IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

Civil Petition No. CBV0003/2017
[on appeal from Court of Appeal, Fiji Civil Appeal No. ABU0027 of 2015 and Civil Appeal No. ABU0031 of 2015.]

BETWEEN: **ONE HUNDRED SANDS LTD.**

Petitioner

AND: **THE ATTORNEY-GENERAL OF FIJI AND MINISTER OF JUSTICE**

Respondent

Coram: **Gates J**

Counsel: **Mr. Anand Singh for the Petitioner**
Mr. Solicitor-General for Respondent
Mr. Haniff [counsel assisting]

Date of Hearing: **20th November 2017**

Date of Ruling: **2nd May 2019**

RULING ON MOTION TO SET ASIDE DISMISSAL OF PETITION BY CONSENT

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[1] On 12th July 2017 the Petitioner filed Notice of Change of Solicitors. On 2nd August 2017 the Solicitors filed a Notice of Withdrawal of Application for Special Leave to Appeal with a Dismissal of Petition by Consent.

[2] The Consent document expressed itself as follows:

> "We, the solicitors for the above mentioned Petitioner and Respondent, who are sui juris, hereby request the dismissal of the Petition in the above matter with no order as to costs."

[3] Both solicitors signed for their respective parts. The papers came before me as President of the Supreme Court and accordingly on 3rd August 2017 I indorsed them "order in terms."

[4] On 11th August 2017 the original Solicitors for the Petitioner in the proceedings, Messrs. Singh and Singh Lawyers, filed a Notice of Change of Solicitors. With it they filed a Motion by Petitioner to set aside the discontinuance of the Petition. They filed in support the affidavit of Timothy Manning, a director of the Petitioner company.

[5] The issue arises, has the court the jurisdiction to set aside the dismissal of the petition by consent?

[6] A primary question is whether either of the deponents who purport to be "duly authorised by the Petitioner" to make the affidavits or to give relevant instructions to their solicitors were indeed so authorised. The shares of the company seem to be equally divided between the two protagonist directors at 2,400,000 shares each.

[7] In his supporting affidavit, filed with the Motion, Mr. Timothy Manning did not provide any supporting document demonstrating the grant of authority by the company for him to make the affidavit or indeed to file the petition, and thus to bring further appellate proceedings. Nor did the solicitor Mr. Tomasi Tuitoga in his affidavit refer to the exact nature of authorised instructions from the petitioning company for which his firm had to discontinue the petition. He did however exhibit a letter dated 6th April 2017 signed by a Director and the Secretary of the Petitioner. It read as follows:

> "06 April 2017
> Haniff Tuitoga
> Level 1
> Garden City Business Park
> Raiwaqa
> Suva
>
> Attention: Faizal Haniff

Re: One Hundred Sands Limited vs Attorney General & Minister for Justice – Civil Appeal No. 3 of 2017

One Hundred Sands Limited hereby instructs Haniff Tuitoga to discontinue the petition filed by One Hundred Sands Limited against the Attorney General and Minister for Justice in Civil Appeal No: CBV 3 of 2017.

Signed under seal
Director Secretary"

[8] Since it was becoming abundantly clear that there was uncertainty as to who had authority to instruct solicitors, Mr. Timothy Manning in his second affidavit filed on 29th September 2017 referred to an authority signed by two Directors of the Petitioner.

[9] This authority was exhibited to that affidavit. It was a "Form of Authority" dated the 27th September 2017. It appeared to give retrospective authority to Mr. Manning to file the petition, (already filed on 3rd April 2017) to swear an affidavit in support (already sworn on 3rd April 2017), and to take "all necessary steps to move the Supreme Court of Fiji to have the notice of withdrawal or discontinuance of the petition dated 2nd August 2017 struck out or set aside and the petition accordingly reinstated..."

[10] At relevant times there is no dispute that the Directors of the Petitioner were:

Larry Claunch
Timothy Terence Manning
Brandon Clive Worthington

and that the Secretary was Alison Southey. These details were filed with the Registrar of Companies.

[11] At first call of this application, Mr. Solicitor was anxious to proceed. However in view of the strange turn of events I ordered affidavits to be sworn and filed to provide the necessary evidence for the court to consider.

[12] In his second affidavit Mr. Manning commented on the instructions given to the Solicitors for the Petitioner for the dismissal by consent:

> "I verily believe that the instructions purportedly given by Mr. Claunch and Ms Southey were clearly not actions taken in the best interests of the Petitioner Company or which were intended to promote its success."

This was of course argumentative comment not permissible in an affidavit which should be confined to evidence. Counsel may comment and suggest inferences that are properly to be drawn from the available evidence.

[13] Mr. Manning blames the solicitors for accepting instructions from Mr. Claunch and Ms Southey. He says nothing on the internal methodology existing for governance of the Petitioner company, how decisions are arrived at, and why the instructions were given by Mr. Claunch and Ms Southey. In a letter exhibited to Mr. Manning's later affidavit, a letter written to the company secretary by fellow director Mr. Worthington, Mr. Worthington reminds Ms Southey of her duty of care to the company "to ensure your actions are in the best interests of the company and that any instructions issued have been sanctioned by the Directors and the Board."

[14] Mr. Worthington in his letter (but not Mr. Manning in his affidavit) had stated that "It is inconceivable that either Mr. Claunch or you could have been acting in the best interests of OHSL in giving instructions to Haniff Tuitoga to file the notice of discontinuance in the Supreme Court." That issue however is not one that has been fully canvassed before this court. The pros and cons as to why the petition should have been dismissed by consent are not properly before the court.

Jurisdiction

[15] The governing section is that dealing with the power of a single judge of the Supreme Court, the heading for section 11 in the Supreme Court Act. The section reads:

> "11. A single judge of the Supreme Court may exercise any power vested in the Supreme Court not involving the decision of an appeal or reference, except that –

(a) n/a

(b) in civil matters, **any order other than an order made by consent of the parties**, or any direction or decision given in pursuance of the powers conferred by this section, may be varied, discharged or reversed by the Supreme Court constituted by 3 judges, who may include the judge who made or gave the order." [emphasis added]

[16] The redress available from the single judge's decision is markedly different depending upon whether the issue is criminal or civil. In a criminal matter a refusal by the single judge may go thereafter to, and be determined by, the Supreme Court constituted by 3 judges. In civil, 3 judges may vary, discharge or reverse a single judge's orders – providing it is not **an order made by consent of the parties**. The remedy for a company at odds with itself would seem therefore not to lie down this path. An aggrieved party would have to bring themselves within the category of cases where separate action might be brought: **Waitemata City Council v Mackenzie** [1988] 2NZLR 242. There is also the possibility of action against the offending or unauthorised Director or officer of the company. The internal governance here lacked orderliness and particularity.

[17] Halsbury has this to say on setting aside or varying a judgment or order:

> "... A judgment given or an order made by consent may be set aside on any ground which would invalidate a compromise not contained in a judgment or order. Compromises have been set aside on the ground that the agreement was illegal as against public policy, or as obtained by fraud or misrepresentation, or non-disclosure of a material fact which there was an obligation to disclose, or by duress, or was concluded under a mutual mistake of fact, ignorance of a material fact, or without authority..."
>
> [para 1210 Halsbury's Laws of Fiji (4th edit.) Vol. 37 (2001) p.353]

[18] It used to be the practice to exhibit to an affidavit a company resolution authorising certain steps to be taken by a person, officer, or director on the company's behalf. These steps might include initiating litigation, deposing to affidavits, or making a

change of solicitors who are to act for the company. Clearly there were gaps here, and retrospective authorisation is not as convincing as prior authorisation.

Companies Act Assumptions

[19] Perhaps cognisant of the likelihood of such informalities and uncertainties, the draftsman of the Companies Act has provided assistance for those who have to deal with a company. Those owing shares, directing companies or managing companies would be wise to understand the requirements for operating a company vis-à-vis outsiders.

[20] For instance a company may execute a document if it is signed in accordance with section 53 of the Act. That provides for the document relevantly to be signed either by:

(a) 2 Directors of the company;

(b) A Director and a secretary of the company

[21] Section 54 is headed **"Entitlement to make assumptions."** It reads:

"[COM 54] **Entitlement to make assumptions**

54 (1) A person is entitled to make the following assumptions in relation to dealings with a company –

(a) a person may assume that the company's articles of association and any provisions of this Act that apply to the company, have been complied with;

(b) a person may assume that any person who appears, from information provided by the company that is available to the public from the Registrar, to be a director or a company secretary of the company –

(i) has been duly appointed; and
(ii) has authority to exercise the powers and perform the duties customarily exercised or performed by a director or company secretary of a similar company;

(c) a person may assume that any person who is held out by the company to be an officer or agent of the company –

(i) has been duly appointed; and
(ii) has authority to exercise the powers and perform the duties customarily exercised or performed by that kind of officer or agent of a similar company;

(d) a person may assume that the officers and agents of the company properly perform their duties to the company;

(e) a person may assume that a document has been duly executed by the company if the document has been signed in accordance with section 53;

(f) for the purposes of making the assumption, a person may also assume that any person who states next to their signature that they are the sole director and sole company secretary of the company occupies both offices; and

(g) a person may assume that an officer or agent of the company who has authority to issue a document or a certified copy of a document on its behalf also has authority to warrant that the document is genuine or is a true copy.

(2) The company is not entitled to assert in proceedings in relation to the dealings that any of the assumptions is incorrect.

(3) A person is entitled to make the assumptions in subsection (1) in relation to dealings with another person who has, or purports to have, directly or indirectly acquired title to property from a company.

(4) The company and the other person are not entitled to assert in proceedings in relation to the dealings that any of the assumptions is incorrect.

(5) The assumptions may be made even if an officer or agent of the company acts fraudulently, or forges a document, in connection with the dealings.

(6) A person is not entitled to make an assumption in subsection (1) if at the time of the dealings they knew or suspected that the assumption was incorrect.

(7) Without limiting the generality of this section, the assumptions that may be made under this section apply for the purposes of this section.

(8) Except, for a change registered under this Act, a person is not taken to have information about a company merely because the information is available to the public from the Registrar."

[22] Significant amongst those assumptions are section 54(1)(e):

"(e) a person may assume that a document has been duly executed by the company if the document has been signed in accordance with section 53."

and section 54(2):

"(2) The company is not entitled to assert in proceedings in relation to the dealings that any of the assumptions is incorrect."

and section 54 (4) and (5):

"(4) The company and the other person are not entitled to assert in proceedings in relation to the dealings that any of the assumptions is incorrect.

(5) The assumptions may be made even if an officer or agent of the company acts fraudulently, or forges a document, in connection with the dealings."

[23] That last is not to say that the evidence here indicates fraud. The evidence does not lead to any such inference. There is no foundational evidence to set up such an allegation. The courts are slow to draw inferences of fraud. It must be clearly alleged and particulars given.

Sufficiency of particulars necessary

[24] Mr. Singh has referred to the observations of Pennycuick J in **Charterbridge Corp Ltd v Lloyds Bank Ltd** [1970] Ch. 62 at p 74 E-F:

"The proper test, I think ... must be whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company."

[25] The judge there dealt with the reasonable belief of a director "in the whole of the existing circumstances." The whole of the existing circumstances has not been bared before this court, unlike in the **Charterbridge** case supra or **Cobden Investments Ltd. v RWM Langport Ltd & Others** [2008] EWHC 2810 Ch. involving a very lengthy trial and the issues of evidence canvassed in an 824 paragraph judgment. Pennycuick J referred to the fact that "there was very little dispute as to the particular facts." His lordship had heard full evidence on the issue of prejudice to the company. He went on:

> "To avoid any possible misunderstanding, these finds do not, of course, imply that either Mr. Pomeroy or the bank officers believed that the transactions were prejudicial to Castleford. They simply did not give separate consideration to the interest of Castleford. The three witnesses were very properly taken at length through the contemporary documents, including correspondence, notes of interviews, internal minutes and other records kept by the bank. I had, of course, to consider their oral evidence in relation to these documents. But I do not think it would serve any useful purpose to refer to the documents in detail. All three witnesses deposed that in their view today the transactions were in the interest of Castleford for reasons which they gave."

[26] In that case the judge said there was no allegation of bad faith. His lordship concluded:

> "In my judgment, the state of mind of the directors of Castleford and of the bank's officers is irrelevant upon this issue of ultra vires.
>
> That is sufficient to dispose of the action; but in case I am wrong on my view of the law, I must proceed to express a conclusion upon the contention that in creating the guarantee and legal charge, the directors were not acting with a view to the benefit of Castleford. That is a question of fact, and the burden of proof lies on the plaintiff company. As I have already found, the directors of Castleford looked to the benefit of the group as a whole and did not give separate consideration to the benefit of Castleford."

[27] Mr. Singh also relies on **Ryde Holdings Ltd. v. Sorenson** (1995) 8 PRNZ 339. Fisher J referred to the sorry outcomes of the litigation to date with its wasted expense, delays, and mutual dissatisfaction with the arbitrator. It should be noted that

this case concerned an arbitration, and interlocutory orders, not determining substantive orders. At page 345, the judge commented:

> "In the absence of contrary legislation the Court has an inherent power to control its own procedures. Procedural orders of continuing effect may normally be revoked or modified at any time before a substantive judgment finally determining the parties' rights."

[28] The inherent jurisdiction referred to was for that of the High Court, not an appellate court with a section specifically excluding jurisdiction as here.

[29] Fisher J also referred to the consideration as to "whether a sufficiently compelling case has been made out", for the exercise of inherent jurisdiction. Clearly arbitration proceedings based upon initial consent orders was in an entirely different category from High Court proceedings.

[30] It is clear that a court will not act lightly to alter what it has pronounced by consent. If jurisdiction were found to exist for the Supreme Court to intervene, the circumstances must entitle the judge to vary or rescind the order. The matter was extensively canvassed in the judgment of the Court of Appeal, Kenya in **Benjoh Amalgamated Ltd. & Anor. v Kenya Commercial bank Ltd.**, Civil Application No. Sup. 16 of 2012 (formerly Civil App. No. 276 of 1997) 20th June 2014.

Conclusion

[31] For this motion to succeed the evidence indicating abuse or one of the grounds must be shown to be abundantly obvious. Much more was needed to be demonstrated here. An important issue was the question of authority to give instructions, yet evidence was not at first provided of any such, nor as to what decisions the company might have arrived at and why. Nor did the deponent condescend to detail what benefit might be achieved by the petitioner by adopting one or other step or policy.

How could it be said that "it was not beneficial to the company." The benefits either way are not necessarily obvious as expressed in the affidavits. More was needed for any conclusion to be reached.

[32] In the cases cited some of this difficulty existed also. Certainly fraud was not established.

[33] The assumptions laid down in section 54 of the Companies Act would seem to preclude the petitioner from undermining its own case as presented. But other avenues of redress for the management or direction of the company might be available.

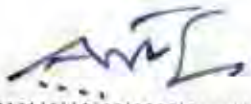
[34] As I have already indicated, there must be a sufficiency of existing circumstances before there could be a proper challenge indicating misrepresentation or fraud. The assumptions would indicate that form of challenge may be closed also.

[35] This is not an application under the slip rule. Section 11 of the Supreme Court Act excludes jurisdiction to approach the Full Court.

[36] In the result I order

(a) The motion to set aside is dismissed.

(b) There will be no order as to costs.



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The Hon. Mr. Justice Anthony Gates
Judge of the Supreme Court

Solicitors:
Messrs. Singh & Singh for Petitioner
Office of the Attorney-General for the Respondent

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