

**IN THE COURT OF APPEAL, FIJI**  
**[On Appeal from the High Court]**

**CIVIL APPEAL NO. ABU 0078 of 2014**  
**[In the High Court Civil Action No. 40 of 2010]**

**BETWEEN** : **SAIFUD DIN** of Tuatua, Labasa, Businessman trading as  
**BABASIGA FUEL DISTRIBUTOR.**  
*Appellant/2<sup>nd</sup> Defendant*

**AND** : **ABDUL IRSHARD KHAN** of Korowiri, Labasa, Unemployed  
*1<sup>st</sup> Respondent/Plaintiff*

**AND** : **ANJESH VIKASH PRASAD** of Basikalave, Dreketi, Driver.  
*2<sup>nd</sup> Respondent/1<sup>st</sup> Defendant*

**AND** : **ATTORNEY GENERAL OF FIJI** of Suvavou House, Victoria  
Prasad, Suva.  
*3<sup>rd</sup> Respondent/1<sup>st</sup> Named Third Party*

**AND** : **DR. JAOJI VULIVECI** of Labasa Hospital.  
*4<sup>th</sup> Respondent/2<sup>nd</sup> Named Third Party*

**Coram** : **Prematilaka, RJA**

**Counsel** : **Mr. V. Kumar for the Appellant**  
**Mr. S. Prasad and Mr. M. Hussain for the 01<sup>st</sup> Respondent**  
**02<sup>nd</sup> Respondent absent and unrepresented.**  
**No appearance for 03<sup>rd</sup> and 04<sup>th</sup> Respondents.**

**Date of Hearing** : **03 February 2025**

**Date of Ruling** : **06 February 2025**

**RULING**

- [1] The appellant appealed the judgment of the High Court at Suva dated 11 November 2014 involving a case of personal injuries caused to the 1<sup>st</sup> respondent (original plaintiff) whilst travelling in a vehicle owned by the appellant (original 2<sup>nd</sup> defendant) alleged to have been driven negligently by the 2<sup>nd</sup> respondent (original 1<sup>st</sup> defendant) who was in the employment of the appellant. In appeal, the judgment of the High Court in so far as the 01<sup>st</sup> respondent was concerned, was partly allowed to the extent that, the award of \$54,600 for future loss of earnings was reduced to \$43,680 and consequently the judgment entered in favour of the 1<sup>st</sup> respondent by the High Court in the sum of \$164,028.70 was altered to a sum of \$153,108.70. In addition to the costs of \$3,000.00 awarded to the 1<sup>st</sup> respondent in the High Court, the appellant was ordered to pay \$1,500.00 as costs of the appeal to the 01<sup>st</sup> respondent<sup>1</sup>. The appellant appealed to the Supreme Court which on 31 August 2018<sup>2</sup> refused leave to appeal and dismissed the application for leave to appeal, affirmed the Court of Appeal judgment and directed the appellant to pay \$2500.00 to the 1<sup>st</sup> respondent in addition the cost ordered by the High Court and the Court of Appeal.
- [2] Upon the receipt of a cheque for a sum of \$155,608.70 on 21 September 2018, the 1<sup>st</sup> respondent's solicitors had written to the appellant's solicitors that the said amount was received as a part payment of the judgment sum in actions in all courts.
- [3] Thereafter, the 1<sup>st</sup> Respondent (successful plaintiff in all three Courts) filed a summons on 19 January 2023 in this court seeking an order for payment of interest on the damages due to him. The summons sought the following orders:

*“**THAT** the Appellant/2<sup>nd</sup> Defendant be ordered to pay interest on General Damages and Costs from the date of Judgment of the High Court of Fiji (HC) to realization as per the Judgment of the Fiji Court of Appeal dated the 30<sup>th</sup> day of November, 2017.*

***THAT** the Appellant/2<sup>nd</sup> Defendant be ordered to pay the sum of \$53,316.42 (Fifty – Three Thousand Three Hundred and Sixteen Dollars and Forty – Two Cents) which sum was short paid as interest payable on General Damages and Costs as per the Judgment.*

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<sup>1</sup> **Din v Khan** [2017] FJCA 148; ABU78.2014 (30 November 2017)

<sup>2</sup> **Din v Khan** [2018] FJSC 21; CAV0014.2017 (31 August 2018)

***THAT*** the Appellant/2<sup>nd</sup> Defendant does pay the cost of this application as ordered by the Honourable Court.

***THAT*** any other relief this Honourable Court deems just and expedient.

The 1<sup>st</sup> Respondent/Plaintiff intends to read and rely upon the grounds contained in the Affidavit in Support of **ABDUL IRSHAD KHAN** of Korowiri, Labasa, Unemployed sworn and filed herein.

This application is made pursuant to **Section 17 and 20 of the Court of Appeal Act[1949].**”

[4] Consequently, Dr. Almeida Guneratne, P had in the Ruling<sup>3</sup> on 18 August 2023 had made the following orders:

‘Orders:

- 1) Orders sought in terms of the 1<sup>st</sup> Respondent’s (present applicant’s) re-filed summons filed on 16<sup>th</sup> March, 2023 (dated 28<sup>th</sup> April, 2023) are allowed.
- 2) The Registrar is directed to send notice to the appellant of this decision both to his solicitors that appear on Record and to his personal address.’

[5] Thereafter, the Registry had managed to serve the Ruling on the appellant on 10 May 2024 in Labasa.

[6] The Ruling had set out the chronology of events that took place preceding the hearing of the 1<sup>st</sup> respondent’s application as follows:

“[4] The matter of the said summons having come-up before me on the 30<sup>th</sup> January, 2023, the Court, finding that notice had not been served on the appellant, directed summons to be served on the appellant’s personal address.

[5] Consequently, upon a fresh summons being filed on 16<sup>th</sup> March, 2023 in compliance with the order of Court made on the 30<sup>th</sup> January, (as per the relevant Affidavits of Service filed of Record), the appellant being absent and unrepresented, on 1<sup>st</sup> August, 2023 when the matter was taken for hearing, the 1<sup>st</sup> Respondent moved that the Court make an order on the said re-filed summons filed on the 16<sup>th</sup> March, 2023.”

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<sup>3</sup> **Din v Khan** [2023] FJCA 182; ABU0078.2014 (18 August 2023)

[7] On a perusal of the relevant directives, I find that on 30 January 2023, Dr. Almeida Guneratne, P, finding that the appellant was and unrepresented, had directed the 1<sup>st</sup> respondent to serve notice on the appellant. However, on 28 April 2023 when the appellant was still absent and unrepresented, the CA Registrar had been directed to serve notice on the appellant at his formal address. The appellant had been absent and unrepresented on 09 June 2023, 01 August 2023 and 18 August 2023. On 01 August 2023, the counsel for the 1<sup>st</sup> respondent had moved that a decision/ruling be given in the matter and accordingly, Dr. Almeida Guneratne, P had delivered the Ruling on 18 August 2023.

[8] After being served with the Ruling, the appellant through his solicitors had filed an Ex-Parte Summons and Affidavit on 04 June 2024, purportedly under section 17 and 20 of the Fiji Court of Appeal Rules 1949 and incorporating Order 32 Rule 5 and Order 32 Rule 6 of the High Court Rules 1988 and section 4 of the Limitation Act 1971 seeking the following orders:

1. *“That the decision delivered by Honourable Justice Almeida Guneratne Ex-Parte on the 18<sup>th</sup> day of August, 2023 in the Court of Appeal be wholly and unconditionally be set aside on the grounds that:-*
  - a. *The appellant was never served nor was being aware of any proceedings instituted by the 1<sup>st</sup> respondent for recovery of interest in Civil Action No. 40 of 2010 when they had accepted the judgment sum and costs High Court as full and final settlement.*
  - b. *That recovery of interest is after 6 years and therefore is statute barred if judgment for interest is not renewed. There is an error also in calculation of interest.*
  - c. *The appellant was not served with any Summons for recovery of any interest on damages awarded in Civil Action No. 40 of 2010 therefore rules of Natural Justice was denied.*
  - d. *The Decision delivered by the President of the Fiji Court of Appeal Honourable Justice Almeida Guneratne was made Ex-Parte, without hearing the appellant.*
2. *The decision delivered by the Honourable Justice C. Kotigalage was in the High Court and the Summons (for Payment of Interest over Damages) was*

*filed in the Court of Appeal therefore this application is wrong for want of jurisdiction.*

3. *That the appellant be allowed to file his affidavit in opposition to the Summons filed by the 1<sup>st</sup> respondent on the 16<sup>th</sup> day of March, 2023.*
4. *That the 1<sup>st</sup> respondent pay costs of this application.*
5. *Any other Orders this Court deems just and expedient.”*

### ***Summons not served on the appellant***

[9] It is very clear that no notice/1<sup>st</sup> respondent’s summons seeking an order for payment of interest on damages (ordered by HC as varied by the CA and affirmed by the SC) had been served on the appellant personally even after his solicitors had informed the 1<sup>st</sup> respondent’s solicitors that they as of that time no longer represented the appellant or had no instructions from him. As a result he had not been heard either before the impugned Ruling was made on 18 August 2023. At the same time, it is equally clear that the appellant had not fully satisfied the interest payment on the judgment sum along with costs ordered by the three courts respectively. The 1<sup>st</sup> respondent undoubtedly had a right to recover the same from the appellant.

[10] Nevertheless, in my view, I sitting as a single judge does not have the power to set aside the impugned orders made on 18 August 2023 by Dr. Almeida Guneratne, P as a single judge. In my view, it could only be done by the Supreme Court or Court of Appeal namely the Full Court. Nevertheless, in view of section 13 of the Court of Appeal Act, the Court of Appeal, in my view, may set aside the impugned Ruling and consider the 1<sup>st</sup> respondent’s summons for payment of interest on the damages. However, before the matter reaches the Full Court, the appellant is entitled to file an affidavit in opposition and the 1<sup>st</sup> respondent is entitled to file an affidavit in reply. Both parties will be allowed to file written submissions for the Full Court hearing.

### ***Are execution powers not vested in the Court of Appeal?***

[11] The appellant’s counsel argued that in any event powers of execution is not with the CA but with the High Court. The counsel for the 1<sup>st</sup> respondent contended that section

20(1)(k) empowers a single judge to make any orders incidental to an appeal. However, the phrase "that is incidental to an appeal or intended appeal" should be interpreted narrowly so that the court could only deal with matters ancillary to an appeal which was afoot<sup>4</sup>. He therefore submitted that the recovery of interest on the judgment sum and costs is incidental to the appeal. However, section 13 of the Court of Appeal while vesting power of execution and enforcement of a judgment with the Court of Appeal as those of the High Court, that jurisdiction is with the Full Court and not with a single judge. In my view, it is still open to the Court of Appeal to refer any matter of execution or enforcement of a judgment to the High Court according to High Court Orders and Rules, for it is the High Court judgment that specifies the interest on the judgment sum subject to the variation by the Court of Appeal. All costs in the three courts also could be dealt with by the High Court in the same proceedings. Yet, this is a matter that may be clarified by the Full Court as Dr. Almeida Guneratne, P had taken the view that a single judge has jurisdiction to make the orders sought by the 1<sup>st</sup> respondent in his summons in pursuance of section 20(1)(k) of the Court of Appeal Act as the matter being "*incidental*" to the appeal or even "ancillary" thereto without, however, considering the effect of section 13 on that position.

***Is the claim of the 1<sup>st</sup> respondent time barred?***

[12] The appellant's counsel relying on section 4(4) of the Limitation Act contended that no arrears of interest in respect of any judgment shall be recovered after the expiration of 06 years from the date on which the interest became due and therefore the 1<sup>st</sup> respondent's claim is statute barred. The question is when the interest became due. If it became finally due after the CA judgment on 30 November 2017 or SC judgment on 31 August 2018, then the appellant's present summons for the recovery of interest on the judgment sum is not time barred as his summons had been filed on 19 January 2023. If it is calculated from the date of the HC judgment on 11 November 2014 it is time barred. This too is a matter for the Full Court to deliberate and decide.

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<sup>4</sup> See **Silimaibau v Minister for Sugar Industry** [2004] FJHC 530; HBC155.2001L (5 March 2004)


[13] In my view, all three matters above highlighted are also important questions of law that need to be dealt with by the Court of Appeal.

[14] Acting under section 20(1) (k) of the Court of Appeal, I direct that the appellant should steps as per Court of Appeal Act and Rules and Practice Directions to prepare appeal records for this matter to be heard by the Full Court and make other following incidental orders.

**Orders of the Court:**

- (1) *Appellant is allowed and hereby directed to take all steps as per Court of Appeal Act and Rules and Practice Directions to prepare appeal records for this matter to be heard by the Full Court after the following directives are carried out by both parties.*
- (2) *Appellant to file and serve his affidavit in opposition along with proof of payment of cost in order (5) to the 1<sup>st</sup> respondent's summons and affidavit filed on 19 January 2023, on all respondents within 21 days from the date of Ruling.*
- (3) *Thereafter, the 1<sup>st</sup> respondent to file and serve his affidavit in reply on the appellant and other respondents within 21 days.*
- (4) *All parties to file their respective submissions within 21 days thereafter.*
- (5) *Orders (1) and (2) are conditional upon the appellant paying \$2500.00 as costs to the 1<sup>st</sup> respondent within 21 days from the Ruling and if the appellant defaults in the said payment his Ex-Parte Summons and Affidavit on 04 June 2024 will ipso facto be dismissed without further notice.*



  
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**Hon. Mr Justice C. Prematilaka**  
**RESIDENT JUSTICE OF APPEAL**

**Solicitors:**

Sunil Kumar Esquire for the Appellant  
Sarju Prasad Esquire for the 1<sup>st</sup> Respondent  
02<sup>nd</sup> Respondent absent and unrepresented.  
No appearance for 03<sup>rd</sup> and 04<sup>th</sup> Respondents