

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

**CIVIL APPEAL NO. ABU 80 OF 2019**  
**(High Court Civil Action No. HBC 8 of 2018[Lautoka])**

**BETWEEN** : **MACIU VAKACEGUILOMALOMA NAIVALU**

***Appellant***

**AND** : **SUPERIOR ROOFING (FIJI) LIMITED**

***Respondent***

**Coram** : Almeida Guneratne, JA

**Counsel** : Mr R Vananalagi for the Appellant  
: Mr R Charan for the Respondent

**Date of Hearing** : 29 June, 2020

**Date of Order** : 6 July, 2020

**ORDER**

[1] Proceedings in this case commenced with the Appellant's application for leave to appeal and extension of time to appeal a decision of the High Court of Fiji at Lautoka wherein in Civil Committal proceedings for Contempt, the Appellant was convicted and sentenced. The Appellant also sought to amend his Notice and Grounds of Appeal.

- [2] The Respondent having taken exception to the Appellant's said application on the basis that the same has been filed under the wrong rules envisaged in the Court of Appeal Act (Cap 12 – "*The Act*") and having filed a striking out application moved that the said striking out application be heard first before I go into the application of the Appellant.
- [3] Consequently, having decided to take the striking out application I set time lines for the filing of affidavits and submissions and made order fixing the matter for hearing on 29 June, 2020.
- [4] When the matter was taken for hearing, learned Counsel for the Appellant moved to withdraw the appeal. Learned Counsel for the Respondent while not objecting to the application for withdrawal of the appeal moved for costs.
- [5] Thus, the task left to me was what appropriate order for costs to make in the aforesaid circumstances. Having reserved my Order in that respect I now proceed to make my determination.

#### *Determination*

- [6] I have in this very session have had to address this issue as to *first*, whether costs should be ordered at all and *secondly*, if costs should be ordered what ought to be the quantum.

#### *Factors to be taken into consideration in answering that issue*

- [7] My thinking in that regard is contained in the Rulings I made in **The Ministry of Education, Heritage and Arts –v- Fiji Teachers Union** [ABU 92/2018], 27 March 2020; **Bhan Pratap Chand –v- Durga Prasad Gautam and Director of Lands** [ABU 97/2019], 23 June 2020.

- [8] Apart from those rulings I also had regard to the full Court decision in **Dhan Lakshmi v Gounder & Kumar** [2020] FJCA 31; ABU0066.2018 (28 February 2020) , per Jameel JA and **Tomu Mairi v B D Lakshman and Sons (Properties) Ltd** [2018] FJCA 5; ABU106.2017 (31 January 2018), per Calanchini P, wherein His Lordship said thus:

*“In my opinion the respondent has been brought to the Court of Appeal unnecessarily and therefore should be awarded reasonable costs in respect of the work involved as a result of the appellant’s misconceived appeal.*

*Before fixing the amount, I should say that in any case when an appellant seeks to withdraw an appeal then, unless there is no application by the respondent, an appellant can expect to have an order for costs made in favour of the respondent.”*

***Application of that judicial thinking to the facts and circumstances of the instant case***

- [9] The exception urged by the Respondent to the maintenance of the Appellant’s application in seeking leave to appeal (and other orders) were on foot for some considerable time as “*the Record*” reveals. Why did the Appellant procrastinate and wait until the matter was taken for hearing? Couldn’t he have at least put the Respondent on notice that the Appeal was going to be withdrawn? Did he have to wait until the matter was scheduled to be taken for hearing? Respondent’s Counsel had come ready to argue and in fact tendered written submissions in open Court on the day (29 June) fixed for hearing (in compliance with an antecedent order I had made).

***The Bane of failure to give timely instructions***

- [10] Had the Appellant given timely instructions to withdraw his appeal to his lawyers he may very well have escaped with some nominal costs, putting the Respondent on Notice that his appeal was going to be withdrawn. The Appellant failed to do so.

[11] For the aforesaid reasons, I proceed to make Orders as follows:

**Orders of Court:**

- 1). *The Appellant's application to withdraw the appeal is allowed.*
- 2). *The Appeal is dismissed.*
- 3). *The Appellant is ordered to pay costs to the Respondent in a sum of \$2,000.00 within 28 days of this Order.*
- 4). *The proceedings in this case are terminated and the Registrar is directed to take this matter off the caust-list.*



*Almeida Guneratne*

Almeida Guneratne  
JUSTICE OF APPEAL