

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

**CIVIL APPEAL NO. ABU 24 OF 2019**  
**[High Court Civil Action No. HBC 324 of 2016]**

**BETWEEN** : **STANTEC NEW ZEALAND LIMITED**

**Appellant**

**AND** : **FIJI ROADS AUTHORITY**

**Respondent**

**Coram** : **Lecamwasam, JA**  
**Guneratne, JA**  
**Jameel, JA**

**Counsel** : **Mr D Salmon, Mr D Bullock and Ms P Low for the Appellant**  
**Mr D Sharma and Mr S Deo for the Respondent**

**Date of Hearing:** **7 February 2020**

**Date of Judgment:** **28 February 2020**

**JUDGMENT**

**Lecamwasam, JA**

[1] This appeal is preferred by the appellant against the judgment of the High Court at Suva dated 1 March 2019. The factual background is as follows:- The appellant and the respondent entered into an agreement for the provision of road management services and construction. Clause 10 of the agreement, which plays a pivotal role in the issue at hand,

dictates the course for the parties in case of a dispute. As dispute had resulted due to some irreconcilable differences between the parties, the appellant had resorted to act under clause 10.2 of the agreement and submitted the dispute for mediation. Clauses 10.1, 10.2, and 10.4 read as follows:

*“10.1 In the event that any dispute or difference of any kind between the parties in connection with or arising out of this agreement arises (“Dispute”), the parties will attempt in good faith to settle such dispute by mutual discussion between the chief executive officers of each party held within 20 business days (or 10 business days if the Dispute relates to an invoice) after the date that the disputing party gives notice of the dispute to the other party identifying the dispute in reasonable detail and requesting consultations between the parties to resolve the Dispute.*

*10.2 If, at the end of such 20 business day (or, 10 business day) period, the Dispute is not resolved, either party may submit the Dispute for mediation. If the parties cannot agree a mediator within 5 business days of the submission of the dispute for mediation, a mediator will be chosen by the Chief Justice of Fiji. The mediator shall fix the time, place and procedure for mediation but in any event, the mediation shall commence within 10 business days of appointment of the mediator.*

*10.4 If the dispute cannot be resolved within 15 business days of the commencement of mediation (or within any extended time agreed to in writing between the parties), the mediation shall cease and either party may submit the Dispute for Arbitration in accordance with the then existing rules and regulations of the Rules of conciliation and the Arbitration of the International Chamber of Commerce. Judgment upon the Arbitrator’s award shall be final and binding and may be enforced by any court of competent jurisdiction. The prevailing party in any action arising under this Contract shall be entitled to its costs of litigation, including reasonable legal fees.”*

[2] As per the order of the learned High Court Judge, the parties accept that clause 10 of the agreement continues to bind the parties even after the termination of the contract. Additionally, Clause 12.8 of the agreement provides that the provisions of clauses 2.11, 5, 6, 9, and 10 shall continue in effect even after the termination of the agreement.

[3] The agreement was initially between the government of Fiji and MWH. The operations of MWH changed hands to Stantec New Zealand Limited. After taking over the operations of MWH, Stantec New Zealand Limited terminated the

Agreement. Having thus terminated the Agreement, it served a notice of dispute on the Respondent, Fiji Roads Authority in complying with the requirements of the Agreement. After the serving of the notice, parties had discussions on 17 and 18 of October 2016 with a view to resolving the matter. Before fixing the said discussion, I find that the parties had taken preliminary steps in regard to the dates, the place, and other incidental matters relating to the discussion.

[4] The appellant was represented by Mr. Michael Stephen Rudge and Mr. Andrew M. Caseley while the respondent was represented by Mr. John Hutchinson and Mr. Rod Bridges. Though discussions continued for one and half days, they could not arrive at a settlement as Mr Caseley walked away from the discussion due to some disagreement. As a result, the discussion came to an abrupt end.

[5] Since the discussions were futile, the appellant issued a notice for mediation as required by the Agreement. However, in the absence of a positive response from the respondents within the stipulated time period of 5 days, the appellants wrote to the Honourable Chief Justice requesting the nomination of a mediator. The respondent had objected to this on the ground that the appellant had failed to fulfill certain preliminary requirements. This situation prompted the appellant to file an originating summons seeking the following reliefs:

*“(a) A declaration that clause 10 of the agreement for the provision of road management services in Fiji between the Plaintiff and the Defendant dated 27th January, 2012 (Agreement):*

- i. continued in effect after termination of that Agreement; and*
- ii. continues to bind the defendant.*

*(b) A declaration that the Plaintiff is entitled to submit the dispute (as defined in the Affidavit in support of the Originating Summons) for mediation as required by clause 10.2 of the Agreement;*

*(c) By reason of the matters referred to in (a) and (b) above an order for specific performance of clause 10.2 of the Agreement, namely, the selection of a mediator of the Dispute by Chief Justice of Fiji; and*

*(d) Costs.”*

- [6] The respondent opposes the mediation process on the ground that the appellant had not fulfilled the pre-conditions for mediation. The Respondent places especial emphasis on the non-compliance with one basic requirement i.e. the obligation to conduct the discussions in good faith.
- [7] The facts reveal that the parties had engaged in discussions for one and a half days when the appellant's representative had walked out of the meeting without affording an opportunity for the respondent to discuss its grievances. The parties appear to have been discussing the grievances of the Appellant up to the time of the representative of the Appellant walking out. When the discussion turned onto the respondent's grievances due to lapses on the part of the appellant, the appellant's representative walked away from the discussions. Hence, the position of the Respondent is that this conduct of the appellant amounts to a breach of clause 10.1 due to the absence of good faith. The Respondent is of the view that unless the pre-condition of good faith is fulfilled the appellant has no right to proceed to mediation. The objection of the Respondent to any nomination of a mediator is based on this position.
- [8] I find that both parties have filed separate notices of dispute, which is an indication of grievances on both sides against each other. The grievances range from the non-payment of invoices by the Respondent to negligent design, negligent construction monitoring, or negligent advice etc. by the appellant. In order to resolve these issues, in accordance with the provisions of the Agreement, parties are required to resort to mediation or failing that, to arbitration. However, as it is, the parties are at an *impasse* due to the issue of the obligation of '*good faith*' contained in the Agreement.
- [9] Prudence dictates both parties to follow the dispute resolving mechanism provided in clause 10 of the Agreement. Both parties should be mindful of the claims at stake, which involves billions of dollars, and agree to resolve the disputes abiding by the spirit of the Agreement. A dispute of this nature has ramifications not only for the parties to the dispute, but also for the country at large. It hinders infrastructural development of Fiji as a development project is brought to a standstill.

[10] Having said that and in view of the above position, it is pertinent to scrutinize the unfolding of events at the discussions that had taken place. The fact that the discussions had progressed without any impediment on the first day is not refuted. The issue which led to the matter at hand had arisen half way through the second day. Therefore, an examination of whether “*good faith*” for the duration of the discussions is an enforceable requirement/obligation is relevant at this juncture.

[11] I advert my attention to the authority of **Wellington City Council v Body Corporate** 51702 (Wellington) [2002] 3 NZLR 486 (CA) cited by the appellant, in which it was held that an obligation to negotiate in good faith was not an obligation to reach agreement, but rather to *honestly try* to reach agreement. The relevant dictum of Tipping J. is as follows:

*“.... an obligation to negotiate in good faith is not the same as an obligation to negotiate reasonably ..... An obligation to negotiate in good faith essentially means that the parties must honestly try to reach agreement. They remain able to pursue their own interests within what is subjectively honest, rather than what is objectively reasonable.”*

[12] It would not be wrong for me to conclude that the appellant demonstrated good faith during the preparatory stages of the discussions. This is borne out by the fact of the appellant’s representative, Andrew Caseley being present in person at the discussions having come all the way from New Zealand to Fiji. Therefore, the conduct of the appellant prior to the discussions taking place demonstrates an honest attempt on its part to resolve the disputes through negotiations.

[13] The affidavit evidence clearly reflects that the parties have deliberated on the issues pertaining to each of them during the negotiations. Whether good faith continued throughout the negotiations requires a subjective exploration and is difficult to determine on objective criteria. Therefore, my view is that the requirement of good faith attaches only to the frank attempt of the parties to resolve the disputes and not necessarily to an ultimately satisfactory conclusion of the negotiations. During negotiations, as each party would make efforts to safeguard their own interests, naturally dissatisfaction could ensue.

The walking away of the Stantec representative at a later stage does not in my view reflect the absence of good faith, as it could be reasonably attributed to any number of factors including frustration, dissatisfaction ,etc of the process. It is the right of the parties to place all their problems on the table during the discussions. Merely because one party abandons the discussion half way through it does not necessarily lead to a conclusion of an absence of good faith. The very fact that the parties had proceeded with negotiations for resolution for one and a half days signals good faith on both sides and a genuine attempt to resolve the dispute.

[14] As such, I find there was no absence of good faith on the part of the Appellant during the above discussions. I am further fortified by a statement of Mr. Hutchinson in his affidavit. In paragraph 48 of the said affidavit at page 782, he had stated thus:

*“(a) given you do not want to discuss our claim, I would like to sum up the meeting by saying that the meeting commenced with the parties having open and frank discussions in good faith; and*

*(b) we have spent a day and a half discussing your claim which has been useful but has not been resolved. We need to consider our next steps under the dispute procedure which is likely mediation and arbitration by mutual agreement.*

*(c) thank you for your attendance.”*

[15] The above statement by the representative for the Respondent adequately demonstrates that the discussion had been conducted in good faith and, in an open and frank manner. The respondent has not at any time before, during, or at the conclusion of the discussions raised the issue of the absence of good faith. Merely because there had been a turn of events not to the satisfaction of the Respondent one cannot assume that the Appellant had approached the discussion without good faith. Hence, I hold the position taken by the respondent cannot sustain on the above grounds and conclude that the absence of good faith has not been proved to the satisfaction of this court.

[16] Now, I advert to paragraph 6 of the judgment of the learned High Court Judge in which he takes up the following position:

*“[6] Both Mediation and arbitration are methods of alternative dispute resolution. Clause 10.2 does not require the parties to refer disputes for mediation or arbitration. However, it confers a direction on the parties to refer any dispute for mediation at first and if it is not successful to refer the dispute for arbitration. The word used in both instances in the agreement is “may”. There is no absolute requirement for the parties to refer any dispute for mediation or arbitration. Clause 10.2 of the agreement provides that the parties may first refer the dispute for mediation and clause 10.4 of the agreement provides that if the dispute is not resolved within 15 days or within any extended time agreed to in writing by the parties either party may refer the dispute for arbitration.”*

[17] I agree with the above reasoning of the learned High Court Judge. The Agreement does not cast a mandatory requirement on the parties to refer any dispute for mediation or arbitration. The Agreement merely provides recourse to Alternative Dispute Resolution if either of the parties so wish.

[18] However in paragraph 7 of his judgment, the learned High Court Judge says the parties cannot be “*compelled to refer a matter for mediation and it has to done of consent.*” It goes without saying that no one can be compelled to resort to arbitration or mediation and it has to be done with the consent of the parties. However, in this case, the parties are bound by the Agreement they have entered into. As a result, the parties have to follow the provisions of the Agreement. The Agreement does not require *consensus ad idem* for the parties to refer the matter for mediation. Any affected party, after issuing a notice of dispute, can resort to mediation without the consent of the other party.

[19] Once notice is given, if the other party does not take steps to nominate a mediator within 5 days, the affected party has the right to make a request to the Honourable Chief Justice to nominate a mediator. As per clause 10.2 “*either party may submit the dispute for mediation*”. This is an optional clause which gives a right to an affected party in his discretion to submit the dispute for mediation.

[20] Therefore, the interpretation of the learned Judge contained in paragraph 7 of his judgment is redundant in view of the provision of the Agreement which confers the right on an affected party to go before a mediator on its own without the consent of the other party. As such, I hold that the affected party, in this case the appellant, had the right to go before the mediator as per the Agreement after discussions failed under clause 10.1. It was thereafter incumbent on the Respondent Roads Authority to have nominated a mediator within five days. As this nomination was not done, the Appellant had correctly referred the matter to the Honourable Chief Justice in terms of clause 10.2 of the Agreement.

[21] Therefore, I hold in favour of the appellant and answer the following grounds of appeal cumulatively in the affirmative:

“1. *The Learned Judge erred in law and fact in failing to refer to, and give effect to, clause 10.3 of the Agreement, which provides:*

*“10.3 Neither party may commence any other dispute resolution or legal proceedings with the exception of an application for an injunction for urgent relief until and unless the mediation process has been completed and the parties have failed to reach an agreement in settlement of the dispute. This application shall be made in the High Court of Fiji.”*

2. *The Learned Judge erred in law and fact in holding that “there is no absolute requirement for the parties to refer any dispute for mediation or arbitration” (at[6]) when in fact clause 10.3 makes reference to mediation, and completion of the mediation process, a mandatory precondition to the commencement of any other dispute resolution or legal proceeding (including in the High Court of Fiji, save for urgent relief).*

3. *The Learned Judge wrongly stated that Stantec was seeking an order compelling the parties to refer the matter to mediation (at [7]), when in fact:*

*a. Stantec was seeking a declaration that it was entitled to refer the dispute to mediation under clause 10.2. As explained in Stantec’s submissions and evidence, this declaration was sought because the FRA had consistently taken the position (including in its correspondence to the Chief Justice of Fiji) that the appointment of a mediator under clause 10.2 was premature and that the necessary preconditions had not been met. As it eventuated, the FRA did not rely on this argument at the hearing.*





- c. *Stantec had referred the dispute to mediation under the contract on 27 October 2016 when it wrote to the FRA referring the dispute to mediation and failing the agree of the parties to as to a mediator, wrote to the Chief Justice on 14 November 2016 by requesting that he appoint a mediator under clause 10.2 of the Agreement;*
- d. *The Learned Judge failed to give any reasons to explain why the FRA should not be ordered to specifically perform clause 10.2 of the Agreement to permit the Chief Justice of Fiji to appoint a mediator, when:*
  - i. *the only reason that the Chief Justice has not appointed a mediator is that the FRA has consistently taken the position that the conditions for appointment of a mediator under clause 10.2 have not been met;*
  - ii. *the FRA conceded for the first time at the hearing that clause 10 of the agreement continued to bind the parties;*
  - iii. *the FRA made no written or oral submissions at the hearing as to why a mediator should not be appointed under clause 10.2”*

[22] The reliefs sought by the appellant before the High Court are:

- “(a) A declaration that clause 10 of the agreement for the provision of road management services in Fiji between the Plaintiff and the Defendant dated 27th January, 2012 (Agreement):*
  - iii. *continued in effect after termination of that Agreement; and*
  - iv. *continues to bind the defendant.*
- (b) A declaration that the Plaintiff is entitled to submit the dispute (as defined in the Affidavit in support of the Originating Summons) for mediation as required by clause 10.2 of the Agreement;*
- (c) By reason of the matters referred to in (a) and (b) above an order for specific performance of clause 10.2 of the Agreement, namely, the selection of a mediator of the Dispute by Chief Justice of Fiji; and*
- (d) Costs.”*

[23] In view of the orders (a) and (b) made above, and in the light of the communication made by the Honorable Chief Justice viz:-

*“My role was to appoint a mediator when the parties were unable to agree on a mediator. It was clear however that there were still preliminary issues in dispute such as the continuance of the agreement and the premature nature of the appointment. It is not for me to hear argument or rule on any of this. Therefore, at this stage, I decline to make the choice from the names submitted until it is agreed by the parties that I should do so, or a court advises me to do so.”*

The parties may advise themselves and take steps accordingly. Consequently, reliefs (c) sought by the Appellant does not arise.

[24] In setting aside the High Court judgment I am of the view that, since the matter involved the interpretation of a clause (10.2) contained in a private agreement, where the High Court took a particular view and this Court sitting in appeal taking a contrary view, (thus the matter being reduced to a question of law on interpretation), I order parties to bear their own costs.

**Guneratne, JA**

[25] I agree with the reasons, conclusions, and proposed orders arrived at by Lecamwasam JA.

**Jameel, JA**

[26] I also agree with the reasons, conclusions and orders proposed by Lecamwasam JA.

Orders of Court:

- i) *Appeal allowed in regard to prayers (a) and (b);*
- ii) *I order no costs and parties to bear their own costs.*



.....  
Hon. Justice S. Lecamwasam  
JUSTICE OF APPEAL



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



.....  
Hon. Justice Farzana Jameel  
JUSTICE OF APPEAL