

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

**CIVIL APPEAL NO. ABU0017 of 2017**  
**(Suva High Court Civil Action No: HBC 341 of 2008)**

**BETWEEN** : **FORMSCAFF (FIJI) LIMITED** *Appellant*

**AND** : **RAJESH NAIDU** *1<sup>st</sup> Respondent*

**AMBE CONSTRUCTION LIMITED** *2<sup>nd</sup> Respondent*

**Coram** : Almeida Guneratne, JA  
Lecamwasam, JA  
Gunawansa, JA

**Counsel** : Mr E. Narayan and Mr S. Naidu for the Appellant  
Ms S. Devan for the 1<sup>st</sup> Respondent  
No appearance for the 2<sup>nd</sup> Respondent

**Date of Hearing** : 8<sup>th</sup> September, 2022

**Date of Judgment** : 30<sup>th</sup> September, 2022

## **JUDGMENT**

**Almeida Guneratne, JA**

### Prefatory reflections on the background to the Appeal

- [1] This appeal arises from a claim filed by the Plaintiff/Respondent (hereinafter referred to as the Respondent) seeking damages against injuries suffered by him during the course of his employment with his employer.
- [2] The trial was conducted by a High Court Judge who relinquished office (judgment not being delivered) in consequence of which (it would appear, His Lordship, the Chief Justice had directed a sitting judge to deliver “*judgment*”.
- [3] The said sitting Judge on the evidence on record and the written submissions filed before the Judge before whom the trial had been conducted, gave judgment in favour of the Respondent.
- [4] The said judgment covered the aspects of negligence and damages to be awarded (both general and special).
- [5] While the Appellant has addressed this Court in his written submissions in re: those aspects, he has raised certain grounds of appeal of a preliminary nature in seeking to put in issue the impugned (delivered) judgment of the High Court dated 25<sup>th</sup> November, 2016 on a procedural aspect.
- [6] Those grounds are contained and urged in the Appellant’s written submissions dated 22<sup>nd</sup> June, 2020. (*vide*: pages 3 to 9 thereof and paragraphs 1.0(ii) and (iv) of the Notice of Appeal dated 20<sup>th</sup> March, 2017, which he elaborated on, in his oral submissions).
- [7] I shall now summarise the essential content of the said grounds:- *viz*

- (i) After the initial Judge who heard the case relinquished office, another Judge being directed to deliver the judgment, notice of the date of that “*judgment*” ought to have been given to the Appellant.
- (ii) Justice Amaratunga’s observation/statement that, “*parties agreed to adopt the proceedings and also relied on the written submissions filed before (Justice Kotigalage)*” was not correct.

[8] I pause here to reflect and comment on the impacting legal principles thereon associated with an aggrieved person’s rights in litigation.

The said impacting principles

[9] 1. The adjudicating body must hear the parties

In the present case, the adjudicating body (the subsequent judge) did not hear the case.

2. Justice must not only be done but it must appear to have been done

In the present case, although it could be argued that, the subsequent judge has made a comprehensive analysis of the evidence appearing on record led before the earlier Judge, nevertheless, an opportunity needed to be given to the appellant to make oral submissions, in as much as the said subsequent judge never heard the case.

3. A primary judge’s function as distinguished from an appellate Court’s role is to understand the case which each party is endeavouring to present. In fact finding, the judge discharges the traditional role of the juror. This cannot be done by looking only at the recorded evidence.

4. Procedural law as an adjunct to the substantive law

(a) These aspects of the law go hand in hand. Indeed, the procedural aspect is the hand maid of the substantive law elements, the conduit through which

the substantive rights of a person could be granted or denied as the case may be.

- (b) In the instant case, the Appellant's lament based as it were on his said three grounds of appeal (as afore-counted), indeed procedural, which I am inclined to agree with.

#### Final assessment and determination

[10] The aspects I took into consideration in my final assessment:-

- (a) This matter has been hanging fire from the year 2008.

#### The Principles impacting thereon

##### 0.1 Justice delayed is justice denied

01.1 We are now in the year 2022.

01.2 Thus, I am not inclined to order a "*trial de novo*" as urged by the Appellant.

01.3 However, I am inclined to adopt the Judicial thinking in the High Court decision of this jurisdiction in **ANZ Banking Group Ltd –v- Vikash** [2010] HBC (18 January 2020) wherein it was said:

*"...exercising this Court's discretion as a matter of jurisdiction and as a matter of case management, I think, in interests of justice and fairness to both parties and in the interests of the Court's limited resources being available to others, this matter should not be heard de novo. However, I will allow the parties Counsels to make oral submissions and I will set a date convenient to both of them and the Court, subject to what follows..."*

01.4 Although the said decision is one handed down by the High Court of Fiji, though not binding on this Court, carries persuasive value (see:

**Rupert Cross on “Precedent in English Law”** (Clarendon Law Series 4<sup>th</sup> edition).

- 01.5 I feel no constraint in saying that I adopt in principle the approach in the said High Court case, which I now lay down as the judicial jurisprudence of the Court of Appeal.
- 01.6 Having opined thus, given the grounds of appeal urged by the Appellant (vide: ground 4 and thereafter), I have given my mind to set a time frame to see a finish to this litigation.
- 01.7 I felt further fortified in adopting that approach on reading a recent decision reported as **Neutral Citation Number** [2021] EWCA Civ.680 which was made available to me by my Brother Justice (Dr.) Gunawansa.
- 01.8 In that case, the Court ordered a re-trial having expressed concerns regarding the delay in delivering a judgment by the lower court. (vide: **Nat West Markets PLC –v- Bitu (UK) Ltd and Others** (supra) para.010.4 cited above).

**Appellant’s position and the Respondent’s counter thereto**

- 01.9 Very briefly Mr Narayan’s submission (for the Appellant) on the preliminary grounds of appeal was that, the Judge’s observation/statement in the judgment (at paragraph 1 the judgment of Justice Amaratunga) was not correct when the Judge said that, “*the matter was taken up for trial before Justice Kotigalage and was concluded before him and parties agreed to adopt the proceedings and also relied on the written submissions filed before the said Judge.*”

01.10 I must say at this point that, having perused the Judge's notes, I could not see any agreement by the parties to adopt the proceedings (and) rely on the "*written submissions filed before the said judge.*"

01.11 Accordingly, I felt inclined to agree with Appellant's Counsel's submission that, the said statement/observation of the learned High Court Judge does not bear scrutiny.

What then should be the resulting position?

2. In my considered view, the trial has taken so many years. Neither party could be held responsible for that.

2.01 If so, should the Respondent be asked to go through a "*trial de novo*?"

2.02 I cannot subscribe to the Appellant's argument in that regard.

2.03 But that is one side of the coin, what about the flip side of it? That is the misdirection on the part of the High Court Judge referred to at paragraph 1.9 above.

2.04 **Thus, the need for striking a via media**

2.05 While I am not inclined to order a trial de novo (agreeing with Ms Devan's submissions), I do agree with Mr Narayan's qualified submission (as I understood) that at least his client be afforded an opportunity to make "*some submissions*" on the material on record, with a right of reply to the Respondent.

2.06 Consequently, having given my mind to the submissions of Counsel in the background of the material on Record I proceed to propose the following orders.

[11] Proposed Orders:

- (a) Trial “*De Novo*” is not ordered.
- (b) However, the Chief Registrar (in consultation with the (Hon. Chief Justice) is directed to assign another High Court Judge to consider and give a judgment within three months thereof on oral submissions (perhaps with additional written submissions) on the basis of the grounds alleged by the Appellant in his grounds of appeal.
- (c) For the reason stated in paragraph 2 above, I do not propose any order for costs.

**Lecamwasam, JA**

[12] I agree with the reasons and orders given and the conclusions arrived at by Almeida Guneratne, JA.

**Gunawansa, JA**

[13] I agree with the findings and the orders proposed by his Lordship Guneratne JA.



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

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

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**Hon. Justice A. Gunawansa**  
**JUSTICE OF APPEAL**