

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

**CIVIL APPEAL NO. ABU 0101 of 2020**  
**(Lautoka High Court HBE: 12 of 2020)**

**BETWEEN** : **VITILEVU CONSTRUCTION PTE (FIJI) LIMITED**  
*Appellant*

**AND** : **MOBILE CRANE HIRE SERVICES PTE LIMITED**  
*1<sup>st</sup> Respondent*

**AND** : **OFFICIAL RECEIVER**  
*2<sup>nd</sup> Respondent*

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

**Counsel** : **Ms. N Tikoisuva for the Appellant**  
**1<sup>st</sup> Respondent absent and unrepresented**  
**Ms N Narayan for the 2<sup>nd</sup> Respondent**

**Date of Hearing** : **17 January, 2023**

**Date of Ruling** : **27 January, 2023**

**RULING**

**Brief account of the background**

[1] This is an application for re-instatement of an appeal (“*the appeal*”) which has been deemed to have been abandoned for failure to pay security for costs of the appeal in terms of Rule 17(1)(a) of the Court of Appeal Rules read with Practice Direction No.1 of 2019.

[2] “*The appeal*” itself had been filed out of time. However, by its ruling dated 25<sup>th</sup> January, 2021 although the reasons for the delay were not acceptable, on the assessment of the merits/prospects of success should leave be granted, leave to appeal was granted.

[3] That was a decision (ruling) handed down by me on the basis of past precedents although on a few occasions I had expressed some reservations in that regard.

[4] Be that as it may, this is the second time the Appellant is seeking the indulgence of Court to grant extension of time to prosecute “*the appeal*.”

**Basis on which re-instatement of “the appeal is being sought**

[5] At the hearing on 17<sup>th</sup> January, 2023, the 1<sup>st</sup> Respondent was absent and unrepresented. The 2<sup>nd</sup> Respondent’s Counsel having submitted that, she would abide by whatever order this Court would make, I invited learned Counsel for the Appellant to make her submissions in support of her application to have the “*deemed to have been abandoned appeal*” re-instated, seeking leave for that purpose pursuant to Rule 17(3) of the Court of Appeal Rules.

[6] Learned Counsel for the Appellant, responding to my invitation submitted that, she would be relying on her written submissions dated 17<sup>th</sup> January, 2023 but in regard to which, she was quick to say that she was referring to the same to assist Court, but in the exercise of her right to make oral submissions, she adverted to paragraphs 2.6 to 2.7 of the said written submissions which she re-iterated orally.

[7] I shall now reproduce below the content of said paragraphs 2.6 to 2.7:

“2.6 *Reasons for the Delay – We refer to the Affidavit of Mr David Toganivalu who deposed that the Notice of Appeal was filed on 11<sup>th</sup> August 2021. It should also be noted by the Court that the filing was during the period of COVID 19 restrictions in Fiji and the closure of Courts and most offices around Fiji. The Court Operations COVID 19 Notice by the Honourable Chief Justice provided a new period for the computation of time. The reasons for the delay is admitted by the deponent as an oversight on his part on the next steps for the present appeal.*

2.7 *Although we accept that the Court of Appeal has previously considered lawyer's omissions to be unacceptable, we beg the indulgence of the Court as the oversight was at a time in which a lot of filing had been delayed during the closure of offices amidst the COVID 19 Pandemic in Fiji including law firms which were not considered as essential services."*

[8] I took into consideration the content of what is averred in the said paragraphs and reiterated in the oral submissions of Ms. Tikoisuva.

[9] Taking them along with the affidavit of David Toganivalu dated 2<sup>nd</sup> June, 2022 in support of the Appellant's summons seeking leave for re-instatement of the appeal, who has taken personal responsibility for the lapse (delay) (*vide*: paragraphs [9] of his said Affidavit), I was compelled to take note of a recent Ruling (decision) of the Chief Justice wherein His Lordship laid down (in effect) that, a litigant should not be punished for lapses on the part of such litigant's lawyers. (*vide*: **Hussain v. Prasad** [2022] FJSC 7, March 2022.

[10] That was a single Judge decision by the Chief Justice writing for the Supreme Court disagreeing with my thinking in the Court of Appeal writing for that Court as a single Judge.

[11] Accordingly, in some of my recent rulings (decisions), in keeping with the principle of stare decisis, I have held myself bound by His Lordship's decision.

[12] Having said all that, here is a case, where the Appellant's lawyer takes personal responsibility for failure to prosecute the appeal in time.

[13] Consequently, although as I have reflected earlier that, it is the second time the Appellant is seeking extension of time to appeal, the applicable principles (and considerations feeding them) remain "*in tact*."

[14] At this point, I also take note of the fact that, there is no counter-affidavit (in opposition) to the affidavit of Mr. Toganivalu (referred to at paragraph [7] above).

[15] While I appreciate and commend Mr Toganivalu for the professional stance he has taken, I myself having at the back of my mind, the grounds of appeal that have been urged why principally I was inclined to grant leave to appeal out of time in that first round (several issues arising for consideration and determination in the context of the provisions of the Companies Act, a matter the full Court needs to look into), which grounds now would remain to be looked into by the full Court for I proceed to make order granting the Appellant's application dated 16<sup>th</sup> June, 2022 seeking leave for re-instatement of "*the appeal*" subject however to certain conditions I shall lay down in my ensuing final orders.

Final Orders of Court

- 1) *The Appellant is granted leave for re-instatement of its appeal dated 11<sup>th</sup> August, 2021.*
- 2) *Consequently, the Appellant is granted 21 days time upon notice of Order 1 above, to file and serve summons to enable the Registrar to fix security of costs for the Appeal.*
- 3) *Should the Appellant fail to comply with Order 2 above, the Appellant's intended appeal shall stand rejected and/or dismissed under and/or in terms of Section 20(1)(g) of the Court of Appeal Act.*
- 4) *Given the nature of the present proceedings, the Registrar is prevailed upon to make available (a) the order of this Court (single Judge ruling of 25<sup>th</sup> January, 2021); (b) the ruling as at this date viz: 27<sup>th</sup> January, 2023 (single Judge ruling) – should the Appeal proceed to hearing before the full Court.*



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

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**Hon. Justice Almeida Guneratne**  
**PRESIDENT, COURT OF APPEAL**

**Solicitors:**

Toganivalu Legal for the Appellant  
AG's Chambers for the 2<sup>nd</sup> Respondent