

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 152 of 2020

BETWEEN: **RESHMI JOSEPHINE KUMAR** trading as **DELTA TRANSPORT SERVICES** having its registered office at Matana Street, Nakasi, Nasinu and P O Box 2778, Nausori, Assistant Accountant at Judicial Department and Businesswoman.

1ST APPELLANT (ORIGINAL 1ST DEFENDANT)

AND: **JAYDEEP KUMAR** of Matana Street, Nakasi, Nasinu and P O Box 2778, Nausori, Sales Manager and Businessman.

2ND APPELLANT (ORIGINAL 2ND DEFENDANT)

AND: **KONTIKI FINANCE LIMITED** a limited liability company licensed as a Credit institution, having its registered office at Level 5, Tappoo City, Suva.

RESPONDENT (ORIGINAL PLAINTIFF)

BEFORE: **Hon. Mr Justice Vishwa Datt Sharma**

COUNSEL: **Mr Nand A.** for the Appellant [1st and 2nd Appellants/ Defendants]
Mr Goundar K. for the Respondent/Plaintiff

Date of Judgment: **13th February, 2024**

JUDGMENT

[Summons for Leave to Appeal the Interlocutory Ruling delivered on 22nd February 2023]

A. Introduction

1. The 1st and 2nd Appellants [Defendants] filed a Summons and sought for the following orders:
 - (1) That leave is granted to the Defendants/Appellants to appeal the Interlocutory Ruling or Judgment of the **Honorable Acting Master of the Suva High Court**, Ms. Vandhana Lal, dated 2nd February 2023 in Civil Action No. HBC 152 of 2020.
 - (2) All proceedings regarding HBC 152 of 2020 are to have stayed pending the hearing and determination of this appeal.
 - (3) That Respondent pays the costs of this Application.
 - (4) Such further and/or other the Court may deem just and appropriate in the circumstances.
2. Both parties to the proceedings filed their Written Submissions and argued the application orally.

B. Test for Leave to Appeal

3. The test when considering whether or not to grant Leave to Appeal an Interlocutory Order or Judgment is that whether that Appeal, if Leave is granted, **has a Real Prospect of Success**.
4. **The Appellant must demonstrate that his Case has some prospect of success in the sense that there is a Substantial Question to be argued in the Appeal.**
5. As far as this Court is concerned, it is only required at the Leave stage to determine and make a decision whether Leave should be granted to Appeal the Learned Master's Interlocutory Ruling of 21st January 2022 whenever the Learned Master dismissed the Appellants'/Plaintiffs' Summons of 23rd May 2019 seeking for Setting Aside of Default Judgment and Stay of Execution of the Default Judgement.
6. At this stage of the proceedings, I am not required to delve myself in analyzing the success of the Proposed grounds of Appeal filed with the Leave application, but merely whether there is a **real Prospect of Success**.

7. In *Totis Inc. Sport (Fiji) Ltd v John Lennard Clerk & another* Fiji Court of Appeal No. ABU 35 of 1996s wherein the Fiji Court of Appeal expressed the following:

"It has been long settled law and practice that Interlocutory Order and Decisions will seldom be amendable to appeal. Courts have repeatedly emphasized that appeal against Interlocutory Orders and Decisions will only rarely succeed. The FCA has consistently observed that above principle by granting Leave only in the most exceptional circumstances."

C. Substantive Action/Proceedings

8. The Plaintiff, Kontiki Finance Limited filed a Substantive Writ Action coupled with the Statement of Claim against the 1st and 2nd Defendants, Reshmi Josephine Kumar t/a Delta Transport Services and Jaydeep Kumar.
9. The Plaintiff's claimed for Judgment against the 1st and 2nd Defendants either jointly or severally in the sum of loan of \$33,620.76 together with interest and costs.
10. Subsequently, the 1st and 2nd Defendants filed their Statement of Defence and Counter claim.
11. Thereafter, Reply to Defence and Counter claim was filed by the Plaintiff.
12. Affidavits verifying list of documents [AVLD] was filed by the Plaintiff, followed by the 1st and 2nd Defendants filing their Affidavits verifying list of documents.
13. On 09th May 2022, the Learned Master had put the parties to the proceedings on notice that **unless orders will be made for non-compliance of orders**. On 25th July 2022 the Learned Master extended the orders to 05th December 2022 but did not make and/or effect any unless orders.
14. On 13th December, 2022 after hearing the Defendants Counsel, the Learned Master made the following orders:
- (1) Defendants to do discovery by 12.00pm on 20th January 2023.
 - (2) If not, the Statement of Defence will be struck out together with the Counter-claim.
 - (3) Mention on 06th February 2023 at 10.30am to check on compliance and entry of Judgment if required.

D. Determination

15. Learned Master confirmed with both counsels in Court on 07th February 2023, if the discovery had been completed by the Defendant by 12 noon on 20th January 2023. This

was done to enable the Learned Master to make a Decision **whether the Defendant's Statement of Defence and Counter-claim should stand struck out as per her order of 13th December 2022?**

16. Subsequently, the Defendant made an oral application seeking an order to **reinstate the Defendant's Statement of Defence and Counter-claim.**
17. The Learned Master noted that even as at 06th February 2023, Discovery was incomplete. The Defendants had been in default since 25th July 2022 and were since that date given liberty, time and again to complete the Discovery.
18. On 7th February 2023, the Defence Counsel, Mr. Singh informed Court that he had his **'Complete Bundle of Documents ready to be handed over to the Plaintiff's Counsel.'**
19. The Defendants Affidavits verifying list of documents [AVLD] was filed on 23rd May 2022. Thereafter, **Discovery was to be completed but the Defendant failed to do full Discovery for a period of 09 months.**
20. This Court notes that it was the **delay by the Defendant to 'complete the Discovery' that had prompted the Learned Master to make the 'unless orders' on 13th December 2022 i.e 'the Defendant to complete Discovery by 12 noon on 20th January 2023, and if this is not done, the Statement of Defence and Counter-claim will stand to be struck out.'**
21. Still, it is noted with utmost concern that the Defendants knowingly failed to comply with the Orders of the Court as was required of them to complete the Discovery.
22. Even the Defendants did not think fit to and/or attempt to make a formal application and seek an order of the Extension of the orders made by the Learned Master on 13th December 2022 but to be in non-compliance of the same.
23. This led the Learned Master to proceed to refuse the **reinstatement of the Statement of Defence and Counter-claim on the Defendant's oral application to reinstate the same, and rather extend the orders on the Summons for directions only.**
24. However, default judgment was therefore entered against the Defendants as claimed by the Plaintiff at prayers (i) and (ii):
 - Judgment against the 1st and 2nd Defendants, either jointly or severally for the sum of \$33,620.76; AND
 - Interest at 24% per annum on the Judgment sum computed from 31st May 2019 until the date of Judgment.
25. It can be ascertained from the Court Records the following:
 - On 13th December 2022, the Learned Master made the order that the Defendant to complete the Discovery by 12 noon on 20th January 2023.

- If above was not done, then the Statement of Defence and Counter-claim will stand struck out.
 - Came 07th February 2023, it was noted that even as at 06th February 2022, Discovery by Defendant was incomplete.
 - On 07th February 2023, the Defendant made an oral application seeking an order to reinstate the Defendant's Statement of Defence and Counter-claim which was refused by the Learned Master.
 - Accordingly, Judgment was entered against the Defendants.
26. The '**unless order**' of 13th December 2022 was activated since there was a failure to ensure compliance of Discovery by the Defendant and came into effect when the Defendant failed to comply with the Learned Masters orders therein.
27. The Defendant by oral application sought for the reinstatement of his statement of defence and counter claim.
28. However, the Learned Master refuse to reinstate the Statement of Defence and Counter-Claim and entered Judgment against the Defendant.
29. I find that because the '**Unless Order**' was activated and that simultaneously, the Defendant sought an order by oral application to reinstate his Statement of Defence and Counter-claim, the Defendant then is entitled as of right and procedurally to file and proceed with an application for '**Leave to Appeal the Interlocutory Ruling of 22nd February 2023 when the Learned Master refused to Reinstate the Defendants Statement of Defence and Counter-claim, rather than for the Defendant to re-apply for the Reinstatement by a formal application per se.**'
30. However, while the Defendants argument may raise a valid point that the 'unless order' of the Learned Master was not very clear and/or the interlocutory order or decision refusing to reinstate the Defendant's Statement of Defence and the Counter-claim for non-compliance of 'Completing the Discovery' on an unless order', I see or cannot ascertain anything on the facts of the case to convince me that I should accede to the Defendants application for Leave to Appeal the Master's Interlocutory Decision of 22nd July 2023, and/or order for Reinstatement of the Defendants Statement of Defence together with the Counter-claim.
31. The file record reflects that the Defendants conduct in their failure to comply with the Learned Masters decision of 13th December 2022 testamounded to contumacious as the Defendant's did not abide by and/or comply with the Court Directives and that there has been a complete disobedience of the unless orders with no good reasons being shown to Court to think otherwise.
32. Bearing all above in mind, I proceed to dismiss the Defendants Summons of 27th February 2023 seeking for Leave to Appeal the Interlocutory Ruling of the Learned Master of 22nd

February 2023.

33. Accordingly, I hold the Learned Masters Ruling of 22nd February 2023 refusing to **reinstate the Defendants Statement of Claim and Counter-claim** to the cause accordingly together with Default Judgment entered against the Defendants as claimed by the Plaintiff at prayers (i) and (ii) of the Statement of Claim therein.

E. Costs

34. The defendants to pay a sum of a summarily assessed costs of \$1,000 of the proceedings to the Plaintiff within 14 days timeframe.

F. Orders

- (i) The Defendants Leave to Appeal the Learned Master's Decision of 22nd February 2023 is refused and accordingly dismissed.
- (ii) The Defendants Statement of Defence together with the Counter-claim remains and/or stands dismissed accordingly.
- (iii) The Defendants to pay the Plaintiff a sum of \$1,000 as summarily assessed costs to the Plaintiff within 14 days timeframe.

Dated at Suva this 13th Day of February, 2024.




Vishwa Datt Sharma
JUDGE

CC: Kumar Goundar Lawyer, Suva
A.K.Singh Law, Suva