

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

CIVIL APPEAL NO. ABU 0043 of 2022
[Suva Civil Action No: 68 of 2021]

BETWEEN : **SHARMILA NARAYAN SANEHI** *Appellant*

AND : **ECO LUMBER PACIFIC PTE LIMITED** *Respondent*

Coram : Dr. Almeida Guneratne, P

Counsel : Ms K Singh for the Appellant
Ms U Fa for the Respondent

Date of Hearing : 14th August, 2023

Date of Decision : 4th September, 2023

DECISION

Essential background content

- [1] The High Court by its judgment dated 30th June, 2022 dismissed a winding up application filed by the appellant against the respondent's company.
- [2] The appellant filed Notice of Appeal against the said judgment urging the following grounds of appeal.

“Grounds of Appeal

1. *The Learned Judge erred in law and in fact in holding that the Respondent had valid grounds to dispute the Application of Winding-Up Application when there was no Affidavit in Opposition and D6 Form Filed, opposing the Winding-Up Application.*
2. *The Learned Judge erred in law and in fact when he relied on or considered that the Affidavit in Support dated 24th February 2022, filed in support of an inter-Parte Summons (hereinafter referred to as the said Affidavit) as the Affidavit in Opposition to the Winding up Petition when the said Affidavit was only in support for the Inter-Parte Summons filed on 24th February 2022.*
3. *The Learned Judge erred in law and in fact when he relied on the Affidavit in Support dated 24th February 2022, filed in support of an inter-Parte Summons for an enlargement of time, despite ordering the Respondent to file their Affidavit in Opposition to the Winding-Up Petition within 7 days from 28th February 2022.*
4. *The Learned Judge erred in law and in fact in not applying the Principal (sic) of Natural Justice when he considered the Affidavit in Support dated 24th February 2022, filed in support of an Inter-Parte Summons for an enlargement of time as an Affidavit in Opposition to the Winding Up Petition, despite Section 15(1) of the Companies (Winding Up) Rules, Companies Act 2015, requiring the Respondent to File an Affidavit in Opposition and Form D6.*
5. *The Learned Judge erred in law and in fact when he failed to consider the requirements of Section 15(1) of the Companies (Winding Up) Rules, Companies Act 2015 and continued to rely on the Affidavit in Support dated 24th February 2022, filed in support of an inter-Parte Summons for an enlargement of time as an Affidavit in Opposition to the Winding Up Petition.*
6. *The Learned Judge erred in law and in fact when he considered the Affidavit in Support dated 24th February 2022, filed in support of an Inter-Parte Summons for an enlargement of time as an Affidavit in Opposition to the Winding Up Petition, breaching the Appellants rights under Section 15(2) of the Companies (Winding Up) Rules, Companies Act 2015.”*

[3] It would also appear that the appellant has paid the security for costs of the appeal.

- [4] Accordingly, at that point there was a proper appeal on foot.
- [5] Thereafter the respondent filed summons seeking to strike out the appeal.
- [6] In the supporting affidavit of Sione Fa (Managing Director of the Respondent Company) it is deposed that:

"the application to strike out is made on the grounds of new information available to the Respondent."
(paragraph 3 of the said affidavit dated 24th January, 2023).

- [7] Could it be said that "*the information*" (as the Respondent seems to call it) is "*new information?*"
- [8] The "*information*" in issue is that, when the appellant and respondent entered into a lease agreement the consent of the Director of Lands had not been obtained as required by Section 13 of the State Lands Act (1945) and therefore the action in the High Court and now the appeal before this Court are tainted with illegality.

Discussion and Determination

- [9] The Section 13 requirement has been there from 1945. That is not new information. It is a state of the law which in fact, as argued by the appellant, which the Respondent Company is presumed to have known or ought to have known particularly, the very deponent in the affidavit supporting the striking out summons being a lawyer. Apart from that, the consent of the Director of Lands as to the requirement of Section 13 of the State Lands Act could have been obtained (arguably) subsequently and therefore "*the lease agreement*" perhaps could have been regarded as being voidable and was not rendered "*void ab initio.*"

- [10] In the leading case of **Ladd v Marshall** [1954] 3 ALLER 745, broad condition which was identified if a court were to allow new evidence to be entertained is that the new evidence could not have been obtained with reasonable diligence for use at a trial.
- [11] The point urged by the Respondent is not even “*new evidence*.” As I said earlier, it is a state of affairs or the law that had stood from the year 1945. It is trite law that “*ignorance of the law is no defence*.” Apart from all that, even in the High Court the Respondent had not taken up the point it is urging before me (a single judge) when a final appeal is pending before the full Court.
- [12] I have in several decisions held as to the situations when this Court sitting as a single judge will entertain striking out applications and when it will not.
See: **Pa Lal Coachwork v. Mohini Lata** [ABU0002 of 2021], 17th December, 2021.
(see also: **Sanok Investment v. Abbco Builders Pte Limited and Another** [ABU0044 of 2021], 30th December, 2022.
- [13] I specifically held in **Pa Lal Coachwork** (supra), that a distinction needs to be drawn between an application incidental to an appeal or intended appeal and an application to strike out a substantive appeal that is pending before the full Court.
- [14] It is perhaps in a most exceptional case that a single judge would be inclined to strike out an appeal pending before the full Court. The instant case is certainly not one of those for the reasons adduced in paragraphs [9] to [11] above. Apart from the grounds of appeal urged in the Notice of Appeal of the appellant, the full Court in the exercise of its discretion will no doubt give its mind to the question of “*alleged illegality*” raised by the respondent.

Orders of Court:

- 1) *The application of the respondent to strike out the appellant's appeal is declined/refused.*
- 2) *The hearing of the appeal before the full Court shall take its normal course.*
- 3) *The Respondent shall pay a sum of \$1,500.00 to the Appellant as costs of his application.*



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

Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL