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

CIVIL APPEAL NO. ABU 044 of 2021
[In the High Court Case No HBE 20 of 2020]

BETWEEN : **SANTOK INVESTMENT PTE LIMITED**

Appellant

AND : **ABBCO BUIDERS PTE LIMITED**

01st Respondent

CR ENGINEERING PTE LIMITED

02nd Respondent

Coram : **Prematilaka, RJA**

Counsel : **Ms. A. Ali and Ms. S. Chand for the Appellant**
Ms. L. Vaurasi for the 1st Respondent
Ms. M. Chand for the 2nd Respondent

Date of Hearing : **03 March 2025**

Date of Ruling : **04 April 2025**

RULING

[1] The appellant appealed on 20 October 2021 against two orders of the High Court. On 27 October 2021, the 01st respondent filed summons supported by an affidavit to strike out the appeal on the ground that the appellant's "*purported appeal*" had been filed contrary to the provisions of section 12(2) (g) read with Rule 16 of the Court of Appeal Act (CA Act) in 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.". The appellant opposed the strike out application *inter alia* 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 i.e. 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*.

[2] Dr. Almeida Guneratne, P in his Ruling[1] agreed that no grounds whatsoever have been urged in the said summons to strike out the "*purported appeal*." However, in regard to the argument on the defective/irregular nature of the affidavit supporting "*the summons*," Dr. Almeida Guneratne, P seems to have held that where a partner of a law firm has deposed to the affidavit it stands on a different footing and could be accepted *i.e.* he could be regarded as an authorized person to swear an affidavit. Finally, the President upheld 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) and the Chief Registrar was directed to have the appeal listed for hearing before the full Court in a forthcoming session.

[3] On 06 June 2024, the 01st respondent had filed fresh summons supported by an affidavit from Ruth Pratiba Nand to have the notice of appeal struck out on the following grounds:

> *(i) The appellant had failed to diligently prosecute the appeal and not complied with Rule 18(1) and 18(10) of the Court of Appeal Rules.*
>
> *(ii) The appeal is a nullity because it was filed out of time.*

[4] The appellant's counsel once again raised some preliminary objections to the respondent's second summons on the basis that the affidavit of Ruth Pratiba Nand is defective and

[1] **Santok Investment v Abbco Builders Pte Ltd** [2022] FJCA 191; ABU0044.2021 (30 December 2022)

therefore the summons combined with the 'defective' affidavit to strike out are fatally defective and a single Judge of this court cannot strike out an appeal formally before the full court.

[5] The appellant's counsel's first argument is that Ruth Pratiba Nand is a law clerk attached to the 01st respondent's law firm and without specific authorization from the 01st respondent company, Ruth could not have sworn an affidavit on behalf of the company because Ruth is not an employee of the 01st respondent.

[6] It is not in dispute that Ruth has attached no authorization from the 01st respondent to her affidavit and she is an employee of the 01st respondent's law firm. In any event, Ruth's affidavit is dated 05 June 2024 and the strike out application (summons & affidavit) was filed in the CA registry on 06 June 2024 raising the question whether an affidavit sworn to prior to the date of the summons could legally support the orders sought in the summons. On this point Dr. Almeida Guneratne, P had held in the previous ruling as a proposition of law that a supporting affidavit must follow a summons on the same date or on a subsequent date (not on an antecedent date). Thus, if the view of Dr. Almeida Guneratne, P is correct, on this alone the summons to strike out the appeal cannot succeed. However, I think that the Court of Appeal should look into this proposition of law and deliver a more considered and reasoned pronouncement for the guidance of courts, practitioners and litigants.

[7] I shall further consider the appellant's argument on the validity of Ruith's affidavit. The counsel relies on the single judge decision by the then Chief Justice in **Paul v Director of Lands** [2020] FJSC 3; CBV0018.2019 (9 June 2020) where His Lordship held:

> *'[16] When Third Party (including Law Clerks/Legal Executives/Litigation Clerks) depose Affidavit on behalf of a party to the proceedings then he/she:-*
>
> *(i) must be authorised in writing by that party to depose such Affidavits;*
> *(ii) must depose as to why that party and if a Company than why its director or authorized officer cannot depose the Affidavit;*
> *(iii) **must not** depose Affidavits on basis of information or belief but depose facts the deponent has knowledge of those facts except where:*
>
> *(a) Affidavit is in support of or in opposition to Application for Summary Judgment;*

(b) Affidavit verifying facts in respect to action for specific performance pursuant to Order 86 of HCR only if directed by Court to do so;
(c) Affidavit verifying evidence of facts during trial when directed by Court to do so pursuant to Order 38 Rule 3 of HCR.

(iv) may depose Affidavits in support of or in opposition to interlocutory application but must do so on the basis of information received which they believe to be true and must disclose the source of such information or beliefs in addition facts that is within their personal knowledge.

[8] ***Paul*** is a single judge decision and the question is whether the subsequent Court of Appeal (Full Court) decision in **R B Patel Group Ltd v Central Board of Health** [2023] FJCA 246; ABU032.2022 (30 November 2023) by three judges should prevail over ***Paul*** where it was *inter alia* held that:

59. All affidavits filed into Court, need only to comply with Order 41 and under it, there is no requirement for any affidavits, excluding those exceptions under Order 4 Rule 5 (1), to be authenticated or deposed with a written authority in case of a company annexed to it.

[9] ***R B Patel*** was concerned with an affidavit sworn to by the CEO of the company on behalf of the company but there was no specific authorization attached to the affidavit.

[10] It is clear that in ***R B Patel*** the Full Court of the Court of Appeal had considered ***Paul***. However, ***R B Patel*** dealt with a different situation to that has arisen in the matter before me in that in this matter Ruth is not even an employee of the 01st respondent but a law clerk attached to the 01st respondent's solicitors (i.e. Young and Associates) as opposed to the CEO who had personal knowledge as to the facts in ***R B Patel***. In my view, the Court of Appeal needs to look at the current scenario in the light of ***Paul*** and ***R B Patel*** and any other authorities because Ruth has said in her affidavit that she has been authorized by the 01st respondent to make the affidavit (though she attaches no written authorization from the 01st respondent) and is personally familiar with various correspondence between Young and Associates and the CA Registry on this appeal as gathered from the 01st respondent's file.

[11] In the circumstances, this is also an important question of law to be clarified by the Full Court for the benefit of courts, practitioners and litigants *i.e.* whether an affidavit sworn to by a member of the support staff of a law firm appearing for a client without written authorization from the client, could be valid and accepted in judicial proceedings.

[12] On the issue whether a single judge could strike out an appeal formally before the Full Court has been decided by Dr. Almeida Guneratne, P in his previous ruling where he said that a single judge is bereft of such jurisdiction and since it calls for an interpretation of section 20(1) of the CA Act, particularly section 20(1)(k) thereof, he requested the Court of Appeal to express its views thereon when determining the substantive appeal.

[13] The respondent has taken up the position that the appeal is out of time. Notice of Appeal had been filed on 20 October 2021 against orders made on 26 February 2021 and 31 March 2021. *Prima facie,* the appeal is out of time. However, both parties seem to have admitted that from 17 April 2021 to 17 September 2021 Lautoka was under lockdown due to COVID 19 thus that period of time may have to be excluded from the calculation of 42 days specified in Rule 16 of the Court of Appeal Rules. The respondent argues that given due allowance for the said exclusion, still the appeal was filed after 83 days from the first order (49 days had lapsed from 26/02/2021 when the lockdown started) and late by 50 days from the second order but only 16 days when the lockdown started but further 34 days since the end of lockdown on 17/09/2021 to make it 50 days by 20/102021. The appellant has not met these submissions directly other than to say that Ruth has merely repeated what Mereseini Belinda Vanua had said in her affidavit which in the previous strike out application was held to be unhelpful but not held to be invalid *per se* because Vanua is a partner of the law firm acting for the 01st respondent unlike Ruth who is only a law clerk of the law firm. I have already held that this is a matter to be ventilated by the Full Court.

[14] Dr. Almeida Guneratne, P in his previous ruling said that even if there had been a misinterpretation/misconstruction of the directives issued by the Hon. Chief Justice on calculation of timelines due to COVID lockdowns on the part of the lawyers that could not have resulted in punishing an appellant (vide: **Hussein v. Prasad** [2022] FJSC 7, 3rd March,

2022 per Kamal Kumar, P). Since, the appellant has not filed an affidavit in opposition it is difficult for the appellant to argue that the appellant relies on such misinterpretation/misconstruction of the directives issued by the Hon. Chief Justice to extricate itself from the late appeal. I would not want to express a concrete view on this issue at this stage. This is too important a matter to be decided by a single Judge and must be left to the Full Court.

[15] The original appeal bearing No. ABU 33 of 2021 filed by the appellant had been *pro forma* dismissed on 27 October 2021 with cost by Dr. Almeida Guneratne, P upon an application by Ms. A. Ali, counsel for the appellant in the presence of Mr. D. Sharma for the 01st respondent who appears to have been the only respondent in that appeal. ABU 33 of 2021 is from Lautoka High Court case No. HBE 30 of 2015 only against the 01st respondent. The current appeal No. ABU 44 of 2021 arises from Lautoka High Court case No. HBE 20 of 2020 against the 01st respondent and another.

[16] Thus, the one and only appeal against orders of High Court on 26 February 2021 and 31 March 2021 appears to be the current appeal and whether it has been filed within time as permitted by Rule 16(b) – 06 weeks – is a matter for the Full Court to decide given the effect of the directives issued by the Hon. Chief Justice on calculation of timelines due to COVID lockdowns.

[17] The 01st respondent has also submitted that the appellant had failed to prosecute the appeal diligently and therefore in breach of Rule 18 making the appeal liable to abandonment under Rule 18(10). In terms of paragraph 5 of the Practice Direction No. 1 of 2019, for appeals filed after 01 February 2019, appeal records are to be lodged for certification by the Registrar within 42 days of receipt of the transcripts of audio recording and of judge's notes. The 1st respondent complains that the appellant had uplifted the transcripts of audio recording and of judge's notes on 13 February 2024 but not filed records for certification up to now. However, it appears from a perusal of the court file that the appellant had pointed out on 23 May 2024 that proceedings of 26 February 2021 was not among what they uplifted. The complete transcripts of audio recording and of judge's notes have been

received by the CA Registry (which informed of the same to the appellant on 01 August 2024) and the appellant has uplifted them on 09 August 2024. First draft of appeal records had been filed by the appellant for vetting on 28 October 2024 and the Registry had wanted several documents to be included as per its email to the appellant's solicitors on 12 November 2024. After obtaining the vetted records (first round) on 15 November 2024, the said solicitors on the same day had written seeking several documents from the CA Registry to be included as requested. CA Registry had provided them on 20 November 2024. The appellant's solicitors had filed in the Registry two volumes of records for re-vetting on 06 December 2024. The Registry had informed the said solicitors on 12 December 2024 that records had been vetted and ready for collection with a few suggestions to be followed. Nothing has progressed since then. The counsel for the appellant submitted at the hearing that the 01st respondent's solicitors had not responded to the contents of the draft records or got given their approval since December 2024 causing delay in further progress of completing the preparation of appeal records.

[18] Rule 18(5) of the Court of Appeal Rules mandates that an appellant must consult other affected parties as to the contents of the record. Once it is done, it is the duty of the respondents to communicate to the appellant any documents to be included or excluded or any other suggestions on their part to make the record complete and ready for the Full Court hearing. Otherwise, they must give their approval for the vetted records as they are. Cooperation by the respondents is essential in the exercise of preparing records and getting an appeal ready for hearing before the Court of Appeal without delay. The counsel for the 01st respondent did not controvert this assertion by the appellant's counsel. Therefore, I am not inclined to hold that the appeal is liable to be abandoned on account of non-compliance with Rule 18.

[19] All in all, given all issues of law discussed above, I am of the view that this appeal must reach the hearing before the Court of Appeal for it to deliberate several matters of law and facts before coming to a conclusion of the success or otherwise of the appeal.

Orders of the Court:

(1) The application to strike out the appeal is refused.
(2) The 01st respondent's solicitors must respond to the draft records or contents thereof to the appellant's solicitors within 02 weeks hereof.
(3) On receipt of the 01st respondent's response, the appellant's solicitors must file final records for certification within 02 weeks therefrom.
(4) Any extension of time for either party in this regard shall be only with permission of court.
(5) Once certified records are available, the Registry must list the appeal on the earliest possible call over date for it to be fixed for a date and time for Full Court hearing.
(6) All other steps must be as per the Court of Appeal Act, Court of Appeal Rules and Practice Directions.
(7) Given the questions of law involved, cost lie where they fall.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

Solicitors:

Interalia Consultancy Lawyers for the Appellant
Young & Associates Lawyers for the 1st Respondent
RC Lawyers for the 2nd Respondent