

**IN THE COURT OF APPEAL, FIJI**  
**[On Appeal from the High Court]**

**CIVIL APPEAL NO. ABU 0011 of 2023**  
**[Suva Civil Action No: HBC 268 of 2008]**

**BETWEEN** : 1. **INTERIOZ & EXTERIOZ ENGINEERING and**  
**CIVIL WORKS LIMITED**  
2. **KALPESH KUMAR PATEL**

**Appellants**

**AND** : 1. **ABDUL ALEEM**  
2. **ABDUL SHAHEEM**

**Respondents**

**Coram** : Dr. Almeida Guneratne, P

**Counsel** : Ms S Devan for the Appellants  
Mr A. K. Singh for the Respondents

**Date of Hearing** : 21<sup>st</sup> June, 2023

**Date of Decision** : 14<sup>th</sup> August, 2023

**DECISION**

[1] This is an application by the Appellants seeking an “*interim injunction*” pending the appeal they have filed against the order of the High Court striking out the Appellants’ claim in consequence of it refusing an adjournment of the trial.

### **The Impugned Order of the High Court**

- “1. *Application for adjournment refused.*
2. *No other witnesses for Plaintiff are present.*
3. *The application for adjournment was made on the eve of the trial and the Plaintiff has not been ready.*
4. *Plaintiff's claim is struck out with cost of \$5,000.00 to the Defendant and \$3,500.00 (is) wasted cost to Court.*
5. *Counter Claim is struck out.”*

[2] When the matter first came up before me, in response to a question raised by Court as to whether the application could be entertained by Court, Ms Devan (for the Appellants) moved to consider the matter while submitting that she was relying on the provisions of Section 20(1)(e) and (k) of the Court of Appeal Act.

[3] Thereafter, on a subsequent mention date, the Appellants’ Counsel having expressed the view that, the summons referred to in paragraph [1] above could be maintained (Respondents’ Counsel having opposed the same), Court directed parties to file written submissions.

### **The Appellants’ submissions**

[4] The Appellants’ submissions may be summarized as follows:

- (a) The 1<sup>st</sup> Appellant Company’s property that was the subject of the High Court action is sought to be disposed of by the Respondents (as averred by the 2<sup>nd</sup> Appellant in paragraph 36 of his affidavit dated 9<sup>th</sup> May, 2023). If the said property is not preserved the Appellants’ appeal will be rendered nugatory;

- (b) The basis on which the High Court in its impugned order struck out the Appellants' action was that no proper grounds to vacate and adjourn the trial had been made out by the Appellants;
- (c) The appeal against that order is pending and the costs ordered by the High Court also have been paid;
- (d) Due to the nature of the orders made by the High Court there is no order that can be now stayed;
- (e) There are strong prospects of success in appeal;
- (f) A single judge (of the Court of Appeal) has the power under Section 20(1)(e) "... to make an interim order to prevent prejudice to the claims of any party pending an appeal" and under Section 20(1)(k) "generally to hear any application, make an order or give any direction that is incidental to an appeal . . . ." (in which regard the decision in Flour Mills of Fiji v. Punja & Sons Ltd. [ABU0026 of 1999], 19<sup>th</sup> November 1999 has been relied on).

### The Respondents' submissions

[5] The Respondents have submitted thus (in summary):

- (a) The 2<sup>nd</sup> Appellant who has sworn affidavit in support of the present summons is not a director of the 1<sup>st</sup> Appellant Company and had no authority to swear the said affidavit in the capacity of a minority shareholder;
- (b) The Appellants have not given an undertaking as to damages;

- (c) As required by Rule 26(3) of the Court of Appeal Act (the Act) the Appellants in their present application has not made it in the first instance to the Court below (the High Court).
- (d) *Re*: the issue of jurisdiction of a single judge to entertain the summons filed by the Appellants and to grant or not the order sought therein, the Respondents have linked to (c) above.

### **Discussion on the competing submissions of the parties**

#### **On the Affidavit of the 2<sup>nd</sup> Appellant**

- [6] Even if the 2<sup>nd</sup> Appellant is not to be regarded as a director, the Notice of Appeal has been filed jointly by both the 1<sup>st</sup> and 2<sup>nd</sup> Appellants and signed by Solicitors in common to both. Therefore, I cannot agree with Respondents' Counsel's submission on the authority (or right) of the 2<sup>nd</sup> Appellant to have affirmed the affidavit in issue. I hold that the first hurdle (as the Respondents called it) was cleared.

#### **Re: The absence if an undertaking as to damages**

- [7] While I have no quarrel with the Supreme Court decision in **Wakaya Limited v. Kenneth Chambers & Another** [2012] 2 FLR 76, and the Court of Appeal decision in **Natural Waters of Viti Ltd. v. Crystal Clear Mineral Water (Fiji) Ltd** [2004] FJCA 59, given the description of the property in question, should the Appellants lose the appeal, *ipso facto* the Respondents would get title to the said property. Thus, the particular circumstances and facts in those precedents stand distinguished from the present case.

- (c) In regard to the applicability of Rule 26(3) of the Act, an exception to its application is where “*exceptional circumstances*” could be shown. On their own showing “there was an injunction against the Respondents since the year 2008 and it was dissolved when the action was struck out.” However, what has to be borne in mind

is, the action was struck out not on merits but for the reason that, the Appellants were not ready for trial on the scheduled date and “*exercising its discretion*” the Court struck out the Appellants action. It is the very exercise of discretion that the Appellants have put in issue in their notice (and grounds) of appeal as having “*prospects of success*” which grounds of appeal I reproduce below.

### **The Grounds of Appeal**

- “1. ***THE Learned Trial Judge erred and/or misdirected himself in law and in fact by refusing to grant an adjournment of trial to the Appellants.***
2. ***THE Learned Trial Judge erred and/or misdirected himself in law and in fact by:***
  - (i) *failing to consider the medical reports and ill-health of the second Appellant.*
  - (ii) *failing to consider that the Respondents would suffer no prejudice by an adjournment and if they did, such prejudice could be reduced by an award of costs.*
  - (iii) *Failing to consider that the within proceedings was a derivative action filed by the Appellants and the second Appellant was a key and material witness for the Appellants as he was a shareholder and Director of the first Appellant Company.*
  - (iv) *Failing to consider that the Appellants second witness was on standby to give evidence although not physically present in Court.*
  - (v) *Failing to consider that this was the first occasion on which the Appellants had applied for an adjournment of hearing.*
3. ***THE Learned Trial Judge Judge’s refusal to grant an adjournment in the circumstances constituted a miscarriage of justice.***
4. ***THE Learned Trial Judge’s decision is wrong and erroneous and tantamount to a wrongful exercise of discretion having regard to all the facts and circumstances of the case and evidence on the whole.”***

[8] Consequently, the cases cited by the Respondents all stand distinguished from the present case. They all dealt with “*stay orders*” in the context of “*injunctions*” and where merits had been involved. A clear instance where a party was necessarily required to go before the Court of first instance is provided in the case of **Peter W. Butt v. Ian Gilbert Burness and Another** [1994] FJCA 94, 27<sup>th</sup> January, 1994. In that case it was said that Rule 26(3)

“... is an eminently desirable Rule particularly where an appeal against a consent order is contemplated because the judge making the consent order will be acquainted with the circumstances in which it was made” (per Tikaram JA).

- [9] On the opposite side of that rationale, I cannot say it would have been desirable to go before the same Court that was acquainted with the circumstances in which the action was struck down for the reason that the plaintiffs (appellants) were not ready for trial on the scheduled date and therefore to seek “*a stay*” of that striking out order from the lower Court.

**Section 20(1)(e) of the Act must prevail over Rule 26(3)**

- [10] In any event, Rule 26(3) being subordinate legislation to Section 20(1)(e) contained in principal legislation, even if there is found to be an inconsistency in the two provisions the will of the legislature must prevail over Rule 26(3).

- [11] In the result, while I hold that, the grounds of appeal constitute grounds having reasonable prospects of success in appeal a single judge has jurisdiction in terms of Section 20(1)(e) to grant an “*interim order to prevent prejudice to the Appellants pending their appeal.*”

- [12] The Respondents’ in their submissions have submitted (respectively at paragraphs 14 and 19 therein) that,

(a) “*Applicant is asking for an injunction on a matter that had been struck out. The Court cannot grant an injunction until and unless an action is on foot.*”

(b) “*... where the proceeding is on foot, (is) (the interpolation is mine) when in the Court of Appeal, an application for a stay should be made.*”

- [13] I agree with that contention as constituting general propositions except that, the Respondents seem to suggest that, the Appellants should have instituted a separate action for the reliefs they are seeking.

- [14] But, although the Appellants in the caption and Order 1 in their summons refer to an “*interim injunction*,” the legal basis of their application is clearly indicated in stating that:
- “This application is made pursuant to Section 20(1)(e) and (k) of the Court of Appeal Act of Fiji.”***
- [15] Furthermore, in the Order 2 sought in their summons, the Appellants have prayed or moved “*for such further or other order(s) that this Honourable Court may deem just and expedient or necessary in the circumstances.*”
- [16] This Court cannot grant an “*interim injunction*” (Order 1 sought), but it can grant other order(s) (Order 2 sought) in granting an interim order pursuant to Section 20(1)(e) of the Act for it deems just and expedient to do so as being necessary in the circumstances, pursuant to Section 20(1)(k) of the Act as well, if only to avoid protracted and multiplicity of litigation, in the same terms as sought in Order 1 of the summons in as much as Section 20(1)(k) is an express incorporation of the concept of the inherent powers of a Court. The words employed therein are “*make any order.*”

#### **What is inherent power of Court?**

- [17] It has been said that powers inherent in a Court are the powers by the very fact of it being empowered to exercise any jurisdiction at all (Mohammed Aslam on the Indian Civil Procedure – Legal Service of India – E Journal).
- [18] For the aforesaid reasons I cannot subscribe to the Respondents’ contention referred to above.
- [19] I also gave my mind to the averment made by the 1<sup>st</sup> Respondent in an apparent rejoinder to what the 2<sup>nd</sup> Appellant in his affidavit of 9<sup>th</sup> May, 2023 had averred which I have referred to in para 4(a) above.
- [20] The 1<sup>st</sup> Respondent in his affidavit dated 29<sup>th</sup> June, 2023 has averred thus:

“35. The Appellant, in its application, alleges that it has come to their attention that I am intending to sell the property. Firstly, the said allegation is baseless and is mere speculation by the 2<sup>nd</sup> Appellant to mislead the court. Secondly, one wonders who would be interested in purchasing a property that has been turned into a dump yard and has been substantially vandalized.”

[21] If that be the case what prejudice would be caused to the Respondents if the *status quo* was to be preserved until the determination of the Appeal?

[22] It follows then that, the balance of convenience clearly lies in favour of the Appellants.

[23] For the aforesaid reasons, I proceed to make my orders as follows.

**Orders of Court:**

- 1) *Though (not an interim injunction) an interim order is granted on the basis of Order 2 of the summons in the terms sought in Order 1 of the summons pursuant to Section 20(1)(e) read with (k) of the Act.*
- 2) *There shall be no costs.*



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**Hon. Justice Almeida Guneratne**  
**PRESIDENT, COURT OF APPEAL**

**Solicitors:**

Neel Shivam Lawyers for the Appellant

A.K. Singh Lawyers for the Respondent