

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

**CIVIL APPEAL NO. ABU 0003 of 2023**  
**[High Court Civil Action No: 101 of 2021]**

**BETWEEN** : **SAMBHU LAL CONSTRUCTION (FIJI) LIMITED** *Appellant*

**AND** : **FIJI NATIONAL UNIVERSITY** *Respondent*

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

**Counsel** : **Mr A.K. Singh for the Appellant**  
**Mr V. Kapadia for the Respondent**

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

**Date of Decision** : **4<sup>th</sup> September, 2023**

**DECISION**

**Essential Background Content**

[1] By Notice of Appeal dated 9<sup>th</sup> February, 2023 the appellant appealed the decision of the High Court dated 20<sup>th</sup> January, 2023 wherein it held as follows:

*“30. a) I stay these proceedings and make order that the dispute between the parties be referred for arbitration.*

- b) *I decline the summons filed by the Plaintiff to cross examine Professor Toby Wilkinson, Vice Chancellor of the Defendant on his Affidavits of 6<sup>th</sup>, 9<sup>th</sup> and 22<sup>nd</sup> April 2021.*
- c) *I decline the Plaintiff's Amended Notice of Motion filed on 22<sup>nd</sup> March 2021. (The Motion sought that the Defendant deposit sum of \$1,180,439.03 into the ANZ account).*
- d) *The Plaintiff shall pay the Defendant costs summarily assessed in a sum of \$1,500.00 within 15 days of this Ruling."*

[2] The appellant urged the following grounds of appeal against the said decision.

- "1. *That the learned presiding judge erred in law holding that the Defendant had not taken any steps in the proceedings despite the fact that his Lordship accepted that the Defendant had filed a Notice of Intention to Defend.*
- 2. *That the learned presiding judge in law in misinterpreting the requirement, the three-tiered rule under Section 5 of the Arbitration Act.*
- 3. *That the learned presiding judge erred in law in holding that "opposing an injunction" by the Defendants is not a step in the proceedings.*
- 4. *That the presiding judge erred in law in holding that the Defendant was willing to proceed to arbitration regarding the Defendant's intention of encashment of bond even though the Defendant unlawfully encashed the bond after agreeing to have the matter decided by arbitration and thereby depriving the Plaintiff of the right to arbitration for which it invoked notice under clause 42.1.*
- 5. *That the presiding judge failed to comprehend the facts of the case at all in granting a stay of the proceeding and referring it for arbitration when the subject matter (the construction site or the Plaintiff's bond) is no more available or could be available to the Plaintiff, in the event that the Plaintiff succeeds in the arbitration and or that the Defendant had before the judgment of His Lordship handed the site to another Contractor and thereby depriving the Plaintiff the right for arbitration.*
- 6. *That the presiding judge erred in law when he failed or refused to order an interim stay of the decision of the Respondent whereby the Respondent encashed the Plaintiff's unconditional bond in resulting the Plaintiff's application for interim injunction as being futile or useless."*

- [3] After filing the said appeal the appellant sought to pay security for costs of the appeal but in view of the fact that the respondent had in the meantime filed an application to strike out the appeal the Registrar stayed his hand in making an order for security of costs of the appeal.
- [4] It is in that background that the respondent's striking out application came up before me for consideration and a determination.

#### **The Respondent's striking out application of the appellant's Notice of Appeal**

- [5] The respondent in support of his application to strike out the appellant's Notice of Appeal has urged the following grounds which I shall summarise as follows:
- (i) The earlier rulings of the High Court, and the impugned judgment (Ruling) dated 20<sup>th</sup> January, 2023) are all interlocutory in nature.
  - (ii) Accordingly, as mandated by Section 12(2)(f) of "*the Act*," leave had to be obtained to appeal.
  - (iii) "*Stay decisions*" also being in issue, by reason of Rule 6 of the Act read with Order 18 Rule 18 of the High Court Act (Rules) leave was required. (vide: respondent's written submissions dated 7<sup>th</sup> July, 2023).

#### **The Appellant's response in opposing the striking out application**

- [6] The appellant's response may be summarized as follows:
- (a) That the dispute between the parties being based on contract, submission to arbitration being a condition precedent, the Respondent by its conduct having repudiated and having encashed the bond with the ANZ Bank (original 2<sup>nd</sup> Defendant) resulting in the appellant having to terminate the contract, there was no more left to go in for arbitration. Therefore and being aggrieved by the judgment of the High Court that it having the right made a direct appeal to the Court of Appeal.

(b) That, even if the said judgment is to be regarded as interlocutory, this Court could still grant leave (to appeal) to the appellant.

(c) That, submission to arbitration being rendered a non-issue (vide: paragraph(a) above) the appellant's cause of action being locked (thus rendering the judgment of the High Court a final order) the dispute on the alleged contract is left to the High Court to determine sans the arbitration clause contained in the terms of the contract, a crucial factor the High Court had non-directed when it referred to arbitration (paragraph 14 of the appellant's written submissions).

[7] I also took special note of the fact that, the present dispute being one based on a contract, there was a clause (42.1) incorporated in the said contract parties having agreed to go in for arbitration. Notwithstanding that, the respondent is said to have encashed the appellant's bond resulting in repudiation of the contract by the respondent. The respondent is also said to have written to the appellant asking him "*to leave the site*" (which formed a factor in the contract) showing that the respondent had no intention to be bound by the contract. All that had resulted in the appellant, on 4<sup>th</sup> May, 2021 terminating the contract (of 12<sup>th</sup> April, 2021).

[8] It was thereafter on 12<sup>th</sup> November, 2021 the appellant filed a Statement of Claim (admittedly without leave of Court) alleging breach of contract, negligence and for damages.

[9] I pause here to reflect on the appellant's position that the present Notice of Appeal is against the decision of the High Court dated 20<sup>th</sup> January, 2023 which was after it filed the said Statement of Claim dated 12<sup>th</sup> November, 2021, thereby suggesting (impliedly) that, the High Court in its impugned judgment had not addressed the same (including "*the arbitration requirement*").

[10] The appellant argued further that:

- “(a) \_\_\_\_\_ its notice of appeal and grounds of appeal were based on the final decision. On 21 February 2023, it also filed an application in the High Court for a Stay of his Lordship’s decision dated 20 January 2023 and also if that decision is interlocutory, then leave be granted to appeal the said decision.
- (b) the respondent also asked the High Court for it to strike out the appellant’s application for leave to appeal if it is an interlocutory appeal and also for a stay of the decision of his Lordship dated 20 January 2023 and on the ground of it being an abuse of process.
- (c) thus, it is clear that the respondent is asking this Honourable Court to have the appellant’s appeal struck out and on the same token it is also asking the High Court to strike out the appellant’s application for leave to appeal if it is an interlocutory decision and also for an order that the decision of the High Court be stayed pending the appeal in the Court of Appeal.”
- (vide: Appellant’s written submissions)

[11] Subject to and in view of what I have said I felt it necessary to have another look at the Notice of Appeal.

[12] Having done that, the grounds of appeal contained in the Notice of Appeal, grounds of appeal numbers 2 and 4 to 6 are fit matters the appellant was entitled to urge by way of a direct appeal without having to seek leave to appeal against the said impugned judgment of the High Court on the merits of the said grounds.

### **The Law is good, but Justice is better**

[13] While I find the appellant to have been lax in failing to comply with the strict procedural law aspects in not seeking leave to appeal out of time the said impugned judgment of the High Court and having participated in the proceedings thereafter, nevertheless in the exercise of discretion vested in me under Section 20(1)(k) of “the Act”, on a balance, I, while striking out grounds of appeal numbers 1 and 3 urged in the Notice of Appeal, I allow the appellant to proceed with grounds of appeal 2, 4 to 6 before the full Court.

[14] In conclusion, while the oft quoted dictum “*law is good but justice is better*” echoes in my ears, it is my fervent hope that, I have endeavoured to strike in this case a balance.

[15] In saying that, in regard to (a) the nature of the impugned decision of the High Court dated 20<sup>th</sup> January, 2023 and its effect on the rights of parties I refer to and recount here some recent decisions of this Court such as **Prenil Sharma v. Inoke and Others** [ABU0038/2022], 7<sup>th</sup> August, 2023 (single Judge) and particularly the full court decision in **Abinesh Singh and Others v. Rajesh Singh and Others** [ABU0089/2020], 28<sup>th</sup> July, 2023 and (b) the procedural aspects canvassed by the respondent on Section 17 of the Court of Appeal Act (Act) and Rule 27 of the Court of Appeal (Amendment) Rules 2018 (as per Government Gazette No. 22 dated 21<sup>st</sup> June, 2018), for the full Court’s consideration when hearing and determining the appeal.

[16] In the result, I proceed to make the following orders.

**Orders of Court:**

- 1) *The respondent’s application to strike out the appellant’s Notice of appeal is allowed in respect of grounds of appeal 1 and 3.*
- 2) *The respondent’s application to strike out grounds of appeal 2 and 4 to 6 is declined.*
- 3) *The Registrar of this Court is directed to re-activate his inquiry and order security for costs of the appeal which he had stayed until the determination of this Court on the respondent’s striking out application.*
- 4) *The consequential steps shall take its normal course in terms of Rules 17 and 18 of the Appeal Act read with Practice Direction No.1 of 2023.*

- 5) *The Registrar is prevailed upon to make this decision available to the full Court when hearing the appeal.*
- 6) *In view of Orders 1 and 2 above, I make no order as to costs.*



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

**Solicitors:**

A. K. Singh Law for the Appellant

Kapadia Lawyers for the Respondent