IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

Civil Appeal No. ABU 105 of 2016
(High Court Civil Appeal 31 of 2013)

BETWEEN : **ENGINEER PROCURE CONSTRUCT (FIJI) LTD**
Appellant

AND : **SIGATOKA ELECTRIC LIMITED**
Respondent

Coram : **Hon. Justice Almeida Guneratne, JA**

Counsel : **Mr. P. Sharma for the Appellant**
Mr. Z. Mohammed for the Respondent

Date of Hearing : **08 February, 2017**

Date of Ruling : **22 February, 2017**

RULING

[1] This is an application by way of inter partes summons seeking leave to appeal and enlargement of time against the Judgment of the High Court at Lautoka delivered on 29th August, 2016 in Civil Appeal No. 31 of 2013.

Background History to the Application in Chronological Order

[2] On a summary Judgment application by the Appellant, the Master of the High Court entered Judgment dated 13th November, 2013 against the Respondent and *interalia* ordered the remainder of the claim contained in the said summary judgment to take its normal course.

[3] The Respondent appealed against the judgment of the Master to the High Court.

[4] The Appellant took objection to the said appeal on the basis that, the Master's judgment was interlocutory and that the Respondent was required to first apply and obtain leave of a Judge of the High Court to appeal.

[5] Thereafter certain intervening events took place which I think is not necessary to go into.

The High Court Judgment

[6] The High Court delivered its Judgment which is presently in issue on 29th August, 2016 setting aside the summary Judgment entered on 13th November, 2016 by the Master referred to above on the ground that there had been non-service of the writ of summons on the Respondent's registered office as required by Section 391(1) of the Companies Act when the Appellant had obtained the said Summary Judgment of the Master.

[7] On 15th September, 2016, the Appellant filed an Inter-Partes Summons in the High Court seeking leave to appal the said Judgment of the High Court dated 29th August, 2016.

[8] However, on that date, Counsel for the Appellant having moved to withdraw the said summons the Learned High Court Judge had made order thus:

"On your application Counsel this summons is withdrawn and dismissed."

[9] The said withdrawal of the summons and the ensuing order had been apparently for the reason that, the Appellant's Summons and Affidavit had misdescribed the name of the Appellant's Company. The Appellant was heard to submit that, the High Court *"struck out"* the application in question which the learned Counsel for the Respondent submitted as amounting to a *"wilful misrepresentation."*

[10] However, two questions that impact on the present application are:

(i) The Appellant's Counsel withdrew the application which was before the High Court on 15th September, 2016. Although that could not have resulted in a dismissal of the said application having regard to Order 2 and the rules prescribed thereunder of the High court Act and Rules, (Cap 13A) nevertheless, could the Appellant have moved a single judge of the Court of Appeal in seeking leave to appeal and enlargement of time to so appeal without having first rectified that problem in the High Court?

(ii) The Appellant not having done that, could it have moved a single judge of the Court of appeal on the argument advanced by the learned Counsel for the Appellant that, the said order of 15th September, 2016 was based on an assumed and a wrong premise?

<u>In search of harmony between rules of procedure and an answer to a practical problem that has arisen in this case.</u>

[11] Those were the initial issues I was confronted with but the present application before me being an application for leave to appeal and enlargement of time, the main focus at the hearing before me was as to whether the Appellant's said application is misconceived.

[12] That brings me to deal with the several grounds on which the learned Counsel for the Respondent resisted the present application which I shall now recount viz;

(a) That, the Judgment of the High Court dated 29th August, 2016 is final and not interlocutory and therefore the present application in seeking leave to appeal out of time is misconceived, and that the Appellant should have gone by way of a direct appeal to the full Court.

(b) That, the Appellant not having moved the High Court to have the summons amended to cure the misdescription referred to above, it was not open for the Appellant to move the Court of Appeal in asking leave to appeal against the said Judgment dated 29th August, 2016.

[13] While the above matters urged by the Respondent were of a preliminary nature against the prosecution of the present application, learned Counsel further submitted that, the failure on the part of the Appellant to have served at the Registered Office the writ of summons which resulted in the summary judgment of the Master was fatal to the Appellant's present application.

[14] I shall now proceed to deal with the aforesaid matters *in seriatim*.

Re: <u>The objection that the impugned Judgment is a final one and therefore the Appellant should have gone to the Full Court of Appeal by way of a direct appeal</u>

[15] Although the Respondent has taken up that objection, I cannot help but make the observation that, if it was convinced that the impugned Judgment is a final one, it had the option to have the present application struck out on the basis that, the Appellant should have gone by way of a direct appeal.

[16] On the other hand, notwithstanding the fact that the Respondent had not pursued that option, the question is whether the Appellant's application in seeking leave to appeal is

liable to be rejected on the argument that, it ought to have moved the full court by way of a direct appeal.

Cannot a party waive a legal right conferred on him which provided a direct appeal? - Assuming a direct appeal was available as Respondent's Counsel submitted?

[17] I am of the view that a party can and in saying that, I say so, without the necessity to go into the question as to whether the judgment of the High Court is in the nature of an interlocutory or final one.

Law is the dictate of reason

[18] Law is the dictate of reason, and it is irrational to say that one has no right to seek leave to appeal for no other or better reason than one has a right to appeal. He to whom the greater is lawful ought not to be debarred from the less on the basis that it is unlawful. (**Non debet Cui plus licet quod minus est non licere**).

[19] It is to be observed that, although the right of appeal is not a matter of procedure and is substantive, the procedure for filing an appeal is procedural. Procedural rules are meant to promote the ends of justice and not to thwart it. The right of appeal is the greater right in relation to the right to make an application for leave to appeal.

[20] To elaborate on that principle, the right of appeal is a right that one already has whereas in an application for leave to appeal one is only asking for that right to be exercised. A right of appeal is a vested right and is larger than an incohate, if not, no right. It would be irrational to say that one loses a lesser right because one is entitled to a greater right unless one is expressly prohibited from seeking the lesser right for the lesser right is subsumed under the greater right. Prohibitions are not to be presumed and there is no such prohibition in the Court of Appeal Act and the Rules made thereunder (Cap. 12).

<u>What is not prohibited must be deemed to be permitted. That is an inveterate principle which is a rudiment of the Law</u>.

[21] I think that sometimes it results in injustice if one were to interpret the law in an overly technical sense. Courts are Institutions of Justice and not Academies of law.

[22] For the aforesaid reasons, the preliminary objection raised by the Respondent to the effect that the present application for leave to appeal cannot be entertained by this Court is overruled.

[23] On account of the view I have taken in regard to the Respondent's aforesaid objection the need to determine whether the impugned Judgment is interlocutory or final does not arise.

Re: <u>The objection that, having withdrawn the Summons, the Appellant not having moved the High Court to have the Summons amended to cure the misdescription, it was not open for the Appellant to move this Court to ask for leave to appeal against the impugned Judgment of the High Court dated 29th August, 2016.</u>

[24] In that regard, Respondent's Counsel hinged his contention on <u>Rule 26(3)</u> of the Court of Appeal Rules which states:
"Wherever under these Rules an application may be made whether to the Court below or to the Court of Appeal it shall be made in the first instance to the Court below."

[25] Interpreting that Rule as he did, learned Counsel for the Respondent submitted that, once that application was withdrawn by the Appellant's Counsel, there was no application before the High Court as contemplated by Rule 26(3) and that, the proper course was for the Appellant to have filed a fresh application in the High Court.

[26] In that regard, my own view is that, when that initial application was made by the Appellant the requirement contemplated by Rule 26(3) had been met. The Appellant

was not able to proceed with the same on account of a mere technical defect. To say that, the said defective application, when it was withdrawn, amounted to a *"non-application"* amounts to defying language and logic. Whether the Appellant had taken steps to have that defect cured and how fatal was it to the prosecution of the present application is not a matter for me to decide in this application.

[27] I have paid due regard to the several provisions contained in Order 2 and the Rules made thereunder of the High Court Act (Cap 13A).

[28] Accordingly, for the aforesaid reasons I overrule and/or reject the aforesaid objection as well.

The Resulting Issue to be looked into

[29] Consequently, the remaining question to be determined is whether, on the applicable criteria, the present application for leave to appeal and enlargement of time is entitled to succeed.

The criteria a Single Judge of the Court of Appeal is required to look into and determine on

[30] The said criteria are well established in the Fijian jurisprudence viz; (i) the length of delay, (ii) reasons for the delay, (iii) the relative prejudice to the competing parties and (iv) as to whether there is an arguable issue and/or there are meritorious grounds to be looked into.

The Decisive Criterion

[31] These criteria have been gone into in several decisions by the Supreme Court and the full Court of Appeal which I have cited in a number of rulings sitting as a single judge. To

cite some, I may refer to: **Abdul Munaf –v- Tahir Hussain & Another** (Civil Appeal No.ABU 0014 of 2016, 26 September, 2016) and **Nilesh Shalen Singh & Another v. Mohammed Khaiyub & 2 others** (Civil Appeal No.09 of 2014, 5th December, 2014).

[32] On a perusal of the said precedents I find that, notwithstanding the length of the delay, the reasons for the delay, the prejudice to the parties concerned, the decisive criterion has been as to whether there is merit in a substantive sense to be considered to grant leave to appeal and allowing enlargement of time.

[33] I now look to see whether there are arguable issues in the present application preferred by the Appellant in seeking leave to appeal notwithstanding the lapse of time.

And what are the arguable issues in the context of the impugned judgment of the High Court dated 29th August, 2016?

[34] Simply stated, to my mind it is whether, the Appellant's application was liable to be rejected for failure to serve the initial Summons referred to above as contemplated by Section 391(1) of the Companies Act or whether the said service, having regard to Order 10(1)(4) of the Rules of the High Court, was in good order.

[35] In that regard, I appreciate and wish to place on Record the timely response on the part of both Counsel in tendering further written submissions to enable me to come to a decision.

Section 391(1) of the Companies Act (1983) vis a vis Order 10(1)(4) of the High Court Rules (Cap 13A of 1988)

[36] **Section 391(1)** of the Companies Act states:

> *"A document may be served (the emphasis is mine) on a Company by sending it by post to the registered postal address of the Company in Fiji, or by leaving it at the registered office of the Company."*

[37] **<u>Order 10 Rule 1(4)</u>** of the High Court Rules states:

> *"Where a defendant's Solicitor indorses on the writ a statement that he accepts service of the writ on behalf of that defendant, the writ <u>shall</u> (the emphasis is mine) be deemed to have been duly served on that defendant and to have been so served on the date on which the indorsement was made."*

<u>The matters that warrant consideration</u>

[38] To begin with, the provision in the Companies Act is couched in discretionary terms whereas the provision in the High Court Rules is mandatory in nature, thus leaving room to argue that a plaintiff is given two options, the Appellant in the instant case having opted for the requirement stated in the High Court Rules.

[39] The next issue to ponder on is, the provision in the High Court Rules being later in time (1988), the provision in the Companies Act being in 1983, whether the provision in the later enactment ought to prevail.

[40] Nevertheless, notwithstanding the considerations articulated at paragraphs [38] and [39] above, the Companies Act being a special statute relating to registered Companies, whether there was a particular intent on the part of the legislature in enacting the Companies Act warranting the invocation of the principle ***<u>"generalia specialibus non derogant</u>***"

[41] In the result, I am of the view that, the issues raised in paragraphs [38] to [40] taken together with what I have articulated at paragraphs[10], [26] and [27] above, the present application for leave to appeal and enlargement of time raise arguable issues for the full Court to go into and determine on.

Conclusion

[42] Accordingly, I grant leave to appeal (and allow enlargement of time) against the impugned Judgment of the High Court dated 29th August, 2016.

[43] In pursuance of the powers conferred on me under Section 20(1)(e) of the Court of Appeal Act, I also grant an order for stay of execution and all other proceedings arising out of the setting aside by the judgment of the High Court dated 29th August, 2016 of the summary judgment entered by the Master on 13th November, 2013.

[44] Before I part with this Ruling I feel obliged to acknowledge the fair manner in which both Mr Sharma (for the Appellant) and Mr Z. Mohammed (for the Respondent) made their submissions.

Orders of the Court

(a) Application for leave to appeal and enlargement of time to appeal is allowed;

(b) Stay of execution and all other proceedings arising out of the setting aside by the judgment of the High Court dated 29th August, 2016 of the summary judgment entered by the Master on 13th November, 2013 is granted;

(c) The Registrar of this Court is directed to list this matter before the Honourable President on a callover date to enable His Lordship to list the hearing of the Appeal before the full Court;

(d) Having regard to the totality of the circumstances of the present matter, I make only an order for nominal costs in the sum of $500.00 which the Respondent shall pay within 21 days of this Ruling to the Appellant.

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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL