

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0044 OF 2021
[High Court at Lautoka Case No. Civil Action 08 of 2016]

BETWEEN : **SANTOK INVESTMENT** *Appellant*

AND : **ABBCO BUILDERS PTE LIMITED** *1st Respondent*

CR ENGINEERING PTE LIMITED *2nd Respondent*

Before : **Dr. Almeida Guneratne, P**

Counsel : **Ms A. Ali for the Appellant**
Mr R. Singh for the 1st Respondent
Mr R. Charan for the 2nd Respondent

Date of Hearing : **9 December 2022**

Date of Ruling : **30 December 2022**

RULING

[1] This is an application by the Respondents to strike out the Appellant’s “*appeal*” (the Respondents’ submissions being that, the “*appeal*” is only one that purports to be “*an appeal*” and in fact there is “*no appeal on foot as envisaged by the law.*”

- [2] The Respondents “*striking out application*” is based morefully on the ground that, the Appellant’s “*purported appeal*” has been filed contrary to the provisions of Section 12(2) (g) read with Rule 16 of the Court of Appeal Act (the Act).
- [3] At the hearing Ms Ali for the Appellant raised a preliminary objection to the Respondents striking out application on the ground that, the Respondents summons as well as the supporting affidavit deposed by Mereseini Belinda Vanua were defective and irregular and therefore needed to be struck out. Learned Counsel contended, consequently, should the said preliminary objection be upheld by this Court, there was nothing more to go into and the Appellant’s “*purported appeal*” (as contended on behalf of the Respondents), remains “*as an appeal on foot*” before the full Court for it to determine on the substantive grounds of appeal filed on 20th October, 2021.
- [4] While the afore-counted aspects are the main focus (which I shall address as being of a preliminary nature), there are also other ancillary issues which I shall address and deal with subsequently.

The alleged defect/irregularity of the summons and the supporting affidavit to strike out the appeal

- [5] Ms Ali submitted that:
- (a) “*the summons*” do not specify any grounds on which the application to strike out the Appeal are based;
 - (b) The supporting affidavit also, while not specifying any such ground and, even assuming there are any such grounds, there is no proper authorisation for the said affidavit to have been deposed by the deponent of the said affidavit.

Discussion and Determination on the said preliminary objection raised on behalf of the Appellant

- [6] The summons to strike out as the sealed stamp of the Registry reveals is dated 27th October, 2021. I agree with Ms Ali that no grounds whatsoever have been urged in the said summons to strike out the “*purported appeal*.”
- [7] In regard to Ms Ali’s argument on the defective/irregular nature of the affidavit supporting “*the summons*,” my consideration and subsequent assessment thereon were focused on the following aspects – viz:-
- (a) Ms Ali’s argument that, the said affidavit addresses on the Court operations and directives on “*time limits*” issued by His Lordship, the Chief Justice.
 - (b) And – there is nothing in the said affidavit of Belinda Vanua supporting legally and factually putting in issue the grounds of appeal urged on behalf the Appellant.
- [8] In so far as the aspect articulated in paragraph 7(a) above is concerned, taken at its highest, even if there had been a misinterpretation/misconstruction of the directives issued by the Hon. Chief Justice that was on the part of the lawyers which could not have resulted in punishing the Appellant (vide: **Hussein v. Prasad** [2022] FJSC 7, 3rd March, 2022 per Kamal Kumar, P).
- [9] Thus, the delay in appealing and failing to seek leave to appeal notwithstanding the lapse of time to appeal goes out of reckoning.
- [10] In the result therefore, I had no hesitation in agreeing with Ms Ali that, the said affidavit of Belinda Vanua was not helpful to the Respondents’ cause (in seeking to strike out the Appeal).

The aspect of authorization – status to depose to an affidavit

[11] Apart from all that, Ms Ali argued that, the deponent of the said impugned affidavit was not a person who could have been regarded as having been properly authorized to depose being a partner of the 1st Respondent’s firm of Solicitors.

[12] I could not subscribe to Ms Ali’s argument on that. Who would be an authorized person in such circumstances to swear an affidavit? In past precedents, several categories of persona have been held to “*be unauthorized*” But, this is a case where a partner of a law firm has deposed which stands on a different footing.

[13] Consequently, the several High Court decisions which Ms Ali submitted for my consideration, which I accepted for consideration (only because, there was a consistent *cursus curiae* by the High Court) but which I found not to be helpful for the reason I have stated in paragraph [12] above.

Consideration of Ancillary Issues

[14] This is in pursuance of the promise I held out at paragraph [4] of this Ruling. Accordingly, I shall deal with the said ancillary issues as follows.

The summons to strike out and the supporting affidavit

[15] The summons has been filed (as the seal of the Court Record reveals) on 27th October, 2021. The supporting affidavit (as the seal of the Court Record reveals) shows that it has been deposed to on 26th October, 2021.

A supporting affidavit must follow a summons on the same date or on a subsequent date (not on an antecedent date)

[16] This I lay down as a proposition of law.

The Issue re: whether a single judge could strike out an appeal formally before the full Court (after even security for costs to appeal has been paid – the jurisdiction of a single Judge)

- [17] That was an issue raised by this Court *ex mere motu*.
- [18] I am grateful to all Counsel who obliged Court in making submissions thereon as well, the said issue being as to whether a single judge could assume jurisdiction to strike out “*an appeal*” formally before the full Court.
- [19] In that regard I have penned some rulings in the past, the Chief among them, (in my assessment) being the case of **PA Lal Coachwork v. Mohini Lata** (ABU 0002 of 2021, 17th December, 2021). I hold the view that, a single judge is bereft of such jurisdiction. In as much as, the issue calls for an interpretation of Section 20(1) of the Act, particularly Section 20(1)(k) thereof, I would request the full Court to express its views thereon when determining the substantive appeal.
- [20] On the basis of the reasons adduced above, I proceed to make my orders as follows.

Orders:

- 1) *The Appellant’s preliminary objection to the reception of the Respondents’ summons (to strike out the Appellant’s notice/grounds of appeal and the supporting affidavit) is upheld;*
- 2) *The Chief Registrar of this Court is directed to have this case (appeal) listed for hearing before the full Court in a forthcoming session.*

3) *There shall be no costs.*



A handwritten signature in blue ink, which appears to read "Justice Almeida Guneratne".

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Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL

Solicitors:

InterAlia Consultancy for the Appellant

Sherani & Company for the 1st Respondent

Ravneet Charan Lawyers for the 2nd Respondent