

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

**CIVIL APPEAL NO. ABU 76 of 2020**  
**(Suva Civil Action No: HBC 313 of 2005)**

**BETWEEN** : **NATALIE KATZMAN** *Appellant*

**AND** : **BARSTOCK INVESTMENTS (FIJI) LIMITED** *Respondent*

**Coram** : **Almeida Guneratne, AP**

**Counsel** : **Ms V. Lidise for the Appellant**  
**Mr R. Singh for the Respondent**

**Date of Hearing** : **12 August, 2021**

**Date of Ruling** : **27 August, 2021**

**R U L I N G**

[1] The plaintiff-appellant's (hereinafter referred to as the Appellant) personal injury claim was dismissed by the High Court by its judgment (judgment). The learned Judge deferred the making of an order for costs which he made on a subsequent date. The Appellant appealed against "the judgment" and the appeal bearing no.ABU0043/2020 is pending. When the learned High Court judge made an order for Costs, the Appellant appealed against the said Order.

[2] The present appeal is against the said order for Costs.

[3] The Respondent has taken exception to the present Appeal being entertained on the basis that, the Appellant was required to seek leave to appeal in the first instance. Learned Counsel for the Respondent (Mr. Singh) adverted to Section 12(2) read with Rule 26(3) of the Court of Appeal Act (the Act).

*“Section 12(2)(e) No appeal shall lie without the leave of the Court or Judge making the order, from an order of the [High Court] or any judge thereof made with the consent of the parties or as to costs only.*

*Rule 26(3) wherever under these Rules an application may be made either to the Court below or to the Court of Appeal it shall be made in the first instance to the Court below.”*

[4] Learned Counsel submitted that, accordingly in terms of Section 20(1)(g) of the Act this Court was obliged to strike out (dismiss) this appeal which he referred to as “*a purported appeal*”.

*“Section 20(1)(g) A judge of the Court may exercise the following powers of the Court to dismiss an appeal for want of prosecution or for other causes specified in the rules.”*

[5] The Respondent has moved for indemnity costs on the basis that, notwithstanding that it had asked the Appellant to withdraw the Appeal in that she had breached the provisions of the Act and had not properly invoked the jurisdiction of the Court of Appeal. The Respondent contends that the Appellant has to seek leave from the High Court to appeal the impugned Order.

[6] As against the Respondent’s submissions, the Appellant’s Counsel (Ms. Lidise) submitted that:

- (i) The issue to be determined is whether the present appeal is a separate appeal or whether it ought to be regarded as an appeal against part of the same main judgment against which there is a pending appeal;
- (ii) The impugned Order therefore cannot be regarded as being interlocutory;
- (iii) Should this Court not be inclined to find favour with (i) and (ii) above, this Court is prevailed upon to regard the present appeal as arising out of an exceptional circumstance and regard it as an application for leave to appeal and grant leave to

appeal so that the full Court may hear and determine the appeal on the personal injury and damages issue as well as the Costs issue as one single Appeal.

[7] I have given my best consideration to the oral submissions as well as the written submissions tendered by the parties and proceed to make my determination as follows.

**Determination**

[8] The situations in which a costs order is made may be broadly classified as follows;

- (i) Where an order is made in the course of a proceedings (trial or inquiry) which clearly makes it an interlocutory one.
- (ii) A second situation is where along with the substantive judgment an order is made for costs, that is, the award for costs follows as being consequential constituting one single decision from which an appeal would lie.
- (iii) Yet another instance is where a Court in respect of an application makes order that Costs shall be in the Cause.
- (iv) It is a fourth situation that we are dealing with in the present case.

[9] In such a situation is a party required to regard “the judgment” as ‘final’ and prefer a direct appeal (as the appellant has done) and treat the order for costs as interlocutory obliging him to seek leave to appeal?

[10] One is familiar with the concept of “split trials” but not of a notion of “a split judgment”.

[11] Had the Appellant waited until the Costs order was made to appeal she might have been faced with a situation to seek extension of time to appeal and appeal. This is the reason the Appellant preferred an appeal against the “judgment” on the substantive matter (which is pending) and then preferred this appeal against the order (award) for Costs (which had been deferred by Court) as being part and parcel or constituting a single decision.

[12] For those reasons I am in agreement with the Appellant’s contention that the present situation falls outside the ambit of Section 12(2)(e) of the Act.

[13] The case of *Charan v. Suva City Council* [1994] FJC 33 does not aid the Respondent. Although *Tomes v Coke Wallis* (2002) JRC10 contemplates a different situation to the one that arises in the present case, however, this appeal cannot be construed as an appeal against “Costs only” as envisaged in Section 12(2)(e) for which reason I agree with learned Counsel for the Appellant that a purposive interpretation needs to be given to that section. I also hold that *Heffeman v Byrne* [2007] FJHC 138 cited by learned Counsel for the Respondent does not take away from that.

### **Conclusion**

[14] For the aforesaid reasons, I cannot subscribe to the Respondent’s contention that this appeal ought to be dismissed in terms of Section 20(1)(g) of the Act.

[15] Consequently, a consideration of the Appellant’s alternative argument does not arise.

[16] In the result the order sought by the Respondent seeking indemnity Costs also does not arise.

### **Practical and an Expeditious Approach – the need of the situation**

[17] In the circumstances, in the exercise of my powers under and in terms of Section 20(1)(k) of “the Act”, I make order that the Appeal bearing No. 0043/2020 against the judgment on the substantive matter be consolidated with the present appeal bearing No. 76/2020 and be heard as one single appeal by the full Court.

### **Orders of Court**

1. *The application of the Respondent to strike out (dismiss) the Appellant’s present appeal (76/2020) is rejected.*
2. *Since a matter of interpretation of the applicability of Section 12(2)(e) and Rule 26(3) of the Act was involved which was not directly covered by any precedent I do not make any order for Costs.*

3. *The Registrar is directed to submit both files bearing numbers 0043/2020 and 76/2020 to be heard and determined as a consolidated Appeal by the full Court on a scheduled date for hearing by the full Court.*



*Justice Almeida Guneratne*

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**Hon. Justice Almeida Guneratne**  
**ACTING PRESIDENT COURT OF APPEAL**