IN THE HIGH COURT OF FIJI
IN THE WESTERN DIVISION
AT LAUTOKA

CIVIL APPELLATE JURISDICTION

Civil Appeal No. HBM 46 of 2019

BETWEEN : **RANG NATHAN & BIMLA WATI** both of Koronubu, Ba,

APPELLANTS

A N D : **SHIV KUMAR** of Lot 20, Nawanawa Road, Suva,

RESPONDENT

Appearances : **(Ms) Anishini Chand for the appellants.**
Mr Tirath Sharma for the respondent.

Hearing : **Wednesday, 08th July, 2020.**

Decision : **Friday, 24th July, 2020.**

D E C I S I O N

[A] INTRODUCTION

(01) This is an application filed by the appellants- original defendants (hereinafter referred to as the "appellants") seeking the following reliefs;

(a) That the appellants be granted further time to file and serve notice of intention to appeal the Ruling of the learned Magistrate RM Mr. Samuela Qica pronounced on the 23rd day of September, 2019 in Ba Magistrates Court, Civil Action No. 78 of 2016.

(b) That execution of the said Judgment is to be stayed pending the determination of Appeal.

(c) Any other order the Court deems just and equitable.

(02) The application is made by summons dated 19th November, 2019 and is supported by an affidavit sworn on 18th October, 2019 by the first named appellant.

(03) The application was vigorously opposed. An answering affidavit sworn on 05th March, 2020 by the respondent-original plaintiff (hereinafter referred to as the respondent) was filed.

(04) The respondent opposes the application on the following grounds; (reference is made to paragraph (02) to (06) of the answering affidavit).

(2) That the affidavit in support of summons for leave to appeal and to enlarge time for filing notice of intention to appeal (hereinafter referred to as 'Applicant's affidavit') is raising issues in respect to the substantive matter which has already been tried in the Magistrates Court.

(3) That rather than raising genuine grounds of appeal, the appellants are bringing to this honorable court irrelevant issues that have no merits for appeal.

(4) That moreover the appellants did not even give sworn evidence in court when the opportunity was given to them during the hearing that was conducted in the Ba Magistrates Court before Magistrate Qica.

(5) That I emphasize that the Grounds of Appeal annexed with the application before this court have no merits.

(6) That so much time has already passed and I am still at the losing side despite having the decision in my favour after a duly and properly conducted hearing.

[B] BACKGROUND

(01) This is a two-fold application, first for extension of time to file notice of intention to appeal and secondly for stay of execution of the judgment of the Magistrate until the determination of the appeal.

(02) This application is in relation to the judgment of the Magistrate's Court at Ba, delivered by the Resident Magistrate on the 12th September, 2019.

(03) What are the background facts to the judgment of the Magistrate's Court? I therefore turn to the facts of the Magistrate's Court case. I take them gratefully from the clear and succinct statement to be found in the paragraphs (01) to (06) of the judgment in the Magistrate's Court.

(1) This is an application by the plaintiff issued on 28/11/16 against the defendant for breach of sale and purchase agreement endorsed by the parties on 18th September, 2019.

(2) *The plaintiff alleges that the defendant defaulted in carrying out his part of the agreement and thus frustrated the contract. The plaintiff claims for damages and loss as per his statement of claim.*

(3) *The defendant also filed a statement of defence on 8/3/17 and didn't deny that there was a sale and purchase agreement after a prior agreement between the parties didn't work out.*

(4) *Defendant claims that it was the plaintiff who delayed the agreement and therefore defaulted. According to the defendant, it was agreed that if the lodgment and settlement was not finalized within the scheduled period [3 months or 90 days] than the $10,000.00 deposited by the plaintiff would be forfeited.*

(5) *The defendant alleges that it was the plaintiff who delayed the settlement and breached the contract.*

(6) *The plaintiff denies the defendant's claim and blames the defendant for delaying the process and breaching the contract.*

(04) The court below decided the case in favor of the respondent [the original plaintiff] and the judgment was delivered on 12th September, 2019. The learned Magistrate ordered that; (reference is made to paragraph (23) of the judgment)

> (23) *"I therefore order that the defendants refund to the plaintiff the sum of $10,000.00 and summarily assessed costs of $1,000.00 to be paid within twenty one (21) days."*

(05) The appellants challenge the decision of the Resident Magistrate.

(06) The grounds of appeal on which the appellants rely on are set out in annexure RN-6 referred to in the affidavit of the first-named appellant sworn on 18th October, 2019.

They are: -

(1) *The learned Magistrate erred in law/fact and/or misdirected himself in law/fact in finding that the Respondent had proven his claim on a balance of probabilities.*

(2) *That the learned Magistrate erred/misdirected himself in law and fact in finding that the Sale and Purchase Agreement dated 18th September, 2015 was unenforceable and subsequently null and void.*

(3) *The learned Magistrate erred in law/fact in finding that it was the Appellants who had frustrated the contract.*

(4) *The learned Magistrate erred in law/fact in not estopping the Respondent from going back on his promise to pay the penalty.*

[C] JURISDICION

(1) **Statutory provision for time to file Notice of Intention to Appeal**

It is **Order 37, Rule 1** of the Magistrates' Courts Rules which sets out the time within which **Notice of Intention to Appeal shall be given**. The Order reads as follows:

> *1. Every appellant shall within seven days after the day on which the decision appealed against was given, give to the respondent and to the court by which such decision was given (hereinafter in this Order called "the court below") notice in writing of his intention to appeal:*
>
> *Provided that such notice may be given verbally to the court in the presence of the opposite party immediately after judgment is pronounced.*

This is a **mandatory rule** and it does not give the Magistrate power to extend time.

Had the legislature intended it could have specifically provided for application to extend time. It did not do so in **Order 37, R.1 but Order 37 R.4** which provides as follows, gave the Magistrates' Court power to extend time to file **grounds of appeal.**

> *4. On the appellant failing to file the grounds of appeal within the prescribed time, he shall be deemed to have abandoned the appeal, unless the court below or the appellate court shall see fit to extend the time.*

(2) **Order III, rule 8 of the Magistrates' Courts Rules provides;**

> *8. In the event of there being no provision in these Rules to meet the circumstances arising in any particular cause, matter, case or event, the court and/or the clerk of the court and/or the parties shall be guided by any relevant provision contained in the Supreme Court Rules.*

(3) Therefore, I turn to the High Court Rules, 1988. **Order 59, rule 10 provides;**

> *(1) An application to enlarge the time period for filing and serving a notice of appeal or cross appeal may be made to the Master before the expiration of that period and to a single judge after the expiration of that period.*
> *(2) An application under paragraph (1) shall be made by way of inter-parte summons supported by an affidavit.*

(4) Putting the matter shortly at this stage, the Court can derive support for the jurisdiction to permit relaxation of the rules by virtue of the general provision contained in Order 3, rule 4 of the High Court Rules, 1988.

Only two authorities need be cited on this legal point. They are;

* **Costerfield Ltd v Denarau International Ltd & Others**[1]

* **Veilave v Naicker**[2]

For the sake of completeness, Order 3, rule 4 is reproduced below in full.

Order 3, rule 4 of the High Court Rules, 1988 provides:

Extension, etc., of time *(O.3, r.4)*

4.(1). The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules, or by any judgment, order or direction, to do any act in any proceedings.

(2). The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

(3). The period within which a person is required by these Rules, or by any order or direction to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose.

Provided that wherever the period for filing any pleading or other document required to be filed by these rules or by the Court is extended whether by order of the Court or by consent a late filing fee in respect of each extension shall be paid in the amount set out in appendix II by the Party filing the pleading or other document unless for good cause the Court orders that some or all of the same be waived.

I will pause here to consider the principles underlying the exercise of the courts discretion when an extension of time is sought under Order 3, rule 4 (Order 3, rule 5 in U.K).

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[1] **Civil Action No.: 214 of 2012 (07-02-2018)**
[2] **(2017) FJHC 131, HBC 159.2013**

The following passage of "Bingham" M.R in **"Costellow v Somerset"**[3] is illuminating;

> *'We are told that there is some uncertainty among practitioners and judges as to the appropriate practice in situations such as this. It is plainly desirable that we should give such guidance as we can. As so often happens, this problem arises at the intersection of two principles, each in itself salutary.* ***The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed****. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. This principle is reflected in a series of rules giving the court a discretion to dismiss on failure to comply with a time limit: Ord 19, r 1, Ord 24, r 16(1), Ord 25, r 1(4) and (5), Ord 28, r 10(1) and Ord 34, r 2(2) are examples. This principle is also reflected in the court's inherent jurisdiction to dismiss for want of prosecution. The* ***second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate.*** *This principle is reflected in the general discretion to extend time conferred by Ord 3, r 5, a discretion to be exercised in accordance with the requirements of justice in the particular case. It is a principle also reflected in the liberal approach generally adopted in relation to the amendment of pleadings.* ***Neither of these principles is absolute.*** *If the first principle were rigidly enforced, procedural default would lead to dismissal of actions without any consideration of whether the plaintiff's default had caused prejudice to the defendant. But the court's practice has been to treat the existence of such prejudice as a crucial, and often a decisive, matter. If the second principle were followed without exception, a well-to-do plaintiff willing and able to meet orders for costs made against him could flout the rules with impunity, confident that he would suffer no penalty unless or until the defendant could demonstrate prejudice. This would circumscribe the very general discretion conferred by Ord 3, r 5, and would indeed involve a substantial rewriting of the rule.* ***The resolution of problems such as the present cannot in my view be governed by a single universally applicable rule of thumb.*** *A rigid, mechanistic approach is inappropriate. Where, as here, the defendant seeks to dismiss and the plaintiff seeks an extension of time, there can be no general rule that the plaintiff's application should be heard first, with dismissal of his action as an inevitable consequence if he fails to show a good reason for his procedural default. In the great mass of cases, it is appropriate for the court to hear both summonses together, since, in considering what justice requires, the court is concerned to do justice to both parties, the plaintiff as well as the defendant, and the case is best viewed in the round. In the present case, there was before the district judge no application by the plaintiff for extension, although there was before the judge. It is in my view of little or no significance whether the plaintiff makes such an application or not: if he does not, the court considering the defendant's application to dismiss will inevitably consider the plaintiff's position and, if the court refuses to dismiss, it has power to grant the plaintiff any necessary extension whether separate application is made or not. Cases involving procedural abuse (such as Hytrac Conveyors Ltd v Conveyors International Ltd [1982] 3 All ER 415, [1983] 1 WLR 44 or questionable tactics (such as Revici v Prentice Hall Inc [1969] 1 All ER 772, [1969] 1 WLR 157) may call for special treatment. So, of course, will cases of contumelious and intentional default and cases where a default is repeated or persisted in after a peremptory order. But in the ordinary way, and in the absence of special circumstances, a court will not exercise its inherent jurisdiction to dismiss a plaintiff's action for want of prosecution unless the delay complained of after the issue of proceedings has caused at least a real risk of prejudice to the defendant. A similar approach should govern applications made under Ords 19, 24, 25, 28 and 34. The approach to applications under Ord 3, r 5 should not in most cases be very different. Save in special cases or exceptional circumstances, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he***

[3] **(1993) (1) ALL.E.R. 952 at 960**

cannot be compensated by an award of costs. In short, an application under Ord 3, r 5 should ordinarily be granted where the overall justice of the case requires that the action be allowed to proceed.'

(Emphasis added)

In "**Mortgage Corp Ltd v Sandres** [4], the Court laid down the general guideline as follows;

> *'The court was acutely aware of the growing jurisprudence in relation to the failure to observe procedural requirements. There was a need for clarification as to the likely approach of the court in the future to non-compliance with the requirements as to time contained in the rules or directions of the court. What his Lordship said now went beyond the exchange of witness statements or expert reports; it was intended to be of general import. Lord Woolf, Master of the Rolls and Sir Richard Scott, Vice-Chancellor, had approved the following guidance as to the future approach which litigants could expect the court to adopt to the failure to adhere to time limits contained in the rules or directions of the court: 1 Time requirements laid down by the rules and directions given by the court were not merely targets to be attempted; they were rules to be observed. 2 At the same time the overriding principle was that justice must be done. 3 Litigants were entitled to have their cases resolved with reasonable expedition. The non-compliance with time limits could cause prejudice to one or more of the parties to the litigation. 4 In addition the vacation or adjournment of the date of trial prejudiced other litigants and disrupted the administration of justice. 5 Extensions of time which involved the vacation or adjournment of trial dates should therefore be granted only as a last resort. 6 Where time limits had not been complied with the parties should co-operate in reaching an agreement as to new time limits which would not involve the date of trial being postponed. 7 If they reached such an agreement they could ordinarily expect the court to give effect to that agreement at the trial and it was not necessary to make a separate application solely for that purpose. 8 The court would not look with favour on a party who sought only to take tactical advantage from the failure of another party to comply with time limits. 9 In the absence of an agreement as to a new timetable, an application should be made promptly to the court for directions. 10 In considering whether to grant an extension of time to a party who was in default, the court would look at all the circumstances of the case including the considerations identified above.'*

As I understand the authorities, the grant of an extension of time under this rule is not automatic. The object of the rule is to (as I understand the rule), ensure that those rules which fix times for doing acts do not become instruments of injustice. The discretion to extend time is given for the sole purpose of enabling the Court to do justice between the parties.

(D) PRINCIPLES TO BE APPLIED

(01) Against that background, it is necessary to turn to the judicial thinking in relation to the principles governing the exercise of the discretion to make the order the appellants now seek. As noted, this is an application to extend the time to file Notice of Intention to Appeal. Whether or not to extend the time is essentially discretionary. The discretion of the Court, as I conceive it, a perfectly free one, the only question is whether, upon the facts of the present case, whether the discretion should be exercised. The Court has to

[4] **(1996) TLR 751**

consider whether it is in the interest of justice, having regard to the whole history of the case, to extend the time. (**Avery v No.2 PSA Board**[5])

(02) Commenting on the discretion, Lord Donaldson of Lymington in **"Norwich and Peterborough Society v Steed"**[6] said;

> *"Once the time for appealing has elapsed, the Respondent who was successful in the court below is entitled to regard the Judgment in his favour as being final. If he is to be deprived of this entitlement, it can only be on the basis of a discretionary balancing exercise, however blameless may be the delay on the part of the would - be appellant. The classic statement of the elements of this equation is to be found in the judgment of Griffiths L J in C M Van Stillevoldt BV V EL Carriers Inc (1983)(1)ALL.E.R 699, (1983) (I) W.L.R 207, which are set out in the Supreme Court Practice 1991 VOL 1, para 59/4/4 and are, as Mc-Cowan LJ set them out, namely;*
>
> - *The length of the delay*
> - *The reasons for the delay*
> - *The chances of the appeal succeeding if an extension of time is granted*
> - *The degree of prejudice to the Respondent if the application is granted."*

(03) The principles upon which an enlargement of time may be granted are well settled and well known. They were considered by the Supreme Court in **NLTB** (now **iTLTB) –v- Ahmed Khan and Another**[7]. In summary, the Court considers (a) the length of the delay, (b) the reasons for the delay, (c) whether there is a ground of merit justifying the appellate court's consideration or, where there has been substantial delay, nonetheless is there a ground that will probably succeed and (d) if time is enlarged will the respondent be unfairly prejudiced? Apart from being exercised in a principled manner the discretion also should be exercised in a manner that re-enforces the importance of compliance with the rules of Court and the need to bring finality to litigation (See; **McCaig –v- Abhi Manu,**[8]).

See * **Herbert Construction Company (Fiji) Ltd v Fiji National Provident Fund** [9]

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[5] **(1973) NZLR 86, 91 (CA)**
[6] **(1991) 2 All. E.R 880**
[7] **CBV 2 of 2013; 15 March 2013**
[8] **CBV 2 of 2012; 24 April 2013**
[9] **[2010] FJCA 3**

* **Kumar v Commissioner of Police**[10]

* **Nair v Prakash**[11]

* **Tora v Housing Authority**[12]

* **A.G. v Sharma**[13]

[E] ANALYSIS

(01) Dealing first with the length of the delay:

(a) The Learned Magistrate delivered the Judgment on 12th September, 2019. In terms of Order 37, rule 1, the time for giving Notice of Intention to appeal began to run from 12th September, 2019.

(b) It is **Order 37, Rule 1** of the Magistrates' Courts Rules which sets out the time within which **Notice of Intention to Appeal shall be given**. The Order reads as follows:

> *1. Every appellant shall within seven days after the day on which the decision appealed against was given, give to the respondent and to the court by which such decision was given (hereinafter in this Order called "the court below") notice in writing of his intention to appeal:*
>
> *Provided that such notice may be given verbally to the court in the presence of the opposite party immediately after judgment is pronounced.*

This is a **mandatory rule** and it does not give the Magistrate power to extend time.

Had the legislature intended it could have specifically provided for application to extend time? It did not do so in **Order 37, R.1 but Order 37 R.4** gave the Magistrates' Court power to extend time to file **grounds of appeal.**

(c) The time limit to file notice of intention to appeal expired on 19th September, 2019.

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[10] **Fiji Court of Appeal Civil Appeal No: ABU 0059 of 2014**
[11] **(2013) FJCA 147**
[12] **(2002) FJCA 16**
[13] **(ABU 0041 935) FJCA**

(d) The appellants' application for extension of time to file notice of intention to appeal sprung on the respondents on 19th November, 2019.

(e) Turning to the period of delay, it is at least two months, which is on any view of it is substantial. These delays, cause great hardships, amounting to very real injustice to the respondents. Under the system that exists at the moment, how in the world could the respondent know whether there is any possibility of an appeal?

(02) **Prejudice**

The respondent through his solicitors wrote a letter to the appellants' previous solicitors on 31st October, 2019 advising the appellants to make the payment of the sum as per the judgment which was delivered. The letter also served as a notice for 14 days given to the appellants to pay the relevant sum.

However, the appellants' previous solicitors through an email informed the respondent's solicitors on the 6th of November, 2019 that they are no longer representing the appellants. This has caused substantial prejudice to the respondent as his actions to recover his money from the appellants have proven futile, and the respondent has been further prejudiced by this application by the appellants.

As per affidavit in response of Shiv Kumar dated 5th March, 2020 the respondent in a good faith and in a fair manner had in fact proposed to consent to the application for enlargement of time for filing notice of intention to appeal under paragraph 7 of the affidavit, provided that the appellants pay into Court's Trust Account the sum of $11,000.00. However, the appellant refused to pay the sum into Court's Trust Account.

This does not leave a good impression.

(03) Turning to the second issue, that is the reason for the failure to file within time, the reasons for it are **not** put forward in the affidavit of the first named Appellant sworn on 18-10-2019. He simply says in his affidavit;

- *That on the 23rd of September 2019, I instructed Messrs Anishini Chand Lawyers of Lautoka to lodge my appeal, as I had to discharge my previous Solicitors Messrs. Reddy & Nandan Lawyers and take my documents and filed to my current Solicitors.*

- *That I have been advised by my Solicitors and verily believe that the prescribed time period for filing and serving Notice of Intention to Appeal has elapsed, however this Court has jurisdiction to extend the period for filing Notice of Intention to Appeal.*

- *I have been advised and verily believe that if I am refused Leave to appeal the Resident Magistrate's decision, it would cause me*

*substantial injustice, as I have meritorious grounds of Appeal. Annexed hereto and marked **'RN 6"** are my proposed grounds of Appeal.*

When did the appellants discharge the previous Solicitors? Why did the appellants fail to file Notice of Intention to Appeal? I have found nothing in the affidavit.

(04) The important point which concerns me is that there is **no** explanation at all in the affidavit as to why there has been the delay which necessitated this application? In such circumstance, the balancing exercise would come down on the side of refusing an extension of time. The delay in this case is not in filing a pleading in the Magistrates' Court. Put another way, the extension of time is not sought for a delivery of pleading. The relief sought is an extension of time to file 'notice of intention to appeal'. Therefore, the appellate court takes a stricter attitude because the litigant has had a trial and lost. The court promotes finality in litigation.

(05) Nevertheless, I am bound to consider the grounds of appeal urged on behalf of the appellants on account of the following decisions;

(*) **Vimal Construction and Joinery Ltd v Vinod Patel and Company Ltd**[14]

(*) **Maciu Tamani Palu aka Maciu Tamanibola Palu v Australia and New Zealand Bank,**[15]**.**

Why did the appellants fail to file Notice of Intention to Appeal? I have found nothing in the affidavit. There is no explanation at all in the affidavit as to why there has been the delay which necessitated this application?

In such a situation the appellants will carry a heavy burden to satisfy the Court that extension ought to be granted in the interest of justice.

Where the delay is slight, it is generally unnecessary to go into merits because the merits play little part but when the delay is longer, much more merit is required to overcome it. See; **Norwich and Peterborough Building Society v Steed**[16]**.**

(06) This does not involve a detailed consideration of the intended grounds of appeal nor does it amount to an attempt at this stage to determine the appeal. However, it is necessary to assess the merits of the intended grounds of appeal in order to determine whether there is sufficient basis to excuse the substantial delay and to allow the appeal to proceed to the High Court.

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[14] **(2008) FJCA 98**
[15] **Misc, 19 of 2011, 05th February, 2013**
[16] **(1991) 2 All E.R. 880.**

(07) I have stated that this matter has its origin in a judgment of the Magistrate's Court at Ba, delivered on the 12th September, 2019.

(08) The Learned Magistrate observed that;

(*) *This case stems from a sale & purchase agreement for the plaintiff to purchase the defendant's property at the cost of $60,000.00.*

(*) *The said sale & purchase agreement couldn't be carried out to completion because the penalty fee required to be paid to ITLTB was not paid and consent for transfer was withheld by ITLTB. Hence, parties have blamed each other for breaching the contract as ITLTB consent has not been granted yet.*

(*) *The said agreement was dated 18/9/15. I accept that although the agreement was not stamped regarding a preliminary objection by defendant's counsel during the trial, I find on the evidence that both parties at trial had agreed that after a prior agreement was cancelled, there was in fact a sale & purchase agreement endorsed by the parties on 18/9/15. To that end and having considered the correspondence from plaintiff and defendant's counsel adduced in evidence, it would only be logical to conclude that the parties had intended to be bounded by sale & purchase agreement dated 18/9/15.*

(*) *The main basis of the plaintiff's claim is that he had paid $10,000.00 as deposit to the defendants and that defendants had failed to pay the penalty fee required by ITLTB for consent to be granted prior to the sale of the subject property. As the defendant had delayed the payment of the penalty, consent was withheld by ITLTB and that caused the agreement to be frustrated, leading to loss and damages.*

(*) *The defendant's case is that the plaintiff had agreed to pay the penalty fee from the purchase price but he delayed the penalty payment and that frustrated the agreement.*

(*) *There is nothing expressly mentioned in the agreement relating to the said penalty. The evidence shows that ITLTB had visited the defendants and informed them to pay the penalty. There is nothing in the agreement regarding the penalty hence it would be unreasonable for the plaintiff to agree on paying the penalty as he would be paying more besides the purchase price.*

(09) The Learned Magistrate held that;

(*) *On the evidence, I cannot accept the explanation by defendant that the plaintiff had agreed to pay the penalty as it doesn't appear sensible and logical.*

(*) *The plaintiff had shown good faith by depositing the $10,000.00. The defendant were selling their property and had they done their due diligence search through their lawyer, they would have found out about the penalty and other incidental cost in relation to the sale of the said property. This would have resulted in additional clauses in the agreement if warranted.*

(*) *In the absence of such clauses or express variation in that regard it is difficult to say that the plaintiff was duty bound to pay the penalty. As I see it, the defendants were selling the subject property hence it was only fair that they bear the burden of meeting costs incidental to the sale of their property.*

(*) *The defendants had the upper hand as they had received the $10,000.00 deposit. Had the defendants shown good faith, they would have negotiated with the plaintiff to have the clause in the agreement varied or amended to include the penalty clause if need be. Had the plaintiff agreed to pay the penalty as alleged by the defendants that would have been clearly reflected in the agreement too.*

(*) *In my view the consent of ITLTB was an important aspect of the sale & purchase agreement. Without the said consent from ITLTB the said agreement becomes unenforceable and therefore null & void. Hence, neither of the parties should be allowed to benefit from something that is invalid. In that regard to allow the actions of the defendants would only lead to unjust enrichment.*

(*) *Having considered all the evidence, I find that it is only prudent to put the parties back in their original position prior to any agreement whatsoever.*

(*) *I find that the plaintiff is only entitled to claim back the deposit sum of $10,000.00 plus costs.*

(10) I now then turn to the intended grounds of appeal. The intended grounds of appeal are that;

(1) *The learned Magistrate erred in law/fact and/or misdirected himself in law/fact in finding that the Respondent had proven his claim on a balance of probabilities.*

(2) *That the learned Magistrate erred/misdirected himself in law and fact in finding that the Sale and Purchase Agreement dated 18th September, 2015 was unenforceable and subsequently null and void.*

(3) *The learned Magistrate erred in law/fact in finding that it was the Appellants who had frustrated the contract.*

(4) *The learned Magistrate erred in law/fact in not estopping the Respondent from going back on his promise to pay the penalty.*

(11) The grounds of appeal are vague and lacking in sufficient particulars for this court to determine whether there is any merit. The court is not able to consider those grounds because they do not specify how the Magistrate erred in fact and law. Besides, the grounds of appeal are primarily premised on findings of fact made by the Magistrate. It is well settled law that an appellate court will seldom interfere with findings of fact by a trial judge having seen and heard the evidence of witnesses. See; (1) **Benmax v Austin Motor Co. Ltd**[17]. (2) **Bebe v Telecom Fiji Ltd [Unreported, Fiji Court of Appeal**[18]**].** (3) **South Pacific Academy of Beauty Therapy Ltd v Coral Surf Resort Ltd [Unreported, Fiji Court of Appeal**[19]**].** (4) **Mahadeo Singh v Chandar Singh**[20].

(12) On 18th September 2015, the appellants (the vendors) and the respondent (the purchaser) entered into a sale and purchase agreement (contract) for the sale and purchase of the land comprised in iTaukei Lease No. 31187, being Koronubu Subdivision, Lot 238, on BA 2133.

(13) Thus, it is an agreement for sale and purchase of a leasehold interest in Native Land in respect of which control and administration were vested in the iTaukei Land Trust Board, by virtue of provisions of the iTaukei Land Trust Act, Cap 134.

(14) The purchase price of the land is $60,000. The appellants admitted in the trial before the Magistrate that the respondent paid a sum of $10,000.00 as deposit (earnest money).

(15) The said sale & purchase agreement couldn't be carried out to completion because the penalty fee required to be paid to iTLTB was not paid and consent for transfer was withheld by iTLTB. Hence, parties have blamed each other for breaching the contract as iTLTB consent has not been granted yet.

(16) The main basis of the plaintiff's –respondent's claim is that he had paid $10,000.00 as deposit to the defendants - appellants and that defendants-appellants had failed to pay the penalty fee required by iTLTB for consent to be granted prior to the sale of the subject property. As the defendants-appellants had delayed the payment of the penalty, consent was withheld by iTLTB and that caused the agreement to be frustrated, leading to loss and damages.

(17) The defendant's-appellant's case is that the plaintiff-respondent had agreed to pay the penalty fee from the purchase price but he delayed the penalty payment and that frustrated the agreement.

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[17] **(1955) AC 370**
[18] **Civil Appeal No. ABU 0065 of 2007, 09.07.2008**
[19] **Civil Appeal No. ABU 0105 of 2005S, 23-03-2007**
[20] **(1970) 16 FLR 155**

(18) There is nothing expressly mentioned in the agreement relating to the said penalty. The evidence shows that iTLTB had visited the defendants-appellants and informed them to pay the penalty. There is nothing in the agreement regarding the penalty hence it would be unreasonable for the plaintiff-respondent to agree on paying the penalty as he would be paying more besides the purchase price.

(19) The transaction was prohibited by statute because the iTLTB has not granted written consent to the sale. As a result, the agreement which constitutes the transaction was illegal. The Court cannot render assistance in enforcing an illegal contract.

(20) Scrutton, L.J., clearly indicated in **Mahmoud v Ispahani**[21], what the position is in relation to an illegal contract when his Lordship said:-

> *"I think the law is laid down in* ***Cape v Rowlands*** *(2 M. & W. 157), where Parke, B., delivering the judgment of the Court said: 'It is perfectly settled that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, thought the statute inflicts a penalty only, because such a penalty implies a prohibition: Lord Holt, Bartlett v Vinor (Carth. 252). And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract? If the contract is prohibited by statute, the Court is bound not to render assistance in enforcing an illegal contract.... .....*
>
> *And in my view, if an act is prohibited by statute for the public benefit, the Court must enforce the prohibition, even though the person breaking the law relies upon his own illegality. I say nothing about the cases to which Parke B., refer in Cope v. Rowlands (2 M. & W. 157, 158), where the statutory prohibition is for the benefit of a particular person, and not for the benefit of the public. It may be that different rules apply to such a case, but in this case it is clear that the prohibition is for the benefit of the public."*

(21) The defendants-appellants submission is that the money paid as the deposit has been forfeited pursuant to the agreement and the plaintiff-respondent has no right to make demands on refund of deposit as the plaintiff-respondent had agreed to pay the penalty fee from the purchase price but he delayed the penalty payment and that frustrated the agreement.

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[21] **(1921) 2 K.B. at p.728**

(22) I reject the defendants-appellants submission on forfeiture of deposit.

(23) There is nothing expressly mentioned in the agreement relating to the said penalty. The evidence shows that iTLTB had visited the defendants-appellants and informed them to pay the penalty. There is nothing in the agreement regarding the penalty hence it would be unreasonable for the plaintiff-respondent to agree on paying the penalty as he would be paying more besides the purchase price.

(24) Be that as it may, the transaction and the agreement which constitutes the transaction is null and void *ab initio* and of no effect, because it is tainted with illegality.

(25) The appellants-defendants are not entitled to proceed to exercise its rights under the agreement to forfeit and retain the deposit (earnest money), because the agreement is unenforceable. If a contract is illegal the rule is that neither side can exercise its rights under the contract. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal.

(26) The alternative defence of the defendants-appellants in the trial before the Magistrate was that the plaintiff-respondent had no right to the return of the deposit (earnest money) because the plaintiff-respondent is ***in pari delicto*** with the defendants-appellants.

(27) The maxim that "***in pari delicto potior est conditio possidentis***" is a maxim of law, founded on the principles of public policy, which will not assist a party who has paid over money or handed over property in pursuance of an illegal or immoral contract, to recover it back, "for the Courts will not assist an illegal transaction in any respect".

(28) Having regard to the wording of Section 12; "*it shall not be lawful for any* ***lessee*** ..... *to alienate or deal with the land ..... whether by sale, transfer or sublease or in any other manner whatsoever*", I am impelled to the conclusion that the primary responsibility for applying for iTLTB's consent lies on the defendants-appellants as vendor.

(29) Therefore, I am of opinion that the plaintiff-respondent (the purchaser) is not *in pari delicto* with the defendants-appellants (vendor) and his position is not tainted by the illegality of the transaction.

(30) The general principle of '***Ex turpi causa non oritur actio***' is founded on the public policy that any transaction tainted with illegality in which both parties are equally involved, is beyond the pale of law and as such no person can claim any right or remedy whatsoever from such contract.

(31) This old and well-known legal maxim is founded on good sense, and express a clear and well-recognized legal principle.

(32) Let me assume for a moment in favor of the defendants-appellants that the plaintiff's-respondent's position is tainted by the illegality of the transaction.

(33) I cannot shut my eyes to the fact that the defendants-appellants would be **unjustly enriched** if the sum paid as earnest money was not returned.

(34) On the other hand, if returned, the Court might be seen to be lending assistance to a party (the plaintiff - respondent) to an illegal contract.

(35) In **Manohan Alumuniun & Glass (Fiji) Ltd v Fong Sun Development Ltd**[22], the Fiji Court of Appeal discussed unjust enrichment thus:

Unjust enrichment has been described as follows:

> *"Unjust enrichment arises in a situation in which the defendant is enriched at the expense of the claimant and there is in addition a reason, not being a manifestation of consent or a wrong, why that enrichment should be given up to the claimant". (Peter Berks, Unjust Enrichment, second ed. 2005).*

[34] Unjust enrichment has also been described as follows:

> *"The principle of unjust enrichment requires first, that the defendant has been enriched by the receipt of a benefit, secondly that this enrichment is at the expense of the claimant, and that the retention of the enrichment be unjust and finally that there is no defence or bar to the claim". (Chitty on Contracts, Vol 1, para 29-018, Sweet & Maxwell, 2004).*

[35] The particular terms of the contract may sometimes make it difficult to ascertain the extent of their enrichment.

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[22] **[2018] FJCA 23; ABU0018.2015 (8 March 2018)**

"Services may take many forms and while some result in an indirect accretion to the defendant's wealth, for instance by improving his property, other 'pure' services do not. (Chitty on Contracts, Vol.1, para 29-021, (supra).

[36] The second witness for the Plaintiff was Samuto Chang, from View Tech the company that had given the quotation for the replacement of the windows. He said that since the installed windows were of residential quality, and were improperly designed, the company was not prepared to risk attempting repair. He thus recommended a total removal of the existing windows and replacement with windows suitable for the 'environment'. In view of this, it also included the price of scaffolding. It quoted a sum of $76,840.00 for the removal of the existing windows and installation of new windows, and $24,000.00 for the scaffolding. This makes up the sum of $100,840.00 set out in the Respondent's Statement of Claim. However, the learned trial Judge did not allow this sum on the basis that the design in the proposed new windows was different from the design of the existing windows installed by the Appellant.

[37] Despite the Respondent's willingness to deposit the balance sum of $10,000.00 in the Solicitor's Trust Accounts until the Appellant rectified the faulty windows, the Appellant was unwilling to accept this course of action and continued to refuse to attend to the repairs. The failure to repair could be attributed to more than one reason; that the Appellant itself knew that the windows were so badly structurally designed that it saw no purpose in attempting to repair them, or that the Appellant was unwilling to perform the contract. Either way, it made no difference to the correct finding that there had been a breach of contract by the Appellant.

[38] In Daydream Cruises Ltd v Myers [2005] FJHC 316, Connors J considered the issue of unjust enrichment in respect of a claim of breach of contract and unjust enrichment. The Plaintiffs pleaded that the Defendants had benefitted from the use of the name "Daydream Island". In determining this claim, Connors J. having considered the relevant authorities said:

"It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep." – Fibrosa Spolka Akcylina v Fairbarn Lawson Combe Babarbaur LD [1943] A.C. 32 at 61 per Lord Wright.

The remedy for unjust enrichment is restitution which is the reversal of an unjust enrichment of the defendant at the expense of the plaintiff. The

measure of the plaintiff's recovery in restitution is the benefit or gain of the defendant and not, as in compensatory damages, the loss suffered by the plaintiff. A restitutionary order once made, compels the defendants to disgorge, and the plaintiff to recoup, benefits which have been unjustly obtained and retained by the defendants to the detriment of the plaintiffs.

In Pravery & Mathews Pty Ltd v Paul [1987] HCA 5, [1987] 162 CLR 221, the High Court of Australia recognized unjust enrichment as a valid basis of liability in a claim for restitution for quantum merit."

The three elements of a claim for unjust enrichment are – National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd [1997] 1 NZLR:

[i] *Proof of enrichment by receipt of a benefit;*
[ii] *Enrichment at the expense of the plaintiff; and*
[iii] *That retention of the benefit is unjust.*

[39] In Daydream Cruises Ltd v Myers (supra) the claim of unjust enrichment was upheld on the basis that the 1st Defendant has received the benefit of the use of the Plaintiffs' name, and the infrastructure and facilities erected on it by the Plaintiff together with the expertise and services of the Plaintiffs. In the circumstances of that case, it was held that the right to use that island was clearly a 'significant enrichment' of the 2nd Defendant.

[40] In the present case, the property in the windows passed to the owner when the contract price was paid by the Respondent. The fact that twelve years after the breach of the contract, the windows were, due to the efforts of the Respondents yet in place, does not amount to due performance of the contract by the Appellant nor does it amount to unjust enrichment on the part of the Respondent. There can be no unjust enrichment based on goods and services manufactures and delivered in breach of contract.

[41] The retention of the faulty windows by the Respondent cannot be regarded as unjust enrichment, because the Respondent had paid for them. Even a claim for set-off would not have been possible because the Respondent had paid $20,000.00 and the Appellant claimed $10,459.61 being the balance due. However, since the Appellant had breached the contract, the Counterclaim was correctly dismissed by the learned trial Judge.

[42] When the money was paid by the Respondent, and the windows were affixed, as part of the contract of services, the property in the goods passed from the Appellant to the Respondent. Thus, in the totality of the circumstances of the

case, I hold that the learned trial Judge did not err in not considering that the windows that were affixed to the Respondent's building, belonged to the Appellant. I therefore dismiss the third ground of appeal.

[43] In my view, the Respondent suffered loss and damage as a result of the leakage in the windows manufactured and installed by the Appellant. The leakage was a direct cause of the failure on the part of the Appellant to properly perform the contract entered into between the parties. This entitles the Respondent to damages. In the absence of a pro-rated breakdown in the Appellant's quotation distinguishing between the goods and services components respectively, (i.e. the cost of the windows as distinguished from the cost of the installation of the windows), I am of the view that the contract entered into between the parties, was a contract for services, and the Appellant failed to perform the contract. I am of the view that in all the circumstances of this case, it would not be correct to hold that the Respondent has benefitted or that its property has been enriched by the faulty windows installed by the Appellant".

(36) The leading authority is **Bowmakers Ltd v Barnet Instruments Ltd**[23]. In that case the defendants, who had been given possession of machine tools under hire purchase agreements which the Court was ready to assume were affected by illegality on the ground that the original sale to the plaintiffs, negotiated in concert with the defendants, contravened the Control of Machine Tools Order 1940, after making some only of the agreed payments, converted certain of the tools to their own use by selling them, and refused to return to the Plaintiffs other tools still in their possession. The plaintiffs accordingly sought to recover damages for the conversion of all the tools. The judgment of the Court was delivered by Du Parco L. J. who said: *"Mr Gallop is, we think, right in his submission that, if "the sale by Smith to the Plaintiffs was illegal, then the first and second hiring agreements were tainted with the illegality, since they were brought into being to make that illegal sale possible, but, as we have said, the Plaintiffs are not now relying on these agreements or on the third hiring agreement.* ***Prima facie, a man is entitled to his own property, and it is not a general principle of our law (as was suggested) that when one man's goods have got into another's possession in consequence of some unlawful dealings between them, the true owner can never be allowed to recover those goods by an action. The necessity of such a principle to the interests and advancement of public policy is certainly not obvious. The suggestion that it exists is not, in our opinion, supported by authority. It would, indeed, be astonishing if (to take one instance) a person in the position of the Defendant in Pearce v Brooks, supposing that she had converted the Plaintiff's***

[23] **[1945] K.B. 65; [1944] 2 All E.R. 579**

brougham to her own use, were to be permitted, in the supposed interests of public policy, to keep it or the proceeds of its sale for her own benefit. The principle which is, in truth, followed by the Courts is that stated by Lord Mansfield, that no claim founded on an illegal contract will be enforced and for this purpose the words 'illegal contract' must now be understood in the wide sense which we have already indicated and no technical meaning must be ascribed to the words founded on an illegal contract. The form of the pleadings is by no means conclusive. More modern illustrations of the principle on which the Courts act are Scott v Brown, Doering, McNab & Co. and Alexander v. Rayson but as Lindley L.J. said in the former of the cases just cited: 'Any rights which (a Plaintiff) may have irrespective of his illegal contract will, of course, be recognized and enforced.' In our opinion, a man's right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the Trial, that the chattels in question came into the Defendant's possession by reason of an illegal contract between himself and the Plaintiff, provided that the Plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim".

(Emphasis added)

(37) The plaintiff-respondent in the case before the Magistrate has paid a sum of FJ$10,000.00 as earnest money to the defendants-appellants pursuant to clause 2.2 of the contract. It is money paid on a consideration which has wholly failed because the contract which constituted the transaction is void as being illegal from the start. The plaintiff's-respondent's action was to recover the money he had paid as money received by the defendants-appellants to the use of the plaintiff-respondent, being money paid on a consideration which has wholly failed. **There is a total failure of consideration because no document of title was delivered to the plaintiff-respondent.** Therefore, the doctrine of 'failure of consideration' applies. The application of an old established principle of common law does enable a man who has paid money and received nothing for it to recover the money so expended.

(38) **The plaintiff's-respondent's claim for repayment is not based on the contract which is void as being illegal from the start, but on the fact that the defendants-appellants had received the money and has in the events which have supervened (illegality) no right to keep it. The payment was conditional. The deposit money is paid for a consideration which is to be performed after**

the payment. The condition of retaining money is eventual performance of the consideration.

(39) **The consideration was not performed (*viz*, no document of title was delivered to the plaintiff-respondent) and the consideration totally failed because the contract is void as being illegal from the start. When the condition and consideration fails, the defendants-appellants right to retain the money also simultaneously fails**.

(40) **It is the failure of consideration (*viz*, no document of title was delivered to the plaintiff-respondent) and not the illegality of the contract which enables money paid as deposit to be recovered**.

(41) Lord Mansfield rationalized the action for money had and received in ***Moses v Macferlan***[24] as follows:

> *"It lies for money paid by mistake; or* ***upon a consideration which happens to fail****; or for money got through imposition (express, or implied); or extortion; or oppression; or an undue advantage taken of the Plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word the gist of this kind of action is, that the Defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."*
>
> (Emphasis added)

(42) **The gist of the action before the Magistrate was an action for money had and received. The action for money had and received is an action outside the contract. The action for money had and received is not based on the contract. The action is not dependent on the illegal contract but solely on the unjustifiable detention by the defendants-appellants of plaintiff's – respondent's money. There is no *turpis causa* in the matter. The restitution is regarded as a separate principle of law independent of contract. Restitution is the response to unjust enrichment, and unjust enrichment is the event which triggers the response. A remedy in unjust enrichment is not claim of damages. Nor is it a contractual remedy.**

See; (1) ***Restitution, Present and Future, Essays in Honour of Gareth***

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[24] **(1760) 2 Burr 1005, 1 Wrn Bl 219, 12 Digest 539, 4478 at page 1012**

Jones[25].

(2) **Andrew Burrows, the Law of Restitution**[26],

(3) **Jacques Du Plessis**, *"Towards a Rational Structure of Liability for Unjust Enrichment: Thoughts from two mixed Jurisdictions"*[27]

(4) The work by Sir William Evans entitled "**An Essay on the Action for Money Had and Received**". It was published in 1802 and dedicated to Sir Edward Law (later Lord Ellenborough). It is reprinted in (1998) RLR3. In its opening paragraphs, Sir William Evans identified the subject-matter of his study as *"the action for money had and received, as enforcing an obligation to refund money which ought not to be retained."* Sir Evans quoted as "proper introduction" to the subject the famous passage from the judgment of Lord Mansfield CJ in **Moses v Macferlan**[28]

"This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies for money which, ex aequo et bono, the Defendant ought to refund; it does not lie for money paid by the Plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or, for money fairly lost at play: because in all these cases, the Defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or ***upon a consideration which happens to fail****; or for money got through imposition, (express or implied) or extortion; or oppression; or an undue advantage taken of the Plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.* ***In one word, the gist of this kind of action is, that the Defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity, to refund the money.****"*

(Emphasis added)

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[25] **(1998), Misnomer, p1, Professor Birks**
[26] ***2nd Edition*** **(2002)**
[27] **122 South African Law Journal 143.**
[28] **(1760) 2 BUR 1005 (at p 102);**

(43) I take comfort in the oft-quoted words of Lord Roche from the decision of '**Fibrosa Spolka Akevina v. Fairbairn Lawson Combe Barbour Ltd**'[29]

> *"It is, I think, a well settled rule of English law that, subject always to special provisions in a contract, payments on account of a purchase price are recoverable if the consideration for which that price is being paid wholly fails: see: Ockenden v. Henley EB & E 485, 492. Looking at the terms of the contract in the case now under consideration, I cannot doubt that the sum sued for was of this provisional nature. It was part of a lump sum price, and when it was paid it was no more than payment on account of the price. Its payment had advantages for the (defendant company) in affording some security that the (Plaintiff) would implement their contract and take up (the transfer) and pay the balance of the price, and it may be that it had other advantages ..... but if no .....document of title were delivered to (the plaintiff)...(or, as in this case, the contract is declared illegal ab initio) then, in my opinion, the consideration for the price including the payment on account, wholly failed and the payments so made is recoverable.*

(44) In the face of the dicta of **Lord Roche in Fibrosa Spolka Akevina v. Fairbairn Lawson Combe Barbour Ltd'[30] and Lord Mansfield CJ in Moses v Macferlan,[31]** It appears to me that the plaintiff-respondent is entitled to the return of the FJ$ 10,000.00 paid in advance as money paid upon a consideration which had wholly failed. I am satisfied that no rule of law, and no considerations of public policy, compel the Court to dismiss the plaintiffs'-respondent's claim in the case before the Magistrate and to do so would be, in my opinion, a manifest injustice.

(45) I am far from satisfied that the grounds of appeal raise an arguable case. Therefore, there is no sufficient basis to excuse the unexplained (substantial) delay and to allow the appeal to proceed to the High Court.

(46) In the circumstances, the application is refused.

ORDERS

1. The application for extension of time to file notice of intention to appeal is dismissed.

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[29] **(1943) AC 32;**
[30] **(1943) AC 32**
[31] **(1760) 2 BUR 1005**

2. The appellants to pay costs of $750.00 to the respondent within seven (07) days from the date of this decision.

.....24/07/2020.

Jude Nanayakkara
[Judge]

At Lautoka
Friday, 24th July, 2020