

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

CIVIL APPEAL NO. ABU 070 of 2019

(Civil Action No: HBC 61 of 2013)

BETWEEN : **ROTOMOULD (FIJI) LIMITED**

Appellant

AND : **DEO CONSTRUCTION DEVELOPMENT COMPANY LIMITED**

Respondent

Coram : Almeida Guneratne, AP

Counsel : Mr Devanesh Sharma for the Appellant
Mr Ashnil Narayan for the Respondent

Date of Hearing : 12 August, 2021
(Final set of written submissions (by the Respondent) filed on 29th October, 2021)

Date of Ruling : 3 December, 2021

RULING

Relevant Background

[1] The High Court gave a Ruling on 17th November 2015. By a subsequent ruling on 29th September, 2016 it granted leave to appeal the 17th November ruling. The Appellant filed notice and grounds of appeal (ABU 114/2016) within time and paid security for costs as well.

- [2] However, on the basis that the Appellant had failed to comply with Rule 18(5) of the Court of Appeal Rules, the Appeal had been deemed abandoned on 28th June, 2019 in terms of Rule 18(10).
- [3] The present application dated 14th August, 2019 is one seeking leave to file a fresh notice and grounds of appeal.
- [4] Pending the said application the Respondent sought to strike it out on the ground of want of jurisdiction and/or non-compliance with the Rules.
- [5] Several sets of written submissions have been filed on behalf of the parties ending with the supplementary submissions dated 29th October, 2021 filed by the Respondent. However, I have taken in principally the Appellant's written submissions dated 16th October, 2019 and 24th August and the Respondent's submissions dated 9th September, 2021 and 29th October, 2021.
- [6] Having regard to the said written submissions as well as the oral submissions made by Counsel I proceed to make my determination as follows.

The jurisdiction issue

- [7] The main thrust of the Respondent's submission is based on Rule 26(3) of the Court of Appeal Rules:

“26(3): 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.”

- [8] But, the present Rule 27 reads thus:

“27 *The period for filing and serving a notice of appeal or an application for leave to appeal under Rule 16 may be extended by the Court below or by the Court of Appeal.*”

(as per the Court of Appeal (Amendment) Rules 2018 – Extraordinary Government of Fiji Gazette No.22 of 21st June, 2018)

[9] Rule 27 being later in point of time, it is an established principle of statutory interpretation that a later provision shall prevail over an earlier one.

[10] It follows therefore that, this Rule 27 (which amended the former Rule 27) read with Section 20(1)(b) and Rule 17(3) of the Court of Appeal Act confers jurisdiction on me to entertain the present application.

Other Impacting Issues to be addressed.

[11] Thus, the present application being one seeking extension of time to file a fresh notice and grounds of appeal against the impugned ruling of the High Court, it is necessary to look at the criteria that arise for consideration as laid down in the seminal decision of the Supreme Court in NLTB –v- Khan [2013] FJSC, 15 March, 2013.

Length of the delay

[12] As would be clear from the chronology of events recounted in paragraphs [1] and [2] above, the delay of 26 days cannot be said to be inordinate.

Reasons for the delay

[13] Even if I were to find that the said reasons may not be fully acceptable, nevertheless on the basis of a strong *cursus curiae*, I felt obliged to see whether there are reasonable prospects of success in appeal if leave is granted.

[14] On that I have given my mind to what the Appellant has submitted (vide: the written submissions dated 16th October, 2019) which I reproduce here as follows:-

“21. *It is submitted that this Court need look no further than the Ruling of the High Court (Justice A. Tuilevuka) made on 29 September 2016 when it granted the Applicant leave to appeal from the interlocutory Ruling.*

22. *The case concerns an arbitrator who was appointed by the parties to determine a building dispute but who went beyond what he was asked to do by the parties and misconducted himself by not allowing the parties to make verbal submissions in the arbitration proceedings although requests were made to do so.*

23. *In granting leave to appeal, the High Court had to consider essentially the same issue now required to be considered, namely the relative merit of the grounds of appeal. That issue was found resoundingly in favour of the Applicant.*

24. *Relevantly as appears from the Ruling of the High Court granting leave to appeal:*

(a) At [1] of the Ruling the six grounds of appeal were considered.

(b) At [21] of the Ruling the High Court found that the six grounds of appeal did raise a serious question for adjudication. It is worth setting that out in full as follows:

“21. *I have considered the six proposed grounds of appeal (see above) advanced by the applicant and I agree there is a serious question for adjudication. I did make a finding that the Arbitrator did misconduct himself by failing to give both parties an opportunity to make verbal submissions in the arbitration proceedings. However, I refused to set the award aside on that score as I was of the view, which views I still hold, that there was not prejudice to the plaintiff (now applicant) before me. The applicant contends that whilst the law was correctly identified, it was incorrectly applied in many respects. I am indeed of the view that there are some serious issues to be considered by the Fiji Court of Appeal. As the Fiji Court of Appeal said in **FPSC v Manunivalagi** (supra), these issues deserve further arguments from both sides leading to an authoritative decision of the Fiji Court of Appeal which we will all benefit from.*” (emphasis added).

[15] I am convinced that there are reasonable prospects of success in Appeal. There certainly are matters that merit the full Court's consideration.

The Prejudice criterion

[16] In that regard the Appellant in the written submissions dated 16th October, 2019 has submitted thus:

“25. *There will be no unfair prejudice caused to the Respondent in the event that the orders sought in the Summons are made. The 3 volume Appeal Record has been prepared and it essentially consists of the documents identified in Rule 18(2) of the Rules. There is no suggestion by the Respondent of any errors or deficiencies in the Appeal Record, and the non-compliance with the consultation requirement in Rule 18(5) appears to be a fairly technical, and otherwise insignificant, non-compliance.*

26. *The Applicant will be seriously prejudiced if leave is not granted since the Respondent had no legitimate claim against the Applicant in the Arbitration. If leave is not granted, the Applicant will suffer prejudice due to no fault on its part but rather due to the fault of the Applicant's solicitors.*”

[17] While I am amenable to the Appellant's submission in that regard, nevertheless there was a lapse notwithstanding Rule 64.

[18] Going back to the Rule 18(5) situation although the Appellant relied on the **Habib Bank Limited Case** [ABU 7 of 2014] (as per Calanchini P), in that case, there had been negotiations between the respective lawyers which had caused the delay. In the instant case, the Appellant had failed to consult the opposing lawyers.

[19] Consequently, in my quest to strike a balance, while I am inclined to grant the present application I feel the ends of justice would be best served in ordering the Appellant to pay a sum of \$2,000.00 within 21 days of this Ruling to the Respondent.

Re: The Reliefs sought by the Applicant (Appellant)

[20] The Applicant has in the summons urged as follows:

“2. That directions be given to progress the new appeal to an early hearing and for that purpose, upon the filing of the fresh Notice of Appeal, the following documents filed in Civil Appeal No.114 of 2016 and the security for costs paid therein be transferred to the new appeal in satisfaction of the relevant rules:

- (a) The Respondent’s Notice;*
- (b) \$3,000.00 paid as security for costs;*
- (c) The High Court Record; and*
- (d) The Transcript of Evidence.*

3. That, if necessary, the Applicant/Appellant file a Supplementary High Court Record to include any additional documents requested by the Respondent.

4. That as an alternative to 2 and 3 above, the new appeal to proceed in the normal way.

5. Such further or other Orders as may seem just to this Honourable Court.

6. That the costs of this application be costs in the cause.”

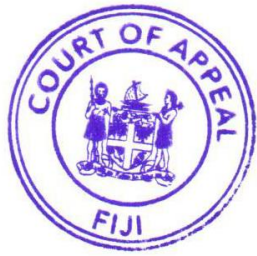
My Response to the Reliefs sought in the said Summons

[21] The initial appeal 114/16 has lost its efficacy. The new appeal is 70/19. Consequently, the Appellant is directed to take steps to proceed with the new appeal in the normal way as stated in Relief No.4 in the summons.

Orders of Court

1. The application (summons) to file fresh notice and grounds of appeal is allowed.
2. However, the Appellant is ordered to pay to the Respondent a sum of \$2,000.00 within 21 days of notice of this Ruling.

3. Should the Appellant fail to comply with Order 2 above the appeal shall stand abated.
4. If the said Order 2 is complied with the Appeal is to proceed the normal way.



A handwritten signature in blue ink, which appears to read 'Almeida Guneratne', is written above a horizontal line.

Almeida Guneratne
ACTING PRESIDENT, COURT OF APPEAL