

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

Civil Appeal No. ABU 0087 of 2015
(High Court Civil Appeal No.HBC 153 of 2012)

BETWEEN : **ABBCO BUILDERS LIMITED** *Appellant*

AND : **STAR PRINTERY LIMITED** *Respondent*

Coram : **Chandra JA**
Basnayake JA
Almeida Guneratne JA

Counsel : **Mr. C. B. Young for the Appellant**
Mr. R. A. Singh for the Respondent

Date of Hearing : **07 May 2018**

Date of Judgment : **01 June 2018**

JUDGMENT

Chandra JA

[1] I agree with the reasoning and conclusions contained in the judgment of Almeida Guneratne JA.

Basnayake JA

[2] I agree with the reasons, conclusion and the proposed orders of Almeida Guneratne JA.

Almeida Guneratne JA

Introduction

[3] This is an application made by Summons which is said to have been made pursuant to Section 20(1) (k) of the Court of Appeal Act (Cap 12) which confers power on a single Judge of the Court.

“... generally, to hear any application, make any order or give any direction that is incidental to an appeal or intended appeal.”

[4] The background history will reveal as to how the matter came up before us as a full Court.

Background History

- [5] (a) The High Court at Suva by its judgment dated 5th November 2015 allowed a claim by the Appellant (Plaintiff) in full in regard to a building construction contract with post judgment interest and costs summarily assessed at \$8,000.00.
- (b) The Appellant appealed to this Court against that Judgment of the High Court on the grounds that the learned High Court Judge had failed to deal with its claim for pre-judgment interest and that the costs awarded were grossly inadequate;
- (c) Pending that Appeal, on 7th December, 2016, a single Judge of this Court considered an application for enlargement of time to appeal against the said judgment of the High Court by the Respondent together with an application by the Appellant to strike off a Cross-appeal which had been filed by the Respondent.
- (d) The single Judge had held against the Respondent in regard to its application for enlargement of time to appeal against the said High Court Judgment and had held

in favour of the Appellant in its application to strike off the Respondent's Cross-Appeal.

- (e) Consequently, the single Judge made order that, "Costs regarding the application for enlargement of time and the application for striking out the cross-appeal of the Respondent to be considered by the full Court when the substantive appeal of the appeal is heard." (Order (2) as per Justice Suresh Chandra, RJA's said order dated 7th December, 2016).

A Momentary pause in regard to that Order in the context of the scope and content of a Single Judge's powers as envisaged in Section 20(1) k of the Court of Appeal Act

- [6] That is "...generally to hear any application, make any order or give any direction that is incidental to an appeal or intended appeal."
- [7] On an interpretation of that power, the single Judge on hearing the said application made the said order in regard to "an intended appeal" and I dare say that I see no problem in equating the expression "an intended appeal" to "a pending appeal", while hastening to add that "to make any order incidental to an appeal" would attract different considerations which I shall elaborate on, in due course.
- [8] Thereafter the substantive appeal by the full Court had been heard and determined on 14th September, 2017. In its judgment the full Court had not addressed its mind to the said order of the single Judge although it had been urged in the Appellant's written submission at paragraph [36] thereof.
- [9] Subsequently, the present application being made by Summons a single Judge had fixed the same for consideration by the full Court.

Submissions made on behalf of the Parties

- [10] On behalf of the Appellant, Mr Young submitted that his application was simply to have the matter referred back to a single Judge which the single Judge had left for the full Court but which the full Court had not dealt with.
- [11] In the same breath, Mr. Young submitted that, “a Superior Court has an inherent power to vary its own orders in certain cases... if the purposes of justice require that it should do so...” (**Bailey v Marinoff** (125) CLR 529 at 544).
- [12] The submission of Mr. Singh made on behalf of the Respondent was that:
- (i) This Court was “functus” after it delivered its Judgment on 14th September, 2017’
 - (ii) A single Judge of this Court has no jurisdiction under Section 20(1) (k) of the Court of Appeal Act to re-open a matter which the Full Court had decided and;
 - (iii) The only remedy the Appellant could pursue was to have appealed to the Supreme Court against the said judgment of the full Court (dated 14th September 2017).
- [13] In his reply Mr. Young re-iterated his opening submissions in submitting that, since the full Court on Appeal had not addressed the order made by the single Judge (Chandra, RJA) as afore-counted, it was open for the matter to be referred back to Chandra, RJA as a single Judge or to any other single Judge of this Court.
- [14] Another point that surfaces in the respective written submissions which the parties are at variance may be referred to at this point.

[15] The Appellant argues that “one cannot infer from the silence of the full Court” (in the substantive appeal) that it had dealt with the issue raised by Summons”. (paragraph 6 of the Appellant’s written submissions dated 9th January, 2018 citing **Becker Shillan & Co. v Barry Brothers** [1921] 1KB 391 at 398.

[16] As against that, the Respondent contends that, “there is no evidence that the full Court did not consider the submission on costs for interlocutory applications” (paragraph 8 of the Respondent’s written submissions dated 10th January, 2018), impliedly suggesting that, the full Court must be deemed to have dealt with it.

Consideration of the rival Submissions and Determination

[17] With respect, the positions taken by Mr. Young recounted at paragraphs [10] and [11] above appear to be inconsistent.

[18] If his application was only to have the matter referred back to a single Judge, I cannot see the relevance of the reference to “a Superior Court’s inherent power to vary its own orders in certain cases...”

[19] Perhaps, it is on realisation of that fact that, Mr. Young relied on a single Judge Ruling [2012 FJSC 16 of His Lordship, Gates, P (Chief Justice) in relation to an antecedent full Court judgment [2012] FJSC 5 in the Supreme Court Case in **Shell Fiji Ltd v Chand.**


Interpretation of “Incidental” as contained in section 20 (1) (k) of the Court of Appeal Act

[20] In **Shell Fiji** (supra), a single Judge made orders at the conclusion of an appeal that were truly “incidental matters”. This is clear from paragraphs [2] and [3] of the said single Judge’s Ruling.

- [21] In contrast, in the instant case, the Appellant is seeking orders for the determination of costs for interlocutory applications that were made by the parties *prior to the substantive appeal* being determined by the full Court which a single Judge had left for the full Court to decide on, but, which the Full Court had not dealt with.
- [22] Consequently, the **Shell Fiji** case clearly stand distinguished from the instant case in as much as, *orders sought for the determination of costs for interlocutory applications that were made by the parties prior to the substantive appeal cannot be regarded as a matter incidental to an appeal as envisaged in Section 20(1) (k) of the Court of Appeal Act.*
- [23] In the result, while appreciating Mr Young's submission that his application is only to have the matter referred to a single Judge for the reasons revealed by the background history which I have recapped at paragraph [5] above, nevertheless even if this Court were inclined to grant his application at first blush for the said considerations, a singly Judge would be bereft of jurisdiction to entertain the matter for the reasons I have highlighted earlier.
- [24] Accordingly, I dismiss this application.

The Orders of the Court are:

1. *The Application is dismissed.*
2. *The Appellant (Applicant) shall pay to the Respondent a sum of \$5000.00 as costs of this application.*


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Hon. Justice S. Chandra
JUSTICE OF APPEAL



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Hon. Justice E. Basnayake
JUSTICE OF APPEAL



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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL