IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

MISCELLANEOUS ACTION NO. 3 OF 2012
(High Court HBC 222 of 2005)

BETWEEN : **GHIM LI FASHION (FIJI) LIMITED**

Appellant

AND : **BA TOWN COUNCIL**

Respondent

Coram : **Almeida Guneratne JA**

Counsel : **Mr. I. Fa for the Appellant**
Mr. A. R. Narayan for the Respondent

Date of Hearing : **13 November 2014**

Date of Ruling : **24 November 2014**

PRELIMINARY RULING

Some Preliminary Comments

[1] This matter arises out of an application made under Section 20(1)(b) of the Court of Appeal Act (Cap. 12 as amended). The matter had been originally listed for hearing on the 11th November, 2014 but later changed to 13th November by the Registry.

[2] Although the lawyers for the Respondent had had some difficulty to appear on that date, Mr. Narayan informed me at the commencement of this hearing that, out of deference to Court he had made alternate arrangements and he was ready to argue the matter, although, I, for my part, was inclined to re-fix the matter for hearing, but on a date within the current Court of Appeal sessions.

[3] I wish to place on record that, it is this kind of professional commitment that helps to maintain that essential relationship between the bench and the bar which is in turn essential for the administration of justice.

What occasioned the present ruling

[4] Proceedings having commenced, Mr. Fa, Counsel for the Petitioner, at the outset submitted that, he was moving to withdraw grounds 2, 3 and 4 (other orders of the impugned High Court judgment being consequential) contained in the Notice of Appeal which application was accepted by me, whilst taking note of Mr Narayan's (Counsel for the Respondent) interjection that, for that reason, the objections he was desirous of raising in regard to the said grounds would not be urged.

[5] It is true that, Mr. Fa, having said that, he was withdrawing grounds 2, 3 and 4 later submitted that he wished to revive the same which was strongly objected to by Mr. Narayan. He submitted that, Counsel cannot be permitted to change his mind at his whim and fancy. However, Mr. Narayan did not base his objection on any specific legal principle although it did carry the trappings of the functus principle in as much as he appeared to suggest that, I had already accepted Mr. Fa's aforesaid withdrawal.

[6] It is on that premise that I decided to proceed and make a ruling on the matter.

Limits of the *functus* principle

[7] It is to be noted that, I made no order on the initial withdrawal by Mr. Fa in keeping with the practice of this Court in not making bench orders. Submissions were ongoing. In those circumstances I do not think that, there was any impediment for Mr. Fa to revive those grounds and make submissions thereon. Nothing happened even remotely close to rendering the Court functus in so far as Mr. Fa's initial said withdrawal was concerned although I am compelled to say, agreeing with Mr.

Narayan that, Mr. Fa, not being able to make up his mind, did consume the time of Court.

Ruling on Counsel's submission to restore the original withdrawn grounds 2, 3 and 4

[8] Accordingly, I rule that, Mr. Fa is free to urge and make submissions on the said grounds 2, 3 and 4 contained in the original Notice of Appeal.

[9] I note here that, upon that initial withdrawal on the part of Mr. Fa, Mr. Narayan was heard to submit that, he had certain preliminary objections to the said grounds and it was in consequence of the said withdrawal that, he was relieved from making submissions thereon.

[10] In the result, upon Mr. Fa's retraction from the earlier withdrawal, no prejudice would be caused to Mr. Narayan or his client for he is free now to urge those objections to the said grounds 2, 3 and 4 contained in the Notice of Appeal.

Re : The Application to amend the Grounds Contained in the original Notice of Appeal

[11] This application was made in the course of proceedings by Mr. Fa and Mr. Narayan objected to the same on the ground that, such an amendment cannot be done and should not be permitted because there is a procedure laid down by the law in that respect.

The Law Relating to Amending the Grounds urged in a Notice of Appeal

The Court of Appeal Act (as amended) – Section 20(1)(c)

[12] Section 20(1)(c) confers power on a single Judge of the Court of Appeal "to give leave to amend a notice of appeal or respondent's notice."

[13] There is nothing in that Section that circumscribes or limits the power of a single Justice of Appeal in granting leave to amend a notice of appeal with reference to any time frame or any stage at which the same could be permitted.

The Court of Appeal Rules – Rule 20(1)(a)

[14] In fact it is that omission in Section 20(1)(c) of the Parental Act, even if one were to regard it as an omission that has been supplied in Rule 20(1)(a) which provides that:

> *"20(1)(a) A Notice of Appeal ... may be amended by or with the leave of the Court of Appeal, at any time."*

[15] However, the said Rule makes reference to the Court of Appeal (the full Court) to permit an amendment "at any time".

What then ought to be the principle that ought to be followed and applied in such a situation?

[16] If one were to read Section 20(1)(c) of the Parent Act it does not in express terms confer the power on a single Justice to permit an amendment to the Notice of Appeal "at any time," whereas Rule 20(1)(a) purports to confer that power on the "Court of Appeal" (the full Court).

[17] Could a broad and untrammelled power conferred on a single Justice by the legislature with no reference to a time frame or any stage at which that power may be exercised be taken away by a Rule?

Higher Norm as against a Subsidiary Rule

[18] Section 20(1)(c) of the Court of Appeal Act being the higher norm I have no hesitation in holding that, that provision has to prevail over Rule 20(1)(a) of the Court of Appeal Rule, being subsidiary to the said statutory provision in Section 20(1)(c) of the Parent Act.

Need to obviate protracted proceedings

[19] It is a time honoured principle in jurisprudence that, "Justice delayed is Justice denied" and if I were to adapt a different approach it would result in just that – the Petitioner having to move to invoke the jurisdiction of the full Court of Appeal to amend his Notice of Appeal.

Would the ends of Justice be achieved in the proposed approach adapted by me as a Single Judge of Appeal?

[20] Appellant's Counsel's application is to add reference to a consequential order made by the High Court which is dated 7th December, 2011, the reference in the initial ground 1 of Notice of Appeal being only to an order dated 17th November, 2011.

[21] I am struck by the principle that, it is incumbent upon any Court to adjudicate and arrive at a judicial determination on the real dispute between the parties for which reason, unless the law prohibits a proposed course of action a Court must permit it.

What is not prohibited must be permitted

[22] As a matter of general principle prohibitions cannot and indeed must not be presumed. As held in the Indian Supreme Court decision in *Narasingh Das v. Mangal Dubey* [1983] 5 Allahabad 16:

> *"Courts and Tribunals must not ... act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for ... but on the converse principle that every procedure is to be understood as permissible. ..."*

[23] Section 20(1)(c) of the Court of Appeal Act does not prohibit or limit a Single Court of Appeal Judge's power to permit an amendment of a Notice of Appeal.

[24] It is a legislatively conferred power which implies discretion.

[25] Rule 20(1)(a) of the Court of Appeal Rules that confers on the Court of Appeal (full Court) to permit such an amendment therefore cannot be construed as a provision that takes away that discretion.

[26] There is no reason to even involve the maxim *expressio nullius* in that context for the said Rule is subsidiary in nature to the said provision in the parental Act.

[27] In the view I have taken, I found nothing that offends the same in the Civil Procedure Decree or any other enactments.

[28] However, I have now to examine Rule 20(2) of the Court of Appeal Rules which states thus:

> *"20(2) A party by whom a supplementary notice is served under this rule, shall within, two days after service of the notice, furnish copies of the notice to the Registrar."*

[29] Interpreting this Rule, the full Court has held in *Attorney General v. Graham Burnett* [2012] ABU23/09, 21st March, 2012 that, "If it is necessary to amend a Notice or grounds of appeal, amendments should be made consistent with this rule." (per Calanchini, A.P. with the other two justices agreeing).

[30] That rule from its clear terms refers to the Court of Appeal (full Court). If it is empowered to amend a Notice of Appeal "at any time" (which would mean that it could be done in the course of proceedings), then proceedings would have to stop to enable a party to comply with the other steps contemplated therein (i.e. Rule 20(2)), before proceeding further with the matter.

[31] The matter does not end there for two further questions arise for consideration.

[32] The first is, does a party have the right to move a Single Judge under Section 20(1)(c) of the Parent Act as well as the full Court under Rule 20(1)(a) read with Section 13 of the Parent Act which decrees that,

> *"For all the purposes of and incidental to the hearing and determination of any appeal under this Act and the amendment, execution and enforcement of any order, judgment or decision made thereon, the Court of Appeal shall have all the power, authority and jurisdiction of the High Court and such power and authority as may be prescribed by rules of Court"?*

[33] The second is, assuming it to be so, does it mean then, whilst the Court of Appeal (full Court) is subject to Rule 20(2), a single Judge is not subject to those procedural steps contemplated by the said Rule on the basis of the untrammelled jurisdiction conferred upon it under Section 20(1)(c) of the Parent Act?

Need for legislative intervention

[34] I think this leads to an anomalous situation which the legislature ought to in its wisdom address its mind.

The procedure adapted must be followed with caution

[35] It is often said that, each case will depend on the peculiar facts and circumstances of that case.

[36] In the instant case, the amendment sought is to add a consequential order as observed earlier which, in my view, justifies the course of action I have pursued.

[37] However, there may arise situations that, that may not be possible. A single judge may well have to adapt a procedure on the analogy of the procedure contemplated in Rule 20 of the Court of Appeal Rules.

[38] Indeed the course of action adapted by me should not be understood to mean that, in every case amendments would be allowed *simpliciter*.

Conclusion

[39] In the absence of any specific procedure laid down in the Court of Appeal Act or the Court of Appeal Rules, applicable to a single judge I rule and proceed to make order permitting the Appellant to amend Ground 1 in the exercise of discretion by adding the impugned order dated 7th December, 2011 on the face of the Grounds urged in the original Notice of Appeal, however, with no other amendments.

[40] I make further order that, the matter of the application for leave to appeal to proceed on that basis.

[41] In all the circumstances, I make further order that the Appellant pay the Respondent a sum of $250.00 as costs of the event which shall be added to or deducted from, as the case may turn out to be in the ultimate determination in the leave to appeal matter.

Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL