IN THE FIJI COURT OF APPEAL
CIVIL APPEAL NO. 42/89

BEFORE THE HON JUSTICE MICHAEL M HELSHAM
PRESIDENT OF THE FIJI COURT OF APPEAL
AND THE HON JUSTICE SIR MOTI TIKARAM
RESIDENT JUDGE OF APPEAL
AND THE HON JUSTICE SIR ARNOLD AMET
JUDGE OF APPEAL

TUESDAY THE 16TH DAY OF JUNE, 1992 AT 9.30 A.M.

BETWEEN:

PRATAP'S STONE CRUSHING AND SCREENING WORKS LTD — APPELLANT

- and -

NADI TOWN COUNCIL — RESPONDENT

MR AKHIL I.C.S. — FOR THE APPELLANT

DR SAHU KHAN — FOR THE RESPONDENT

O R D E R

The Plaintiff filed a Statement of Claim dated 17th May 1989 claiming against the defendant the sum of $71,760 in respect of certain road works which it claimed it had done with the authority of the defendant and for and on its behalf.

A Statement of Defence to that claim was filed on 3rd July 1989 and alleges that the Plaintiff was never instructed and/or authorised to carry out the work as alleged. It also says that the approval, if any was given, was obtained by undue influence.

A summons for summary judgment was filed on 12th July, 1989 and there was an affidavit in support. The summons was served on 19th July 1989 and it required the defendant to appear before a Judge on 28th July 1989.

There was no appearance on 28th July by the defendant and summary judgment was signed on that day. An injunction was obtained by the defendant on 11th August 1989 by which execution on the judgement was stayed or restrained, and it was based upon an affidavit showing that the matter had come before His Lordship on the application for summary judgment and by mistake, that application had been overlooked by the solicitors who appeared for the defendant by reason of some mix up in the office. The injunction was granted. Following the injunction, the defendant filed a summons dated 18th August 1989 to set aside the judgement. It was supported by an affidavit of 3rd August 1989. That matter came before the Judge on 29th September 1989 and His Lordship gave judgment on 17th November 1989 and the order was entered on 22nd November 1989.

The Plaintiff/Appellant purported to appeal to this court from the Interlocutory Judgment setting aside the original order. For that application, leave is required (See Section 12(2) of the Court of Appeal Act). No leave was sought either from a judge or from this court until the matter was raised by us at the commencement of these proceedings.

Counsel for the appellant/plaintiff then sought leave to appeal, pursuant to what he claimed was the inherent jurisdiction of this court. Notwithstanding the absence of any summons or affidavit to support leave to appeal, we decided that without granting leave, we should allow Counsel to argue the grounds as to why the appeal should be allowed, on the basis that we would make a determination about leave after we had heard his submissions. Quite obviously, serious questions of fact are to be tried if the matter comes to a hearing. The whole proceedings and this appeal were unfortunately generated by the mistake of the solicitor, a mistake of which the plaintiff/appellant wished to take advantage.

The Judge had all that in mind for he ordered, when setting aside the judgment, that the defendant pay all the costs occurring or incurred by this mistake.

Having heard the submissions of Counsel for the appellant, we have reached the conclusion that His Lordship made no mistake.

The Appellant seeks to rely on one statement in the short judgment of the learned Judge. In paragraph 2 of his judgment dated 17th November, the learned Judge says this:-

> " The defendant has now made the application to have that judgment set aside.
>
> In its defence the defendant states that the plaintiff is not authorised to do the work on certain roads - this purports to show it has a defence".

The plaintiff argues that because of a letter which is set out in the record and to which we have been referred, approval appears to have been granted for the particular work involved by the defendant and therefore His Lordship was in error when he stated that it was not authorised to do that work.

But the question of whether that approval was ever properly granted had been argued before His Lordship. What appears on page 102 of the record is a reference to this same letter and the reliance or purported reliance of the plaintiff/appellant upon its contents.

The record states this:-

> " Vijay Prasad wrote the letter on instruction of the Mayor. There is collusion among the councillors. Mayor's affidavit is suspect. No question of buying time. Condition of setting aside should not be allowed".

It is quite clear that it was put to His Lordship that there was no authorisation because of the events which had occurred, which would have vitiated any apparent authorisation and which would have rendered any such authorisation nugatory.

Following this argument and those submissions, His Lordship says:

" In its defence the defendant states that the plaintiff is not authorised to do the work".

And quite clearly that is the defence which is being raised and which was alluded to before His Lordship.

There is no reason in our view therefore, why the appeal against the order setting the judgment aside should succeed and therefore we do not propose to grant leave to appeal. There is no appeal therefore, but for abundant caution, we believe, we should make an order that the appeal should be dismissed.

It maybe that there is an injunction in operation from the original order that His Lordship made. But that is an injunction which restrained any further execution on the original judgment. That judgment has been set aside by His Lordship and that has been confirmed in effect by this court, therefore, there is no need to make any order on the matter of the injunction.

The learned Judge's order will therfore stand.

Up to the stage when the learned Judge set aside the order granting judgment to the plaintiff, he took into account that the defendant's solicitor had been at fault and made orders to rectify that position, so far as he could.

The plaintiff sought to take advantage of the situation by bringing a further appeal to this court or attempting to do so.

In the circumstances which we have outlined in the judgment of the court, we feel that the proper order for costs is that the defendant's costs occasioned by this appeal should be its costs in the proceedings.

Leonard Mckenzie

PRESIDENT