

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

Civil Appeal No. ABU 0035 of 2017
(High Court Civil Action No. HBC 117 of 2015)

BETWEEN : **CANE BAY FARM LIMITED**

Appellant

AND : **FIJI ELECTRICITY AUTHORITY**

Respondent

Coram : Basnayake, JA
Almeida Guneratne, JA
Jameel, JA

Counsel : Mr. R. Harper for the Appellant
Mr. N. Lajendra for the Respondent

Date of Hearing : 17 September 2018

Date of Judgment : 05 October 2018

JUDGMENT

Basnayake, JA

[1] I agree with the reasoning and conclusions of Jameel, JA.

Almeida Guneratne, JA

[2] I agree with (Madam) Justice Jameel's judgment that the High Court had correctly exercised its discretion in declining the application for an adjournment of the trial for the reasons stated in Her Ladyship's judgment.

Jameel, JA

Introduction

- [3] This is an appeal from the order of the High Court of Fiji at Suva whereby the learned trial Judge declined an application for adjournment in terms of Order 35.r.3 of the High Court Rules, and awarded costs to the Respondent in a sum of \$2000 payable by the Appellant, and a sum of \$1,000 as wasted costs payable by the Appellant to the court.
- [4] The only issue in this appeal is whether the learned trial Judge erred in failing to exercise discretion when he declined an application for adjournment, on the date fixed for trial. The decision of a judge at first instance in respect of such an application is a discretionary one and this court will not usually interfere in respect of the exercise of such discretion, except for very good reason.
- [5] On 17 January 2017 the matter was listed to be mentioned to fix dates for trial. When the case was called on that date, both parties were represented by their respective counsel and trial dates were assigned. The trial was fixed for 3 days, namely 3, 4, and 5 April 2017. The Pre-Trial Conference Minutes were recorded on 26 July 2016.
- [6] On 3 April 2017, the first date for trial, the Appellant's Counsel made an oral application for an adjournment. This was declined by the learned trial Judge.

The Judge's Notes

- [7] The learned trial Judge's Notes reveal the following:
- (a) That Mr. O'Driscoll for the Appellant made an application for adjournment of the trial which had been fixed for three (3) days on the ground that his client Mr. Simon Cole, the Managing Director of the Appellant Company, had gone abroad. No reason was given at the time, for the witness having to go abroad.
 - (b) In response to the question by court whether any other witnesses were present, Mr. O'Driscoll informed court that the 2nd witness Mr. Andrew Singh was to be present with Mr. Cole, and Mr. Cole had not arranged for Mr. Singh to come to court;

- (c) At this point, Mr. Gounder who appeared for the Respondent objected to the adjournment and moved that the case be struck out with costs of \$2500 to the Respondent, for the following reasons;
- (i) there was no formal application for adjournment, nor was there proof that the Witness was overseas,
 - (ii) the case had been fixed for three days in the presence of Mr. O'Driscoll,
 - (iii) no other witness was present for the Appellant,
 - (iv) no steps had been taken by the Appellant to file the Schedule of Special Damages as referred to in paragraph 17 of the Statement of Claim,
 - (v) in support of its objection to the application for adjournment, the Respondent relied on the judgment of this Court in **Goldenwest Enterprises Limited v Timoci Pautogo**, [2008] FJCA 3 (3 March 2009), and paragraph [35] of Wati J's Judgment in **National Bank of Fiji Ltd v Tabuya** [2010] FJHC 264; HBC373.2009 (22 July 2010) (379 of 2009).
- (d) In reply, Mr. O'Driscoll stated that he received short notice from his client to apply for the adjournment. Mr. O'Driscoll relied on paragraphs [54] and [55] of the judgment in **Goldenwest** (*supra*). Mr. O'Driscoll responded that the failure to file the Schedule of Special Damages is not a relevant circumstance, as the claim could well be dropped. It appears, that even in this regard the Appellant's attitude to compliance with pre-trial steps was casual.

The order of the High Court

[8] The Order of the High Court states as follows:

- “1. The application for adjournment for this trial for 3 days is declined.*
- 2. The Plaintiff shall pay the Defendant costs in a sum of \$2,000 and wasted costs to the Court in of \$1,000.”*

[9] Although the record of the lower court does not show that the learned trial Judge had struck out the Claim, it was the understanding of the parties that this had been done,

especially in view of the fact that the Respondent's Counsel made an application for striking out.

Grounds of appeal

[10] The grounds of appeal urged by the Appellant are reproduced below:

*"1. That the learned trial Judge erred in law and in fact in failing to exercise his **discretion** to adjourn the hearing in view of the unavailability of the Appellant's principal and substantive witness.*

*2. That the learned trial Judge erred in law and in fact in **failing to direct himself that the hearing could not proceed** in the circumstances put forward by Counsel for the Appellant at the hearing on 3rd April 2017 despite there being no formal application filed seeking such adjournment and in all the circumstances outlined by counsel for the Appellant".*

The Grounds of appeal and the arguments

[11] Both grounds of appeal are related to each other and will be dealt with compositely. The Appellant complains that the learned trial Judge erred in law in failing to adjourn the hearing despite the unavailability of the Appellant's principal witness, and that the learned trial Judge ought to have exercised his discretion and allowed the adjournment sought. The Appellant relies on the provisions of Order 35 r.3 of the High Court Rules which provides as follows:

"The Judge may, if he thinks it expedient in the interest of justice, adjourn a trial for such time, and to such place, and upon such terms, if any, as he thinks fit."

[12] In paragraph 6 of its written submissions the Appellant for the first time, takes up the position that the adjournment was sought on the basis that:

"The Appellant's principal witness was unavailable due to unforeseen circumstances of an urgent business matter suddenly arising which were out of his control and could not be deferred".

- [13] Before this court, the Appellant relies on the case of **Gardner v Prime Land Development Ltd** [2016] FJHC 764; HBC176.2007 (26 August 2016). Whilst this court is not bound by the judgment of a lower court, it is observed that in any event the facts of that case are distinguishable from the facts of this case. In that case, the Defendant filed summons seeking to vacate the dates set down for trial by an application for postponement being filed two months prior to the date of hearing. The principal witness had been diagnosed with a life-threatening illness three months after the trial dates were scheduled. The Defendant's Solicitors had given advance notice about the impending summons to vacate the trial dates. The principal witness for the Defendant was undergoing continuing medical treatment overseas, which fact had been deposed to in an affidavit, the witness was unable to give evidence even by electronic means such as Skype, and the medical report in support of these facts had been annexed to the affidavit. In addition, there was no other witness who could give evidence on the matter in issue. In that case, the court had the benefit of evidence substantiating the application for adjournment. In this case, there was none. The facts of this case are diametrically at variance with those facts, and that is evident from the objections raised by the Respondent which have been summarized in paragraph 7(c) above.
- [14] The trial Judge was bound to exercise his discretion in terms of the Rules bearing in mind the interests of both parties. Although costs may compensate the opposing party, the competing interests of case management and the cost of public time and resources are equally important. The overall conduct of the party who makes the application can influence the trial Judge's decision in exercising his discretion. The timeliness of the application will have an important bearing on this, and in this case, the Appellant made the application on the morning of date of trial. There was no proof that the principal witness Mr. Simon Cole had gone abroad, or the reason why he had to go, whether the matter was unavoidable, unforeseen, or had arisen after the dates were fixed for trial. The court was only told that Mr. O'Driscoll himself had received short notice from the client, but there was no evidence whatsoever to corroborate even this. Even the issue of 'short notice' was in response to the objection raised by the Counsel for the Respondent. None of the four listed witnesses of the Appellant was present on the date, there was no formal application, and Mr. O'Driscoll only told court that the Registry had been informed of the unavailability of the witness. The Court noted the fact that the Respondent was ready for trial, as its witnesses were present.

- [15] The Appellant now contends that the learned trial judge should have acknowledged that as the Plaintiff in the lower court, it would not have willingly caused undue delay in pursuing its own claim without good reason. Whilst as a general proposition this appears to be correct, the reality in this case is that, in fairness to the learned trial Judge, there was no acceptable evidence on which he could have exercised his discretion under Order 35, r.3. There was no evidence to indicate that the Appellant had taken necessary steps showing diligence in prosecuting its claim, and was handicapped only by the unforeseen unavailability of its principal witness.
- [16] Mr. O' Driscoll said the letter sent to the Registry informed of the unavailability of Counsel was dated 29 March 2017, but the Respondent said that the said letter was in fact dated 30 March 2017, had been addressed to the Respondent's Solicitors, and copied to the High Court Registry. This letter had also been faxed on 30 March 2017 to the Respondent's Solicitors.
- [17] The Respondent also submitted that despite the Appellant having stated in its Statement of Claim and Reply to Defence, that it will collate and file a Schedule of Special Damages, it had not done so, nor was there an indication that the Appellant would abandon its claim for special damages; and none of the witnesses of the Appellant were subpoenaed. In reply to this Mr. Harper for the Appellant stated that there was no need to subpoena the witness Mr. Singh as he worked for the Appellant. There was no information about whether all the listed witnesses were employed by the Appellant, and therefore whether the same justification applied to them too.

The Law

- [18] The trial Judge's decision on an application for an adjournment will be interfered with only exceptionally. In **Goldenwest** (*supra*) at paragraph [29] the court said:

"It is a principle, universally applied, that the power to adjourn or refuse to adjourn a proceeding is within the discretion of the Court hearing the matter. It is further universally accepted that an appeals court should be loath to overturn the trial court's exercise of discretion as to the grant of an adjournment or its refusal, except upon good reason. This principle is

stated in various ways, each nonetheless confirming it: A trial court's decision on request for adjournment will not be reversed absent a clear showing that the trial court erroneously exercised its discretion: **State v. Elliot**, 203 Wis. 2d 95, at 106; 551 NW 2d 850, at 854 (Ct. App.) (1996); **Re Joshua GH, A Person Under the Age of 18**, Wis. Ct Apps, Dst 1, No. 99-1357(1999)

The granting of an adjournment is in the absolute discretion of the court depending on the facts of each case. Unless it can be shown that the discretion was improperly exercised it should not be disturbed: **Go Pak Hoong Tractor and building Construction v. Syarikat PasirPerdana**(1982) 1 MLJ 77; **AyerMolek Rubber Company Berhad (1292-P) v. Mirra SDN BHD (153829-A)** (2007)(Company Winding-up No: D2-28-14-2006) High Court of Malaysia at Kuala Lumpur, 12 December 2007)

... adjournments of cases fixed for hearing are not obtainable as a matter of course but may be granted or refused at the discretion of the court ... The exercise of this discretion, however, is a judicial act against which an aggrieved party may lodge an appeal, but since it is a matter of discretion, an appellate court will be slow to interfere with it ... It would however appear that in order to succeed in an appeal against such exercise of discretion, the appellant shall satisfy the appellate court that the trial court acted on an entirely wrong principle or failed to take all the circumstances of the case into consideration and that it is manifest that the order would work injustice to the appellant: **Okeke v Oruh**(1999) 6 NWLR (Pt 606) 175, at 188; **Unilag v Aigoro** (1985) 1 NWLR (Pt 1) 143; **Alsthom v. Saraki** (2005) 1 SC (Pt 1) 1; **Caekey Traders Ltd v. Gen. Motors Co Ltd** (1992) 2 NWLR (Pt 222) 132; **George v. George** (2001) 1 NWLR (Pt 694) 349; **Nigerian Telecommunications PLC v. Chief SJ Mayaki**Ct App. Lagos, 2006 (12 April 2006), at 6".

[19] In regard to an application for adjournment, this court in **Goldenwest** (supra) said:-

“[42] There is, however, a requirement that there be no fault on the part of the party seeking the adjournment; Piggot Construction v United Brotherhood (1974) DLR 93d) 311 (Sask. CA).”

[20] In **Goldenwest** (supra) this court found that in all the circumstances of the case, the denial of the adjournment was unfair and unjust and amounted to a denial of the right to be heard. In that case, Goldenwest Ltd was the defendant in the lower court. Its application for an adjournment on the basis that its witness was overseas was refused, the Plaintiff's evidence was led, and the court made a winding-up order against Goldenwest Ltd, who then made an application to this court to stay the order of the lower court pending the decision of this court. It was in those circumstances that this court held that the failure to grant an adjournment had resulted in denying Goldenwest the opportunity to lead evidence on its behalf, and was therefore unjust and unfair and, that procedural fairness required that it be given an opportunity to be heard.

[21] In **Goldenwest** (supra) this court said it will interfere with the decision of the lower court to deny an adjournment:

“If the refusal of the adjournment amounts to a denial of a fair hearing and hence a denial of natural justice or procedural fairness, or where the refusal to adjourn would cause a definite and irreparable harm to the party seeking it, an adjournment should be granted”.

[22] In the instant case however, the Appellant was the Plaintiff in the lower court, and the question of procedural fairness does not have quite the same relevance, as it did for the Appellant in **Goldenwest Limited** (supra). As the Plaintiff in the lower court, a Plaintiff who is remiss cannot, in fairness to the opposing party who is ready, be treated for the purposes of an adjournment application, in the same way as an unfortunate, ill-prepared or disadvantaged defendant ought to be treated by the court.

[23] The Supreme Court of Fiji in the case of Nand v Ali [2012] FJSC 13; CBV0020.2008 (8 May 2012) cited with approval this Court's decision in Goldenwest (*supra*).

[24] The Appellant's claim that definite and irreparable harm will be caused to it, by the refusal to grant an adjournment, is also unacceptable in view of the level of unpreparedness, and the casual attitude shown to the court.

Conclusion

[25] The Appellant was unable to satisfy this court that the learned trial Judge acted on a wrong principle of law, or failed to take the relevant circumstances into consideration in exercising his discretion to refuse the adjournment application. The learned trial Judge was entirely correct, and the order does not contain an error of law which requires this Court interfere with the order made. Accordingly the appeal is dismissed.

The Orders of the court:

1. *The appeal of the Appellant is dismissed.*
2. *The Appellant is ordered to pay to the Respondent a sum of \$5000.00 as costs.*
3. *This shall be in addition to the costs ordered by the High Court.*
4. *The aforesaid sums shall be paid by the Appellant to the Respondent within 21 days of this judgment.*



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Hon. Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

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Hon. Madam Justice Farzana Jameel
JUSTICE OF APPEAL