

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

CIVIL APPEAL NO. ABU 0123 of 2018
(High Court No. HBC 180 of 2013)

BETWEEN : GRANT ROBERT GRAHAM
BRENDON JAMES GIBSON

Appellants
(Original 2nd Defendant)

AND : INSPIRED DESTINATION (Inc) LIMITED
BANK OF SOUTH PACIFIC

First Respondent
(Original Plaintiff)

Coram : Basnayake, JA
Almeida Guneratne, JA
Jameel, JA

Counsel : Ms P Low for Appellant
Ms Khan for 1st Respondent
Ms S Devan for 2nd Respondent

CIVIL APPEAL NO. ABU 0126 of 2018
(High Court No. HBC 180 of 2013)

BETWEEN : BANK OF SOUTH PACIFIC

Appellant
(Original 3rd Defendant)

AND : INSPIRED DESTINATION (Inc) LIMITED
GRANT ROBERT GRAHAM
BRENDON JAMES GIBSON

First Respondent

Coram : Basnayake, JA
Almeida Guneratne, JA
Jameel, JA

Counsel : Ms S Devan for Appellant
Ms S Khan for 1st Respondent
Ms P Low for 2nd Respondent

Date of Hearing : 13 September, 2019

Date of Ruling : 20 September, 2019

RULING

- [1] This is a consolidated appeal against the judgment dated 19th October, 2018 of the High Court of Lautoka.
- [2] By that judgment, the High Court gave judgment in favour of the 1st Respondent in both ABU 123/2018 and ABU 126/2018. (Inspired Destinations (Inc.) Ltd – the original plaintiff).
- [3] Two joint appeals were filed by the 1st and 2nd defendants, and a separate appeal was filed by the 3rd defendant against the said impugned judgment of the High Court.
- [4] The parties involved, the privity issues in relation to the legislation and the legal issues impacting on their rights to prosecute their respective appeals are the matters that I shall venture to address in the ensuing Ruling.
- [5] Those aspects which I propose to address and deal with arose in consequence of two preliminary objections raised by Counsel for the plaintiff- first respondent.

Preliminary Objection (1)

- [6] At the commencement of the hearing, Ms Khan on behalf of the plaintiff-first respondent in Appeal No. ABU 123 of 2018 took exception to Ms Low proceeding with her appeal on behalf of the Appellants (Grant Robert Graham – Original 2nd defendant) on the ground that, no written submissions had been filed.
- [7] Having given ear to Ms Low and Ms Khan this Court reserved its ruling on the said preliminary objection. I now proceed to pen my ruling on the said preliminary objection.

The Substantive Law and Procedural Law

- [8] Both those aspects in the classificatory process of the law no doubt complement each other. It is through procedural rules (being the conduit) that an aggrieved party is required to reach that substantive aspect of the law.
- [9] While conceding her lapse, Ms Low sought the indulgence of Court to accept her written submissions which she was ready with to tender to Court and serve a copy thereof on the 1st Respondent's Counsel on appropriate orders this Court may make in its discretion.
- [10] Looking at the judicial approaches to compliance with procedural rules, I have found that those approaches have fallen into two schools of judicial thought. One, adapting a strict view and the other a liberal view. I must confess I fall into the latter.
- [11] Why I have, in my own philosophy of thought, opted to subscribe to that latter school of judicial thought is because I have been struck by that oft quoted judicial dictum "*The Courts of Law are institutions of justice and not academies of law.*" (per Abrahams, CJ in a Sri Lankan Supreme Court decision in the late 1930s).
- [12] Consequently, having perused the terms of the relevant Practice Direction (No.1 of 2018) and seeing that, non-compliance in failing to file written submissions as required therein is not a dismissal of an appeal, thus leaving in the hands of this Court an area of discretion, I proceed to make my Ruling on the matter at hand in allowing the Appellant (Ms Low) to make available to this Court her written submissions with a copy to (Ms Khan – Counsel for the 1st Respondent) within 7 (days) of this Ruling on payment of costs in a sum of \$2,000.00 to the credit of this case in the name of the 1st Respondent, which, in my view, would be adequate to meet her admitted lapse.

Preliminary objection (2)

- [13] Ms Khan (Counsel for the 1st Respondent in both appeals viz: ABU 123 of 2018 and ABU 126 of 2018) took objection to Ms Devan's (Counsel for the Appellant in ABU 126 of

2018) right to proceed with the said Appeals on the basis that, there being a first appeal by Ms Devan and while the same was on foot, the Statutory Rules did not permit to have urged a second appeal.

- [14] For that argument, Ms Khan relied on Section 12(1) of the Court of Appeal Act and the Rules made thereunder, which she was heard to submit, brought into the fold of contention Rule 6 of the Court of Appeal Act particularly which states thus:

“Subject to these Rules (that is, the Court of Appeal Rules) the (High Court) Rules shall apply to proceedings in and before the Court of Appeal in Civil Causes or matters.”

The High Court Rules relied upon by Ms Khan

- [15] The relevant Rule relied on is Order 20 Rule 1 of the High Court Rules which reads as follows:

“Order 20

Amendment

Amendment of writ without leave ...

(1) Subject to paragraph (3), the plaintiff may, without the leave of the Court, amend the writ once at any time before the pleadings in the action begun by the writ are deemed to be closed.

(2) Where a writ is amended under this rule after service thereof, then, unless the Court otherwise directs on an application made ex parte, the amended writ must be served on each defendant to the action.

(3) This rule shall not apply in relation to an amendment which consists of—

(a) the addition, omission or substitution of a party to the action or an alteration of the capacity in which the party to the action sues or is sued, or

(b) the addition or substitution of a new cause of action, or

(c) (without prejudice to rule 3(1) an amendment of the Statement of Claim (if any) endorsed on the writ, unless the amendment is made before service of the writ on any party to the action.”

[16] In the light of that Rule urged by Ms Khan I thought it necessary to look at the chronology of events on this case.

- "i) 19/10/18 *Judgment delivered in favour of the Plaintiff.*
- ii) 2/11/18 *Appeal filed on behalf of the 2nd and 3rd Defendant by Howards Lawyers being ABU 123 of 2018.*
- iii) 2/11/18 *Stay application filed by 2nd and 3rd Defendant in the High Court by Howards Lawyers.*
- iv) 5/11/18 *Another appeal filed by the 3rd Defendant (when the first one was still on foot) by Neel Shivam Lawyers being ABU 126 of 2018.*
- v) 8/11/18 *Another stay application by the 3rd Defendant on ABU 126/2018 filed by Neel Shivam Lawyers.*
- vi) 8/11/18 *Amended Notice and Grounds of Appeal filed by Howard Lawyers and this time only on behalf of the second Defendant with the only difference being not naming the 3rd Defendant an Appellant.*
- vii) 21/11/18 *Both Stay Applications called for hearing and vacated due to Howard Lawyers not appearing and/or giving their agents adequate instructions for conducting the hearing.*
- viii) 3/12/18 *Hearing on both applicants for stay."*

Analysis of the aforesaid aspects

[17] On perusing the said two appeals ABU 123/18 and 126/18, I found that the 1st defendant in the original proceedings does not feature in the said two appeals as a party.

[18] The 2nd and 3rd defendants have been made parties to both the said appeals.

- [19] Consequently, I cannot see any basis for the 1st Respondent in the said two appeals to have urged the said High Court Rule.

The Resulting Position on the said Preliminary Objection (2)

- [20] Thus, the said High Court Rule had no relevance to the matter of the two appeals at hand and Ms Khan's argument (respectfully) boils down to an argument that, two appeals being on record, the present appeal cannot be allowed to stand.
- [21] I cannot agree with that argument for the reason that, there being nothing to prevent an Appellant from filing a second appeal although a first appeal was on foot. There is no basis for this Court to act on the said High Court Rule (for the reason articulated above) and there being no statutory provision prohibiting the same I am inclined to hold that, what is not prohibited must be permitted.
- [22] Of course, although I could not find any authoritative precedent as to whether an appellant could file a second appeal in respect of the same matter or cause, though urged, as I perceive, is a question of law, that is not a matter for this Court to determine and is a matter for the legislature to decree at some point.
- [23] In the absence of such legislative intervention what this Court has to decide on and determine is as to whether the Appeals in ABU 123/18 and ABU 126/18 should be heard on the merits.
- [24] Viewing the matter from that perspective, I have no hesitation in holding that, given the fact that, as the Record reveals, effectively the same grounds of appeal have been urged in the said second appeal under consideration and against the same parties that, although the Appellants had not withdrawn their first appeal, (for which reason) they must proceed on their first appeal in both ABU 123/2018 and 126/2018 or opt to proceed on their second appeal.

[25] Accordingly for the aforesaid reasons I proceed to make my Ruling on the said 2nd preliminary objection over-ruling the same.

[26] Given the fact that, in regard to the said 2nd preliminary objection it required an interpretation of the impacting statutory provisions I shall not make any order as to costs.

Orders of Court:

1. *Both preliminary objections (1) and (2) referred to in this Ruling are over-ruled.*
2. *Subject however to what I have said in paragraph [12] of this Ruling.*
3. *Should the Appellants (Ms Low's Clients) fail to comply with Order 2 above their appeal shall stand rejected and/or dismissed.*
4. *In so far as the Ruling on preliminary objection (2) referred to in Order 1 above is concerned, for the reasons contained in that Ruling, there shall be no order for Costs.*



.....
Hon. Justice E. Basnayake
JUSTICE OF APPEAL



.....
Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL



.....
Hon. Justice F. Jameel
JUSTICE OF APPEAL