

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

Civil Appeal No. ABU 0064 of 2018  
(HBC No. 341 of 2011)

BETWEEN : ALSPEC HOLDINGS LIMITED  
*Appellant*

AND : MINISTRY OF WORKS, TRASPORT & PUBLIC  
UTILITIES  
*1<sup>st</sup> Respondent*

AND : ATTORNEY GENERAL OF FIJI  
*2<sup>nd</sup> Respondent*

Coram : Almeida Guneratne, JA

Counsel : Ms. B. Qioniwasa for the Appellant  
: Ms. A. Ali with Ms. O. Solimailagi for the Respondents

Date of Hearing : 23 September 2020

Date of Ruling : 08 October 2020

**RULING**

[1] By this application the Appellant is seeking extension of time to finalise and file the record of appeal for certification.

[2] At the outset it would not be inappropriate to make a few preliminary observations.

- (a) On account of the difficulties the Appellant says it had faced in preparing the Record, the Registrar had granted two extensions, finally informing that a formal application by way of summons with supporting affidavit would have to be made.
- (b) The initial scheduled date for preparing the records was 31<sup>st</sup> December, 2019 which had stood extended till 14<sup>th</sup> February, 2020, upon the failure of which the appeal had been “deemed abandoned”.
- (c) Thereafter the Summons for extension of time has been filed on 25<sup>th</sup> August, 2020.
- (d) The affidavit supporting the summons is by one Aliti Tinai who has described herself as Legal Secretary at the Appellant’s Solicitors firm.
- (e) From 27<sup>th</sup> February, 2020 the Appellant’s solicitors had been seeking instructions from the Appellant which had been finally received only on 28<sup>th</sup> July to proceed with the Appeal.

[3] The aforesaid factual content of the aspects touching on the matter I have recounted on the basis of the Appellant’s own said “supporting affidavit” of Aliti Tinai referred to above and the written submissions filed dated 23<sup>rd</sup> September, 2020.

[4] As against that, the Respondents in their affidavit in opposition and written submissions dated 23<sup>rd</sup> September, 2020 advance the following points for consideration viz:

- (a) The appeal having been “deemed abandoned” the only option open to the Appellant was to file a fresh appeal.
- (b) Given the length of the delay and the reasons adduced they are not acceptable.

- (c) ‘There are no merits in the proposed grounds of appeal urged that could have any prospect of success.
- (d) In the circumstances the prejudice criterion stands in favour of the Respondents.

Consideration and relative evaluation of the opposing stands taken by respective Counsel on the issues articulated above

On the issue of “abandonment”

- [5] On that issue, I had no quarrel with Ms. Ali who contended on behalf of the Respondents that, on the basis of Section 39 of the Court of Appeal Act (the Act) the President of this Court had statutory authority to regard an “appeal being deemed abandoned” for non-compliance of statutory provisions.
- [6] However, my reservation in that regard is and was when I expressed my views in the Ruling I handed down in Sun (Fiji) News Limited v Kewal Chand; ABU 058/2019, 3<sup>rd</sup> September 2020, which I reiterate here which is principally in regard to Clause 8 of Practice Direction No.1 of 2019 which states thus:-

*“Abandonment is an automatic consequence of non-compliance with Practice Direction No.1 of 2018 and No.1 of 2019. Parties will not receive formal notice that the appeal is deemed to be abandoned”*

- [7] Who makes the decision that “an appeal is deemed to have been abandoned?”.
- [8] In my view it had to be the Court. The Registrar was required to forward the file to a Judge for Judicial sanction. That is not seen on the file.
- [9] Accordingly, I see no inconsistency with what I have said on the said practice direction in that Ruling in the Sun (Fiji) News case (supra).

- [10] In so far as “no notice being required to be given of the abandonment”, to begin with, Rule 17(2) and (3) of the Act make no mention of it.
- [11] When a party’s rights or interests are affected, the requirement of notice is an essential pre-requisite of the principles of natural justice. I recall that classic statement in the English case of Cooper v Wandsworth Board of Works [1863] 1 C.B. 180 that, “Justice of the Common Law will supply the omission of the legislature (per Byles, J) “when the said requirement is not expressly referred to (approved in the seminal decision in Ridge v Baldwin (HL) [1964] AC 40.
- [12] What has happened here is exactly the opposite. The Principal Act as well as Rule 17 is silent on that. I for one cannot subscribe to the view (as contained in Clause 8) of the Practice Direction that, notice could be dispensed with.
- [13] Apart from that, learned Counsel herself argued that, the option available to the Appellant was to file a fresh appeal. If the Appellant had no notice that the appeal was abandoned how could it have filed a fresh appeal?
- [14] For the aforesaid reasons I reject Ms. Ali’s contentions based on the issue of abandonment and agree with Ms. Qioniwasa’s argument on the said issue.

Distinguishing Sun (Fiji) News Ltd v Kewal Chand, ABU 058/2019, 3<sup>rd</sup> September, 2020

- [15] Ms. Ali stressed the fact that, while the Sun (Fiji) News ruling (supra), involved the failure to comply with a direction to file written submissions, the present case was concerned with the non-compliance to prepare and file court records as mandated by Rule 18 of the Court of Appeal Act.
- [16] Consequently, learned Counsel argued that the provisions of Rule 17 must be viewed in conjunction with Rule 18.

[17] The present application being one for enlargement of time seeking leave to appeal it was incumbent upon me to consider the well-established principles enunciated by the Supreme Court in NLTB v Khan [2013] FJSC 1, 15<sup>th</sup> March 2013, in their application to the instant case such as the length of delay, reasons adduced therefor, prejudice criterion and whether the proposed grounds of appeal reveal merits with a reasonable prospect of success if leave was to be granted.

#### Length and Reasons for the Delay

[18] Even if I were to ignore the initial delays which the Appellant has sought to explain linking the same to the dialogue its solicitors had struck with the Registry, by 14 February, 2020, two extensions having been granted by the Registrar, the Appellant by that time having had “notice of abandonment” as well.

[19] Thus, after 14 February, 2020, to shift any blame on the Registry for any delay was not only unreasonable and unfair but also amounts to “an abuse of process”.

[20] Party litigants and their lawyers must bear in mind that, the Registry is an essential and the administrative arm of the Courts and acts in terms of powers and functions conferred on it by the Rules of Court and Practice direction. In the present case, even the extensions given by it have been in accordance with that and finally even advising the Appellant to take steps to seek further extension of time formally through the Courts.

[21] And, when did the Appellant do that? It was on 25<sup>th</sup> August, 2020.

[22] Thus, there was a delay of more than 6 ½ months.

#### What are the reasons given for the delay?

[23] Those reasons are adduced in Aliti Tinai’s affidavit wherein it is stated that, from 27<sup>th</sup> February, 2020 the Appellant’s solicitors had been seeking instructions from the

Appellant which had been finally received only on 28<sup>th</sup> July, 2020 to proceed with the Appeal. This delay the deponent ascribes to “the Covid 19 restrictions that have been in place and the fact that our client’s principals only contact is through his son”. (Paragraph 14 of the said Affidavit).

- [24] However, by at least the end of April, 2020 the Covid restrictions were not in operations, a fact I take judicial notice of. As for the other reason given in the said affidavit, the Respondent was not obliged to take any responsibility.
- [25] For the aforesaid reasons, I agree with the contention of Ms. Ali for the Respondents that, the reasons for the delay are not acceptable.
- [26] Apart from all that, there is also the legality and therefore the acceptability of the affidavit of the said Aliti Tinai.

Legality and therefore the acceptability of the affidavit of Aliti Tinai dated 18<sup>th</sup> August, 2020

- [27] Aliti Tinai identifies himself as a legal secretary at the Solicitor’s firm.
- [28] In a recent ruling of mine, (vide: **Gulf Seafood (Fiji) Ltd v I-Taukei Land Trust Board**, ABU 0079/2019, 28<sup>th</sup> August, 2020), adopting as I did as a precedent for this Court, a *cursus curiae* of the High Court culminating in a decision of the present Chief Justice writing for the High Court in **Habib Bank Ltd v Mahmood Raza**; HBC 053/2005, 26<sup>th</sup> May 2020. I found and held it unacceptable to entertain affidavits by law firm clerks whether they describe themselves as “legal assistants”, “litigation assistants” and the like.
- [29] I looked at the said affidavit only for the reason that, the said objection was not taken by the Respondents’ Counsel.

[30] However, that does not prevent me from saying that even on the ground of legality of the said affidavit the same was liable to be rejected resulting in there being no affidavit to explain the delay from 14<sup>th</sup> February, 2020 until 25<sup>th</sup> August 2020.

Re: Merits of the proposed grounds of appeal

[31] I reproduce below the proposed grounds of appeal urged by the Appellant.

- “1. That the learned Trial Judge erred in law and in fact in failing to consider the evidence in Exhibit 29 being that the assessed figure of work done by the Appellant was in the total of \$786,347.19 VIP and that the Appellant had only been paid \$681,31.34. The evidence before the High Court should have lead the learned Trial Judge to the conclusion that there was an outstanding sum of at least \$105,115.85 owing to the Appellant and the Appellant was entitled to the same.*
- 2. That the learned Trial Judge erred in law and in fact in failing to properly consider the effect of the report submitted by SKM showing that the work completed by the Plaintiff was proximate to the sum claimed in the prayer to the Statement of claim.*
- 3. That the learned Trial Judge erred in law and in fact in not correctly identifying the contract terms relevant to the pleadings of the parties and going outside what was pleaded in deciding the matter despite having upheld objections to the same raised by the Appellant during the course of the trial.*
- 4. That the learned Trial Judge erred in law and in fact in failing to consider that the documentary evidence of the progress payments should have lead to a conclusion that the engineer’s evidence was discredited by function of the fact that the Defendant’s engineers had reassessed and increased the amounts paid to the Appellant under some of the progress certificates”.*

[32] As against that, I looked at the Judgment of the learned High Court Judge.

- [33] The dispute being a building contract, it is evident from His Lordship's decision that the said decision was based on "the consulting engineer's evidence who had verified as to the works undertaken by the Appellant including the performance anomalies. It is having given due consideration to these aspects that the learned Judge had, on the invocation of the principle of "*quantum meruit*" awarded to the (Plaintiff) Appellant, the sum His Lordship awarded.
- [34] Neither in the flawed affidavit of Aliti Tinai nor in the Appellant's written submissions has that been assailed to the satisfaction of court.
- [35] Assessment of a "quantum meruit" flowing as it were from an alleged breach of contract had to be established by evidence, which I found to be lacking on the material before me.
- [36] If so, that being a determination of fact, I have no hesitation in saying that, I have no reason to interfere with that finding of fact by the learned High Court Judge.
- [37] Apart from that, no submissions were made by the Appellant as to how His Lordship in the High Court could be said to have applied the principles on the concept of "quantum meruit" wrongly.
- [38] Indeed, the alleged merits of the Appellant's case being the last bastion to obtain leave, I did spend time in studying some leading works in the field and in none of them could I find even a token reason to interfere and comment on a trial court's province to make findings of fact and draw conclusions thereon save for anything that could be said as amounting to a clear misdirection/non-direction or a demonstrable error of law.
- [39] Indeed, Ms. Ali lucidly contended, adverting to and re-iterating what she had submitted in her written submissions dated 23<sup>rd</sup> September, 2020 thus:

*"36. The basis of the Appellant's claim in the High Court was for special damages or judgment for the value of works which the Appellant claims has not*



*been paid for, and general damages for breach of contract. The Respondents' position was that the Appellant had been paid for the value of the works it had performed up to termination of the Appellant.*

*37. It is evident from the Ruling of the High Court that the decision turned on the consulting engineer's evidence who verified the works undertaken by the Plaintiff including its performance anomalies. The Appellant's appeal essentially challenges the learned Trial Judge's discretionary decision when it is well established principle that the appellate court will exercise judicial restraint in intervening in decisions involving exercise of discretion.*

*38. It is therefore respectfully submitted that the Appellant's appeal does not have any reasonable prospect of success.*

*39. Furthermore, the Appellant's appeal does not identify any error of law for determination by the appellate court and does not raise issues of general or public importance that warrants the determination of the appeal by the appellate court."*

#### The Prejudice Criterion

[40] Although I could rest my decision on the basis of the reasons adduced above, even in regard to the prejudice criterion, I could not find a basis to entertain the Appellant's application in as much as:-

- (a) The matter in dispute relates to public expenditure
- (b) The matter has been hanging fire since 2011

[41] Thus, even the "prejudice criterion" stands in favour of the Respondents.

Conclusion and Determination

- [42] On the basis of the aforesaid reasons, while I reject the Respondents' contentions based on the "issue of abandonment", I uphold the arguments based on "reasons for the delay", "the prejudice criterion and "lack of merits" in the proposed grounds of appeal".
- [43] Accordingly, I proceed to make my orders as follows:-

Order of Court:

1. The application of the Appellant's summons seeking enlargement of time to prepare, finalize and certify the copy records is refused and accordingly dismissed with Costs fixed in a sum of \$1,000.00.



*Jelet Guneratne*

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**Almeida Guneratne**  
**JUSTICE OF APPEAL**