

IN THE COURT OF APPEAL
AT SUVA

CIVIL APPEAL NO. ABU 0021 OF 2014
(High Court Civil Action No. HBC 30 of 2014)

BETWEEN : DIGICEL (FIJI) LIMITED *Appellant*

AND : FIJI RUGBY UNION *1st Respondent*

VODAFONE FIJI LIMITED *2nd Respondent*

Coram : Chandra RJA

Counsel : Mr. M. M. Varitimos QC and Ms. M. Muir for the Appellant
Mr. N. Lajendra for the 1st Respondent
Mr. S. P. Sharma for the 2nd Respondent

Date of Hearing : 13 May 2014

Date of Ruling : 23 May 2014

RULING

1. This is an application by the Appellant to have the hearing of the appeal in the May Session of the Court of Appeal.

Factual Matrix

2. The Appellant had filed writ of summons and statement of claim on 31st January 2014 and sought injunctive orders against the 1st Respondent.

3. The learned High Court Judge set down the hearing for 6 February 2014 but since the 1st Respondent had already entered into a sponsorship Agreement with the 2nd Respondent the motion of the 31st January 2014 could not be dealt with.
4. On being granted leave, the Appellant had filed amended notice of motion on 7 February 2014 seeking restraining orders against the 1st Respondent.
5. The 2nd Respondent was made a party by consent as the 2nd Respondent had made an application to intervene on 10 February 2014.
6. The parties had filed affidavits and thereafter written submissions had been filed, and in addition oral submissions had been made regarding the application on the Injunction on 25 February 2014.
7. The learned High Court Judge gave his ruling refusing the application for interim injunction on 13 March 2014.
8. The Appellant filed notice and grounds of appeal on 2 April 2014 and on 3 April 2014 moved that the Appeal be taken up for hearing during the May Session of the Court of Appeal.
9. On 13th May 2014 the application to consider whether the appeal could be taken up for hearing in the May Session of the Court of Appeal was taken up. The Appellant and the 1st Respondent had filed written submission and oral submissions were made by Counsel appearing for all three parties.

Appellate Procedure

10. The Court of Appeal Act and Rules (cap.12) provides the procedure for appeals and an appeal lies against an order of the High Court in terms of section 12.
11. In terms of section 12(2)(f)(ii) leave to appeal is not required where an injunction is refused.
12. In terms of Rule 16 of the Court of Appeal Rules, the notice of appeal shall be filed in the case of an appeal from an interlocutory order within 21 days from the date of the order of the High Court.
13. Within 7 days after the service of the notice of appeal, the Appellant must file a copy endorsed with a certificate of the date the notice was served and apply to the Registrar to fix the amount of the security to be given by the Appellant for the prosecution of the appeal, and or the payment of all such costs as may be ordered to be paid. Rule 17(1). Such costs have to be paid within the time directed by the Registrar. Rule 17(2).
14. Rule 18 sets out the procedure regarding the preparation and costs of record.

"18(1) (a) The primary responsibility for the preparation of the record on the appeal rests with the appellant, subject to directions given by the Registrar.

(b) the Registrar is responsible for the preparation of the transcript of the Judge's notes.

(2) The record consists of the following documents –

(a) the notice and the grounds of appeal;

(b) the respondent's notice (if any);

- (c) any supplementary notice served under Rule 20; the judgment or order of the Court below;*
 - (d) the originating process by which the proceedings in the court below were begun and any interlocutory or other related process which is the subject of the appeal and the pleadings;*
 - (e) the official transcript of the Judge's notes or record, if any, of such of the evidence given in the court below as is relevant to any question at issue on the appeal;*
 - (f) any list of exhibits made under Order 35, Rule 8 of the High Court Rules 1988;*
 - (g) any affidavits, exhibits, or parts of exhibits which were in evidence in the court below and are relevant to any question at issue on the appeal.*
- (3) Before preparing the case record the appellant must lodge any copies of documents referred to in sub-rule (2) for certification by the Registrar as a true copy of the documents of which they purport to be a copy.*
- (4) If there are any errors or deficiencies in the bundle of documents, the Registrar must within 7 days require the appellant to remedy them within 21 days.*
- (5) On preparation of the record, the appellant must consult all other parties directly affected by the appeal as to its contents.*
- (6) Any documents which a party objects to being included must be so indicated in the record for the purpose of adjustment of costs.*

- (7) *Within 7 days of the expiry of the 21 day period mentioned in sub-rule (4) the Registrar must certify the record as being correct.*
- (8) *The appellant must within 28 days of certification of the record serve a notice on all parties named in the notice of appeal that the case record is ready of collection from the appellant and must lodge 4 copies of the record with the Registrar.*
- (9) *Following lodgment of the case records the Registrar must forthwith list the appeal for the next or subsequent call-over date.*
- (10) *If any provision of this Rule is not complied with, paragraphs (2) and (3) of Rule 17 apply as if the non-compliance were non-compliance with sub-rule (1) of that Rule.*
- (11) *The fees for preparation, certification and copying of the record are as prescribed in Part I of the First Schedule."*

Steps taken by the Appellant regarding the Appeal

15. The Appellant as stated above has filed the notice of appeal together with the grounds of appeal on 2nd April 2014 and has paid a sum of \$5000 being security of costs on 9 April 2014.
16. The certification of the record as being correct had not been completed as required by Rule 18(7) although the Appellant had lodged the copies of the documents necessary for the record and had consulted the other parties regarding the contents of the record.
17. The Judge's Notes had not been made available by the High Court for the completion of the record. The Appellant had requested for the Judges Notes to be included in the record.

Status of the Court Record

18. On a perusal of the affidavits filed by the Appellant it is observed that the Court Record is not yet complete. The Registry has called for the Judge's Notes from the High Court but they had not been made available yet.
19. The Appellant has submitted that it would be just to dispense with the Judge's Notes as the Ruling had been made on the basis of the extensive affidavits that were filed, that there was no cross examination of the deponents to such affidavits, written submissions and that no oral evidence was given.
20. The 1st Respondent has submitted that the Judge's Notes should be included as substantive oral submissions were made and that even on call dates the learned High Court Judge had made important directions and recorded general matters which would be important in the determination of the appeal by the Court of Appeal.
21. A perusal of the Ruling of the learned High Court Judge shows that certain undertakings to Court by the parties had been recorded and certain directions had been given while the matter was being dealt with in the High Court.

Consideration of the Appellant's Application

22. The Application of the Appellant is to have the appeal heard in the May Session of the Court of Appeal and further directions as deemed necessary or advisable in the discretion of the Court to facilitate the urgent hearing of the appeal. The Application was supported by Affidavits deposed by Maurice McCarthy and Brenda Nanius.

23. The Application of the Appellant was opposed by the Respondents and the 1st Respondent had filed an answering affidavit deposed by Dr. Berlin Kafoa.
24. The Appellant and the 1st Respondent had filed written submissions and at the hearing Counsel for all three parties made oral submissions.
25. The Appellant had in addition to the written submissions filed regarding the listing of the appeal in the May Session filed written submissions regarding the dispensation of the Judge's Notes.
26. Considering the position regarding the preparation of the record in the present case, the steps in the process of the preparation of the record as required by Rule 18 (7), (8) and (9) had not been completed yet. According to Rule 18(9) after the completed Records are lodged with the Registrar, the Registrar has to forthwith list the appeal for the next or any subsequent call-over date. These stages had not been reached when the Appellant made its application to have the appeal listed for hearing in the May Session and the call over date had passed and the appeals to be heard in the May Session had already been listed for hearing. The practice followed in the Court of Appeal in listing cases at the call-over, is to give priority to the older appeals which are in the queue where the records are completed in compliance with the Rules. In the present instance on the call-over date 28th March 2014 for the May Session, not even the notice of appeal had been filed by the Appellant.
27. Considering the submission in respect of the dispensation of the Judge's Notes, as observed above they have not been made available up to the time of the hearing of the application of the Appellant. Although there was no evidence given before the Court, the Ruling of the learned High Court Judge has reference to certain determinations made by

him on call dates and certain undertakings given by the parties had been recorded. In view of these circumstances the inclusion of the Judge's Notes in the record would be necessary to be considered by the Court of Appeal when it hears the appeal of the Appellant. In any event a single Judge has no jurisdiction to make an order to exclude Judge's notes in the preparation of an appeal record.


28. Regarding the application for the hearing of the appeal in the May Session, Counsel for the Appellant in his oral submissions and the written submissions stated that the agreement which was in question before the Court had negative covenants and therefore the interim injunction should have been granted. The question regarding negative covenants in the agreement would require this Court to consider the agreement between the parties and related issues, which are matters to be dealt with in the appeal and not within the scope of the present application.
29. The Appellant further submitted that irreparable prejudice and harm is being caused as a result of the refusal of the interim injunction, the 2nd Respondent being a competitor of the Appellant and continues to enjoy significant benefits. The affidavit of the Appellant had spelt out certain events by which it would be consider itself to be affected. The Appellant was aware of this position when the Ruling was given by the learned High Court Judge. This should have prompted the Appellant to speed up their approach in appealing the said Ruling. The Solicitors for the Appellant should have been aware of the appeal process of the Court of Appeal as laid down in the Court of Appeal Act and Rules and advised the Appellant to file the notice of appeal early in order that they could get the Appeal Record ready and completed before the call over date, which was the 28th March 2014 for the May Session of the Court of Appeal. The Appellant had fifteen days up to the 28th of March 2014 to file the notice of appeal. The Appellant had missed the call over date by the time the Notice of Appeal was filed on 2nd April which was just two days prior to the completion of the 21 days allowed by the Statute.

30. Having filed the notice of appeal in the manner stated and moving Court to expedite the hearing after the date lines of the normal process of listing appeals for hearing had gone by and getting a favourable order would create precedents which would hamper the due process of the appellate system and would work unfairly for Appellants who have met the date lines in the appeal process.
31. The Appellant based its present application on Section 20(1)(k) of the Court of Appeal Act stating that a single judge had a wide discretion in dealing with such applications. Section 20 sets out the power of a single judge of appeal and Section 20(1)(k) states:
- "generally to hear any application, make any order or give any direction that is incidental to an appeal or an intended appeal"*.
32. No precedents were cited by any of the parties regarding the application or interpretation of this sub-section. This sub-section in relation to an appeal would refer to a situation where the appeal record is completed and ready for listing. It is my view that giving of an order to expedite the hearing of an appeal before the Full Court of Appeal would not come within the purview of this sub-section as a matter incidental to an appeal. Such an order may have the effect of over-riding the rules set out in Rule 18 of the Court of Appeal which in my view are mandatory regarding the steps in the process of the preparation of the appeal record leading upto the listing of the appeal for hearing.
33. In view of the above reasoning the application of the Appellant is refused and the Appellant has to advise itself regarding the seeking of an urgent hearing of the appeal.
34. The parties shall bear their own costs.

Orders of Court:

1. The application of the Appellant to have the appeal heard before the May Session of the Court of Appeal is refused.
2. The parties shall bear their own costs.




Hon. Justice S. Chandra
Resident Justice of Appeal