IN THE SUPREME COURT OF FIJI
AT SUVA

CIVIL PETITION NO: CBV 0016 of 2020
Court of Appeal Nos. ABU 19 of 2016 and ABU 102 of 2017

BETWEEN: **MOHAMMED YASAD ALI**

Petitioner

AND: **MOHAMMED WAHID KHAN**

Respondent

Counsel: **Mr A. Ram for the Petitioner**
Mr A. Sen for the Respondent

Coram: **The Hon. Acting Chief Justice Salesi Temo**
Acting President of the Supreme Court

The Hon. Mr. Justice Brian Keith
Judge of the Supreme Court

The Hon. Mr. Justice Filimone Jitoko
Judge of the Supreme Court

Date of Hearing: **06 April, 2023**

Date of Judgment: **28 April, 2023**

JUDGMENT

Temo, AP

[1] I have had the honour to read the draft judgment of Keith J in this case. I agree entirely with his reasons, conclusion and orders.

Keith, J

Introduction

[2] This case shows how sometimes things can go wrong in unexpected ways. An appeal to the Court of Appeal was treated as having been abandoned because of the appellant's failure to comply with a practice direction. An application to reinstate the appeal was dismissed, and the appellant now asks the Supreme Court to resurrect his appeal. The procedural history is important, and I trust that I will be forgiven for going into it in some detail.

The proceedings in the High Court

[3] *The determination of the preliminary issue*. On 20 June 2013 Mr Khan issued proceedings in the High Court against Mr Ali claiming damages for assault and battery. He claimed that that had happened on or about 7 October 2008. If the limitation period for the bringing of such a claim was 6 years, the claim had been brought in time. If the limitation period was only three years, the claim was statute-barred. The issue whether the claim was statute-barred was ordered to be tried as a preliminary issue. On 9 May 2014, Master Robinson decided that the claim was statute-barred. Mr Khan appealed against that ruling. On 3 February 2016, the appeal was allowed by Brito-Mutunayagam J. He held that the claim was not statute-barred.

[4] *The judgment of the High Court and the two appeals*. On 11 March 2016, Mr Ali filed a notice of appeal against that ruling (ABU 19 of 2016). Before the appeal could be heard, the action proceeded to trial, and on 5 May 2017 Brito-Mutunayagam J gave judgment for Mr Khan in the sum of $52,890 including interest. Mr Ali decided to appeal against that judgment as well (ABU 64 of 2017). An order for security for the payment of costs was made, but that security was not provided, and the appeal was deemed to have been abandoned. A fresh notice of appeal was filed (ABU 102 of 2017), and that second appeal proceeded in the normal way.

[5] *The filing of the High Court records*. An appellant in a case proceeding in the Court of Appeal is required to file in the Court of Appeal Registry ("the Registry") a record of the proceedings in the High Court. Mr Ali's solicitors filed the record (known as the Record of the High Court) relating to the first appeal on 27 June 2017. However, they did not file

the record relating to the second appeal, and on 30 March 2020 the Registry marked the second appeal abandoned for non-compliance with para 6(ii) of Court of Appeal Practice Direction No 1 of 2019 ("the Practice Direction"). The Court of Appeal file shows that Mr Ali's solicitors were informed of that by the Registry by letter dated 15 April 2020, though the letter stated that *both* appeals had been deemed to have been abandoned.

[6] *The effect of non-compliance with the Practice Direction*. Para 6(ii) of the Practice Direction provided:

> *"For all civil appeals that were filed prior to 1 February 2019, the following arrangements are to apply: ...*
>
> > *(ii) Where the notice of appeal was filed in 2017 the appeal record is to be lodged for certification no later than 31 December 2019."*

The effect of non-compliance with para 6 was set out in para 7:

> *"In the event of non-compliance with paragraphs ... 6, then paragraphs (2) and (3) of Rule 17 of the Rules apply as if the non-compliance were non-compliance with paragraph (1) of Rule 17."*

Rule 17(2) provided that if rule 17(1) was not complied with, the appeal was deemed to have been abandoned, though since the second appeal related to a final order, a fresh notice of appeal could be filed within 42 days from the date when the second appeal was deemed to have been abandoned. No such fresh notice of appeal was ever filed. This, then, was the route by which the second appeal was deemed to have been abandoned. That it was the second appeal only which was deemed to have been abandoned is apparent from the certificate of abandonment dated 30 March 2020 which an officer in the Registry completed: the appeal which it said was deemed to have been abandoned was ABU 102 of 2017.

[7] It is important to note that the Registry could not have treated the first appeal as having been abandoned. It could not do that as there had been no failure to comply with the Practice Direction in the case of the first appeal. The record for the first appeal had previously been filed.

[8] Mr Ali wanted the second appeal to be heard as well as the first appeal. His solicitors could have filed a fresh notice of appeal as provided for by rule 17(2). We were not told why they chose not to do that. Perhaps they had forgotten that that could have been done. Perhaps they thought that Mr Ali would be liable for all the costs of the second appeal if they did that. What they in fact decided to do was to ask the Court of Appeal to reinstate the appeal.

[9] *The mistake in the Registry*. How did the Registry come to think that *both* appeals were deemed to have been abandoned? The answer is this. The two appeals had been ordered on 6 October 2017 to be consolidated. The effect of their consolidation was that the court could either hear them together, or hear one immediately after the other, or order one of them to be stayed pending the determination of the other. That is the effect of Ord 4 r 2 of the Rules of the High Court. This rule applied to appeals pending in the Court of Appeal: see rule 6 of the Court of Appeal Rules. Indeed, when Calanchini P ordered that the two appeals be consolidated, he ordered that the two appeals be head together. What the order for consolidation did *not* mean was that there was now only one appeal. Indeed, that was recognized by the Chief Registrar because following the order for consolidation, he ordered on 24 October 2017 that the High Court record be filed within 28 days of the receipt of the judge's notes. He can only have been referring to the record for the second appeal as the record for the first appeal had been filed on 27 June 2017.

[10] Unfortunately, that was not appreciated by the officer in the Court of Appeal Registry who was responsible for this appeal. It was thought that the order for consolidation meant that there was only one appeal, and when the second appeal was deemed to have been abandoned, the first appeal had to be deemed to have been abandoned as well. That is borne out by what happened in the Registry. Prior to the order for consolidation, there would have been two Court of Appeal files in the Registry – one for each appeal. After the order for consolidation, the Registry incorporated the two files into one file. There was nothing wrong with that as a matter of clerical administration. The problem was the belief that there was now only one appeal rather than two.

Reinstating the appeals

[11] *The first appeal*. The application for reinstatement of what was thought to be the one appeal was heard by Guneratne JA. Unfortunately, everyone assumed that the effect of the consolidation was that that there was only one appeal, and once that had been deemed to have been abandoned, there would not be an extant appeal if it was not reinstated. On 16 October 2020, Guneratne JA decided that it should not be reinstated. That brought the consolidated proceedings to an end. It is that decision of Guneratne JA which is the subject of the current appeal to the Supreme Court.

[12] It was *not* the case that there was only one appeal. As I have said, the effect of the consolidation of the two appeals was only that they should be heard together. Indeed, the first appeal had never been deemed to have been abandoned, and Guneratne JA's decision to refuse reinstatement should only have applied to the second appeal. That was the only appeal which needed to be reinstated. So what led everyone to think that the effect of the consolidation was that there was only one appeal? The answer may be because the grounds of appeal in the notice of appeal relating to the second appeal included the grounds of appeal relating to the first appeal as well. That should not have happened. The notice of appeal relating to the second appeal correctly stated that the appeal related to Brito-Mutunayagam J's judgment of 5 May 2017, and that meant that the grounds of appeal in that notice of appeal should have been confined to the later judgment, not his judgment on the period of limitation. It follows from all this that the first appeal must be allowed to proceed in the normal way.

[13] *The second appeal*. What remains to be addressed by the Supreme Court is whether Guneratne JA erred in law in refusing to reinstate the second appeal. That involves first considering why the record for the second appeal had not been filed by the time the Registry deemed the second appeal to have been abandoned. Since no oral evidence had been given either before the master or on appeal to Brito-Mutunayagam J, there had been no need for the judge's notes to be included in the record for the first appeal. However, Mr Ali's solicitors were aware that the record relating to the second appeal had to contain the judge's notes as the appeal related to a hearing at which evidence had been given. In an affidavit sworn in support of the application to reinstate what in reality was the second appeal, Mr

Ali's solicitors said that they had not received the judge's notes by the time that the Registry treated the second appeal as having been abandoned. That was why the record relating to the second appeal had not been filed by then.

[14] Mr Sen for Mr Khan made the point that the affidavit did not say when Mr Ali's solicitors first asked for the judge's notes. I agree with Mr Sen that it would have more helpful if they had spelled out the efforts they had made to get the judge's notes, but at the end of the day, that does not really matter, as Guneratne JA said in para 9 of his judgment that he had no hesitation in accepting the reason given by Mr Ali's solicitors for the delay. It is plain from the rest of his judgment that he was not just accepting that the reason they had given was the true reason. He was saying that the reason they had given was an acceptable one. So why did he not reinstate what in reality was the second appeal?

[15] Guneratne JA gave two reasons for not reinstating the appeal. First, in para 31 of his judgment, he thought that Mr Ali had no prospect of successfully arguing on the appeal that Brito-Mutunayagam J had been wrong on the limitation point. However, that was the subject of the first appeal, and as I have already said, that appeal must proceed in the normal way. The outcome of the current appeal to the Supreme Court therefore relates only to the second of the two reasons which Guneratne JA gave for refusing to reinstate the appeal. That was set out in paras 41 and 42 of his judgment. He noted that three years had elapsed since judgment for $52,890 had been given against Mr Ali. There had been no stay on the execution of that judgment. Mr Ali had therefore been obliged to pay the judgment sum even though he was appealing against the judgment. He had not done so. The effect of that was that Mr Khan had been deprived of "the fruits of his judgment". Guneratne JA thought that this conduct on the part of Mr Ali should result in depriving him of the reinstatement of the appeal.

[16] This was an unusual approach for two reasons. First, if the written submissions advanced to Guneratne JA by Mr Khan's solicitors are anything to go by, this was not an argument that they had advanced at all. They relied only on the argument that the appeal on the limitation issue lacked merit. Secondly, Mr Khan's obvious remedy for Mr Ali's failure to pay the judgment debt was to enforce the judgment in the usual way. If Mr Khan's solicitors had not done that, the reason why Mr Khan had been deprived of "the fruits of

his judgment" would not have been because Mr Ali had not paid the judgment debt, but because Mr Khan's own solicitors had not taken steps to enforce it. In those circumstances, it could not fairly be said that Mr Ali had, by *his* conduct, forfeited his chance to have the second appeal reinstated.

[17] In these circumstances, the issue is a factual one: did Mr Khan's solicitors indeed try to enforce the judgment? Mr Sen told us that they did. They tried to lodge a writ of *fieri facias* in the High Court Registry, but were told that that could not be done. The Registry no longer had the High Court file, as it has been sent to the Court of Appeal Registry when the appeal was filed. Mr Sen told us that since the High Court Registry no longer had the High Court file, the writ of *fieri facias* could not be lodged, and the writ was returned to them. Indeed, Mr Sen said that the High Court file would show the attempt made by Mr Khan's solicitors to file the writ of *fieri facias*. He wanted us to look at the High Court file for that purpose.

[18] I was surprised by what Mr Sen told us. It would be very strange if enforcement proceedings were held up as a consequence of an appeal having been filed when a stay of execution had not been ordered. We therefore made our own enquiries about what the practice of the High Court Registry was. It transpired that Mr Sen was quite correct when he said that the High Court file is sent to the Court of Appeal Registry when an appeal is filed. But what we were also told was that if some other step in the action needed to be taken, such as the filing of a writ of *fieri facias*, the practice of the High Court Registry is to ask the Court of Appeal Registry for the return of the High Court file, and the writ of *fieri facias* would then be filed in it in the usual way. The one thing which would not happen would be for the writ to be returned to the solicitors. It would be marked with the date and time of receipt, it would then be retained in the High Court Registry, and it would then be put into the High Court file when the High Court file came back from the Court of Appeal Registry.

[19] All of that makes absolute sense. It means that enforcement proceedings need not be delayed for the very many months, perhaps years, before the appeal is decided. The only time which is lost is the day or two it takes for the High Court file to be returned to the High Court Registry from the Court of Appeal Registry. So if, as Mr Sen claims, the writ

of *fieri facias* was returned to Mr Khan's solicitors when it could not be filed, that would have been completely contrary to the practice of the High Court Registry. Indeed, in response to Mr Sen's request that we looked at the High Court file ourselves, we have done that. There is no reference in it to any attempt by Mr Khan's solicitors to file a writ of *fieri facias* until a letter from Mr Khan's solicitors to the High Court dated 26 October 2020 (4 days after Guneratne JA's judgment) complaining that the writ remained unexecuted. The inescapable fact is that Mr Sen's claim to have unsuccessfully attempted to file the writ of *fieri facias* is not borne out by the file, and the only document in the file about the writ of *fieri facias* – the letter of 26 October 2020 – is inconsistent with that claim because it referred to the writ of *fieri facias* having been filed, even though Mr Sen claimed to us that he had not been able to do that.

[20] In support of his claim that the writ of *fieri facias* was returned to him, Mr Sen provided us with what purported to be the writ which Mr Khan's solicitors tried to file, but which Mr Sen claimed was returned to them. He also provided us with what purported to be the *praecipe* which must precede the issue of the writ. The writ was not dated, but – and this is the important point – the *praecipe was* dated. It was dated 30 April 2020. That was almost three years after judgment had been given for Mr Khan, and just after the Court of Appeal Registry had deemed the appeal to have been abandoned. Mr Sen did not offer any explanation for why Mr Khan had not tried to enforce the judgment earlier. The answer seems to me to be obvious. He did not want to go to the expense of enforcing the judgment when an appeal against the judgment was pending in case the appeal was allowed. Whether that is right or not, though, the fact that Mr Khan's solicitors did not seek to enforce the judgment for so long means that it was not Mr Ali's conduct which resulted in Mr Khan being deprived of "the fruits of his judgment". It was Mr Khan's solicitors' decision not to enforce the judgment until after the appeal had been deemed to have been abandoned.

Conclusion

[21] For these reasons, I would give Mr Ali leave to appeal on the basis that his appeal raised a matter of substantial general interest to the administration of civil justice, namely whether an appellant's failure to pay a judgment debt is conduct of the kind which should deprive him of having his appeal reinstated if it has been deemed to have been abandoned for non-

compliance with a practice direction of the court. In accordance with the Supreme Court's usual practice, I would treat the hearing of the application for leave to appeal as the hearing of the appeal, I would allow the appeal, I would set aside the order of Guneratne JA, and I would order that Mr Ali's appeals in ABU 19 of 2016 and ABU 102 of 2017 be reinstated. Bearing in mind that the Registry must share much of the blame for what went wrong, I would make no order for costs both in the Court of Appeal and the Supreme Court.

Jitoko, J

[22] I am entirely of the same opinion, and I have nothing to add.

Orders:

(1) Leave to appeal to the Supreme Court granted.
(2) Appeal allowed.
(3) Order of Guneratne JA of 16 October 2020 set aside.
(4) Appeals ABU 19 of 2016 and ABU 102 of 2017 reinstated.
(5) No order for costs in the Court of Appeal and the Supreme Court.

The Hon. Acting Chief Justice Salesi Temo
Acting President of the Supreme Court

The Hon. Mr. Justice Brian Keith
Judge of the Supreme Court

The Hon. Mr. Justice Filimone Jitoko
Judge of the Supreme Court