements of misfeasance are discussed in Master's decision. House of Lords(UK) In ***Three Rivers District Council and others v Bank of England***, [2000] 3 All ER 1 held the ingredients of torts and they are defendant must be a public officer, exercise of power as a public officer, state of mind of the public officer, duty to Plaintiff, causation and damage to the Plaintiff. Pure economic loss is not granted in tort. (See Privy Council decision of ***Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd***. ***The Mineral Transporter, The Ibaraki Maru***[1985] 2 All ER 935, [1986] AC 1, [1985] 3 WLR 381)

ii) Plaintiff's claim for alleged economic loss, against first defendant is based on tenancy contract between Plaintiff and a third party for which first defendant was not a party. First defendant was exercising his official duty. Traffic infringement notice was not issued by first defendant or his office but a different entity which is govern by a separate statute.

iii) ***Three Rivers District Council and others v Bank of England***, [2000] 3 All ER 1 at p7 discussed the development of tort of misfeasance in UK as follow;

"The coherent development of the law requires the House to consider the place of the tort of misfeasance in public office against the general scheme of the law of tort. It is well established that individuals in the position of the depositors cannot maintain an action for compensation for losses they suffered as a result of the Bank's breach of statutory duties (see ***Yuen Kun-yeu v A-G of Hong Kong*** [1987] 2 All

ER 705, [1988] AC 175, ***Davis v Radcliffe*** [1990] 2 All ER 538 , [1990] 1 WLR 821). Judicial review is regarded as an adequate remedy. Similarly, persons in the position of the depositors cannot sue the Bank for losses resulting from the negligent licensing, supervision or failure to withdraw a licence (see the Yuen Kun-yeu case, Davis's case). The availability of the tort of misfeasance in public office has been said to be one of the reasons justifying the non-action ability of a claim in negligence where there is an act of maladministration (see ***Calveley v Chief Constable of the Merseyside Police*** [1989] 1 All ER 1025 at 1030, [1989] AC 1228 at 1238). **It is also established that an ultra vires act will not per se give rise to liability in tort** (***see X and ors (minors) v Bedfordshire CC, M (a minor) v Newham BC*** [1995] 3 All ER 353, [1995] 2 AC 633). **And there is no overarching principle in English law of liability in tort for 'unlawful, intentional and positive acts'**: see ***Lonrho Ltd v Shell Petroleum Co Ltd*** [1981] 2 All ER 456 at 463, [1982] AC 173 at 187 in which the House refused to follow ***Beaudesert Shire Council v Smith*** (1966) 120 CLR 145, which was subsequently overruled by the Australian High Court in ***Northern Territory of Australia v Mengel*** (1995) 185 CLR 307. The tort of misfeasance in public office is an exception to 'the general rule that, if conduct is presumptively unlawful, a good motive will not exonerate the defendant, **and that, if conduct is lawful apart from motive, a bad motive will not make him liable'** (see Winfield and Jolowicz on Tort (15th edn, 1998) p 55, ***Bradford Corp v Pickles*** [1895] AC 587, [1895–9] All ER Rep 984, ***Allen v Flood*** [1898] AC 1, [1895–9] All ER Rep 52). The rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes. (See ***Jones v Swansea CC*** [1989] 3 All ER 162 at 186, [1990] 1 WLR 54 at 85, per Nourse LJ, a decision reversed on the facts but not on the law by the House of Lords: [1990] 3 All ER 737 at 741, [1990] 1 WLR 1453 at 1458). The tort bears some resemblance to the crime of misconduct in public office (see ***R v Bowden*** [1995] 4 All ER 505, [1996] 1 WLR 98)."(emphasis added)

(iv) From the abovementioned case ***Three Rivers District Council and others v Bank of England***, [2000] 3 All ER 1 it is clear that what Plaintiff needs to state is that first Defendant had unlawfully done an act. But from the pleadings it is evident that Plaintiff's allegation is not that first defendant had done anything unlawfully. The alleged abuse is relating to not allowing loading and unloading along two specified streets. The relevant breaches were under Land Transport Act, 1998 and Traffic Infringement Notice was issued. Due process needs to be followed for alleged violation and there is no illegality in the said action which was not done by first Defendant. Motive of first Defendant is irrelevant for misfeasance.

(v) Plaintiff's claim against first Defendant is not relating to unlawful act but state that he was motivated by other factors. Bad motive will not make first Defendant liable (see ***Three Rivers*** (supra)).

(vi) First defendant had also informed to the tenant of the Plaintiff who was conducting a business that they should refrain from loading and unloading on said roads, which

was a hindrance to flow of traffic and users of the road. This is pleaded in the statement of claim hence an admitted fact. So before issuing Traffic Infringement Notice tenant was informed of their illegal action. If their action was legal they had ample time to come to court or seek appropriate legal remedy. Absence of that indicate that there was nothing unlawful in the first defendant's action. There is no allegation of unlawfulness in the said notification, in pleadings.

c. Since this appeal ground (c) is related to appeal ground (a) and there is no merits in that. I would not repeat what was stated under (a).

d. Master had considered Plaintiff's action against first defendant as Misfeasance. The ingredients of tort of misfeasance was sufficiently dealt by Master and facts were analysed those in the decision. There is no real prospect of success of that ground of appeal.

e. Misfeasance can be due to omission or commission but in this case Plaintiff in the statement of claim had alleged certain acts and Master had considered them. Plaintiff had entered with a tenancy agreement with a third party. The tenancy agreement had a clause that Plaintiff would provide a loading bay for tenant. This tenancy agreement cannot override traffic regulations on public thoroughfares. If Plaintiff desired he can provide any loading area in his property but not on public roads through tenancy agreements or any other agreement. This appeal ground also has no real prospect of success.

Conclusion

[25] There are no merits for 'real' prospect of success in the grounds of appeal stated in the written submission. Even an amendment will not help Plaintiff due to nature of the claim against first Defendant. Plaintiff had not sought any amendment before Master. Leave to appeal is refused. Summons for leave to appeal is struck off. Cost of this action is summarily assessed at $1,500 to be paid within 21 days.

Final Orders

a. Leave to appeal against Master's decision of 7.6.2019 is refused. Summons for leave to appeal is struck off.
b. Cost of this application is summarily assessed at $1,500 to be paid by Plaintiff to first Defendant within 21 days.

Deepthi Amaratunga

Judge