

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

**CIVIL APPEAL NO.ABU 0020 OF 2016**  
**(High Court Civil Case No. HBC 76 of 2012)**

**BETWEEN** : **OLAF ALLEN** *Appellant*

**AND** : **FIJI RUGBY UNION** *Respondent*

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

**Counsel** : **Mr. R. Prakash for the Applicant**  
**Mr. N. Lajendra for the Respondent**

**Date of Hearing** : **23 September, 2016**

**Date of Ruling** : **29 September, 2016**

**RULING**

**Nature of the present application**

- [1] This is an application that purports to have been made under Section 20(1) (b) of the Court of Appeal Act (Cap, 12) read with Rule 17(3) of the Rules made thereunder against the judgment dated 5 October, 2015 of the High Court in Suva.
- [2] I may however add that the antecedent Rules viz: Rule 16 and Rule 17 in its entirety have a bearing on the application as well given the background to the present application, being one which follows after the initial appeal was deemed to have been abandoned.

[3] A survey of past precedents reveals that, there are two categories to which applications for enlargement of time fall into. They are:

1. Where an application is made to have time extended in regard to an appeal filed out of time *per se* as envisaged in the Court of Appeal Rules.
2. Where an Appeal filed in the first instance is found to have been abandoned and an application is made to have time to appeal extended and/or enlarged.

[4] The present application falls into the second category referred to above.

**Criteria Applicable to either category**

[5] Discerning as I did the criteria applicable to either category referred to above, as revealed from past precedents, some of them being my own Rulings, I feel that it would suffice to lay down the said criteria without the need to refer to the said precedents.

[6] They are:

- (a) The length of the delay
- (b) Reasons adduced for the delay
- (c) The chances of an applicant succeeding if time for appealing is extended (enlarged) on the basis that there are issues for the full court to consider in the interest of justice including as to:
  - (i) whether the appeal raises issues of general importance
  - (ii) whether the appeal raises important questions of law and
- (d) The degree of prejudice caused to the Respondent should the application be allowed
- (e) The background history to the matter of litigation between the opposing parties
- (f) The respective conduct of the parties
- (g) whether there was room for the invocation of the doctrine of impossibility of performance.

### Some Reflections at this point

- [7] The said criteria surfacing from past judicial precedents are referred to in the respective bundles of authorities counsel have submitted. In addition thereto, it may be in good order to refer to two recent Rulings as well. (**viz:**) Raj Datt v. Sunil Datt, Misc. Action No. 33 of 2011, Minutes of 7 June, 2013, per Calanchini, A. P. and Abdul Munaf v. Tahir Hussain Munshi and Another (Civil Appeal No. ABU 0014/2016, Minutes of 26 September, 2016, being one of my Rulings, where several other precedents were also referred to.
- [8] A study of the said precedents reveal that, the approach of this Court has been that, even some of the other criteria are not satisfied, the decisive criterion would be the criterion of an applicant's chances in appeal referred to in paragraph 6(c) above of this Ruling. Mr Lajendra (counsel for the Respondent) respectfully disagreed with me and submitted that the applicable criteria ought to be considered cumulatively in an application of this nature, for which reason I felt obliged to consider the said criteria, one by one, my own view being otherwise.

### Length of the delay

- [9] The Applicant himself concedes that the delay involved is 67 days. I hold that, the said delay was substantial and reject the said ground.

### Reasons for the delay

- [10] The reasons given are that, the lawyer who had appeared for the Applicant in the High Court had resigned from his office soon after the initial Notice of Appeal had been filed and thereafter the matter of the Applicant's Appeal had been left in abeyance. These are the reasons adduced in the affidavit of Sonia Jit dated 11 March, 2016 (a Clerk attached to the concerned Solicitor's office) and the subsequent affidavit (in reply) of the Applicant himself dated 16 May, 2016 (and not 18 March, 2016) as stated in the written submissions.



- [11] Consequently, having regard to the Affidavit filed by the Chief Executive Officer of the Respondent (the Fiji Rugby Union) dated 12 May, 2016 as well I have no hesitation in rejecting the said grounds relating to the reasons for the delay.
- [12] Before proceeding to examine the applicant's chances of succeeding in the appeal I shall now refer to the background to the dispute.

**Background to the dispute**

- [13] The Respondent had conducted a lottery known as the Fiji Rugby Grand Lottery which was for the purpose of raising funds. The Applicant purchased a ticket which was priced at \$20.00 and participated in the draw. The first prize winner was to receive a sum of \$100,000.00. The lottery conducted by the Respondent was drawn on 30 December, 2010 and the Applicant was declared the first prize winner on his ticket. However, the Applicant was not paid the prize money.
- [14] This was due to the fact that, the Fiji Commerce Commission (FCC) had conducted an investigation and found that, the Respondent had breached the Commerce Commission Decree, 2010 in;
- (i) having reduced the price of lottery tickets from \$20.00 to first \$15.00 and then \$10.00 (apparently to sell more or all the tickets prior to the draw) and
  - (ii) not placing all the tickets sold at the draw.
- [15] The Fiji Commerce Commission then instituted proceedings in the High Court of Suva against the Fiji Rugby Union (FRU) seeking the following reliefs (viz:)
- “(A) To restrain the FRU from distributing the winning prizes to those winners whose names were drawn on 30 December, 2010 for the lottery tickets in support of the flying Fijians to the World Cup until they have responded to the orders made by the Commission dated 1<sup>st</sup> January, 2011 and after the Applicant has made a decision on the same; and

(B) To declare that the aforesaid actions dated 30 December, 2011 are in contravention of Sections 75, 76, 77(1) (e), 83(1) and 85(1) of the Commerce Commission Decree 2010.”

[16] The hearing having taken place on 25 January, 2011, the High Court gave judgment on 3 March, 2011 granting Relief (A) referred to above while refusing Relief (B). (vide: [2011] FJHC 139.

[17] As the chronology of the events reveal, the present Applicant had sought a summary judgment by Summons claiming the prize money he had won and the matter having come up before the Master of the High Court at Suva, the Master by his decision dated 27 July, 2012, for the reasons stated therein, struck off the Summons for Summary judgment. (vide: HBC No. 76 of 2012) .

[18] I also note from the proceedings made available to me that, the present Applicant had also filed an action by way of originating summons which had been dismissed (vide: HBC 315 of 2011).

[19] Then comes the present action which was also dismissed by the learned High Court Judge by his judgment dated 5 October, 2015.

### **Some Preliminary Observations**

[20] Before moving onto consider and make a determination in this application as to the Applicant’s chances of success should leave be granted I thought it would not be inappropriate to make reference to some of the salient features revealed in the proceedings.

- (a) After the filing of the action by the Fiji Commerce Commission (FCC) (referred to in paragraph [16] above, the FCC and the FRU had entered into a deed of settlement in terms of which the parties had agreed:

“(i) Fiji Rugby Union shall refund all the tickets bought for \$10.00 prior to the draw of the lottery.

(ii) FRU shall redraw the lottery and ensure that all ticket butts of tickets bought at \$20.00 are included in the re-draw.”

(vide: Paragraph 2 d. Of the impugned High Court Judgment).

- (b) On the advice of the Fiji Commerce Commission, the Respondent had declared that the first draw was illegal as tickets had been sold below the prescribed price of \$20.00 and all \$20.00 ticket butts were included in the draw. (vide: paragraph 2.i of the High Court Judgment).

- (c) PW3 in cross-examination had said that the draw was not properly conducted.

### **Re: The Learned High Court Judge’s Findings**

[21] The learned judge found that:

- (a) The Defendant (Respondent) had obtained a Gaming License to conduct a ticket lottery;
- (b) The license was subject to the Gaming Decree, 2009 and any other law, as provided in the relevant license;
- (c) it was also provided as a special condition that the license “shall be governed by and construed exclusively under the laws of Fiji.”
- (d) the conduct of a lottery falls within the ambit of Section 75, 76 and 77 of the Commerce Commission Decree (CCD) that empower the Fiji Commerce Commission to give direction to the defendant (Respondent).



**Re: The Conclusions arrived at by the Learned Judge**

- [22] The learned Judge concluded that:
- (i) the breach of the Commerce Commission Decree nullified the draw
  - (ii) the lottery was not conducted in accordance with law (and it) follows that the draw was illegal and void (and it) is a fundamental principle of the law of contract that no rights can flow from an illegal transaction.
  - (iii) the reduction of the price of a ticket was in contravention of the CCD, 2010 (and) was “unconscionable” and unfair to persons who bought tickets at \$20.00 to compete with those who bought tickets at \$10.00.
  - (iv) the validity of the re-draw does not arise for consideration in these proceedings.

**Submissions of learned counsel for the Applicant at the outset of this hearing**

- [23] Learned Counsel submitted that should leave be granted, he would confine himself to just two grounds in Appeal namely, Grounds 2 and 5 urged in the original Notice of Appeal and accordingly I shall proceed to examine the said grounds in order to come to a conclusion as to whether the application ought to be granted.

**The said grounds of Appeal**

- [24] (i) *Ground 2 – the learned trial Judge erred in law and/or in fact by accepting that the Fiji Commerce Commission had nullified the initial draw due to the Respondent’s breach of the Commerce Commission Decree when there is no such notification but rather only a Deed of Settlement between the Fiji Commerce Commission and the Respondent.*
- (ii) *Ground 5 – the learned trial judge erred in law by deciding that no rights can flow from an illegal transaction, (which it wasn’t) to a third party who took no part in the alleged illegality. The illegality (wrong) was raised by the authorities being the Fiji Commerce Commission but was never determined.*

- [25] It is to be noted that, the said grounds of appeal have been urged on account of the learned High Court Judge's findings and the conclusions he drew therefrom that, in effect, the applicant was not entitled to the prize money of \$100,000.00 "he had won" as the first prize winner on the basis that the draw of the lottery that was in issue was illegal.
- [26] The Applicant's counsel's contention was that, the learned judge erred when he held that, the first draw of the lottery was illegal due to the breach of the Respondent in reducing the prize of the lottery tickets from \$20.00 to \$10.00 and due to the Respondent's failure to include all such tickets sold for \$20.00 in the first draw.
- [27] The said lottery had been conducted by the Respondent in terms of the Gaming Decree, 2009 for which reason interpretation of the term "gaming" as defined in Section 3(1) of the said Decree (which includes therein a lottery). That brought in its wake "a licensing authority" and a consideration of Section 10 of the said Decree and the special condition the Fiji Commerce Commission was empowered to impose in regard to the sale of lottery tickets by a licensee vis a vis the licensor.
- [28] Consequently, to my mind, the conduct of "the lottery" being governed by the aforestated considerations, and there being no condition which I could see imposed on the Respondent prohibiting it from selling the tickets at a reduced price of \$10.00, the applicant's counsel's contention that the Fiji Commerce Commission (FCC) was misconceived in its view that by selling the tickets at a reduced price of \$10.00, the Respondent had breached the terms of the lottery in the face of a clause (clause 1.2) of the conditions which expressly states that the license validates the sale of all lottery tickets sold is a contention that deserves consideration by the full court.



- [29] I was also stuck by counsel's argument that the Fiji Commerce Commission had only intervened after the lottery in question had been determined in which context I gave my mind to the Australian Federal Court decision in Kuzmanouski v. NSW Lotteries Corporation (2010) FCA 876.
- [30] I also gave my mind to the several authorities relied upon by learned counsel for the Applicant to support his arguments before me, all of which are contained in his written submissions dated 9 June, 2016 as well and which I respectfully say, the Respondent was not able to counter, at least for the purpose of granting this application..
- [31] At this point, I am obliged to say sitting as a single judge of the Court of Appeal in the exercise of my jurisdiction under Section 20 of the Court of Appeal, I am not empowered to determine the merits of the appeal but to see whether the grounds of appeal 2 and 5 referred to above carry *prima facie* merit.
- [32] In that regard I was guided by a consistent line of decisions such as Herbert Construction Company (Fiji) v. Fiji National Provident Fund [2010] FJCA 3; Reddy's Enterprises Limited v. The Governor of the Reserve Bank of Fiji [1991] 3FLR73 at p.82; Kanakana v. The Attorney General [2012] FJCA 24; Registrar of Titles v. Prasad [2001] FJCA 5; Lautoka City Council v. Ambaran Narsey Properties Ltd. [2012] FJCA 26 and Reddy v. Devi [2016] FJCA 17.
- [33] Within the confines of my said judicial function (viz: my jurisdiction as a single justice of appeal), I am convinced that ground 5 does carry merit to be considered and be gone into by the Full Court while agreeing with Mr Lajendra's arguments in regard to Ground 2 that, the same ought not to be entertained, when he demonstrated in his client's favour in regard to the reference to "notification" urged in the said ground as being factually incorrect. In any event I cannot see this ground as being one that could stand in favour of the Applicant's case.

[34] I say, the said Ground 5 carries merit for the following reasons:

- (a) What role did the Applicant play in the said “illegal” conduct of the draw (quite apart from the learned Judge equating “illegality” to “voidness”?)
- (b) The Fiji Commerce Commission and the Fiji Rugby Union settled matters between themselves, as the very ‘settlement’ shows, in order to circumvent ‘punishment’ the FRU might have been visited with for the so called ‘illegal’ conducting of the lottery with the result, the Fiji Commerce Commission is happy and the FRU is also contented. But, what about the Applicant who had won the first prize at the said lottery? What hand did he have to play in all this?
- (c) If, as the learned High Court Judge concluded, if the reduction of the price of a ticket was in contravention of the CCD (2010) (and) was ‘unconscionable’ and unfair to persons who bought tickets at \$20.00 to compete with those who bought tickets at \$10.00, was it not “more unconscionable and unfair” to deprive the 1<sup>st</sup> prize money the Applicant had won having bought his ticket for \$20.00, being the class of persons to which he fell into?
- (d) I cannot resist in making the comment that, if a person who had bought a ticket for \$10.00 and won any prize, leave alone the 1<sup>st</sup> prize, then, would it not have been open for any person who had purchased a ticket for \$20.00 to challenge it basing such a case on all the provisions of the CCD and the Gaming Decree to have the award of such prize money annulled on the very grounds of voidness and/or illegality? But, in the case that is under consideration it was the Applicant who had won as the 1<sup>st</sup> prize on the draw, the reason why he has initiated the present proceedings.

[35] I have raised these questions for I felt that they fall into Ground 5 of the Grounds of Appeal without making any deductions thereon, leaving the same for the Full Court to determine.



**Criterion of Prejudice to the Respondent**

- [36] In that regard I have given my mind to what has been submitted at paragraph 6.0 of the Applicant's written submissions dated 9 June, 2016 which Counsel reiterated in his oral submissions and I say, the Respondent's submissions were not persuasive enough to counter them in that regard.
- [37] In the result only Ground 5 remained to be considered and in that regard I hark back to what I have said at paragraph [6] (c) of this Ruling and I say:-
- (a) To begin with, the Applicant had nothing to do with the alleged "illegal transaction" involving the Fiji Commerce Commission and the Fiji Rugby Union in the light of the provisions of the Gaming Decree and the Commerce Commission Decree. He was not a party to that so called "illegal transaction".
  - (b) Even assuming, having regard to the provisions of the said two Decrees, that it was an illegal transaction, did the High Court address the issue of how the same impacted on the Applicant's legitimate expectation, having won the said lottery to receive the prize money?
  - (c) In that regard, do the conclusions drawn by the learned High Court Judge at paragraphs (t) to (cc) of his judgment warrant scrutiny by the Full Court?
  - (d) In the wake of what I have posed above, there is an additional factor as well, and that is, what the High Court itself had held in [2011] FJHC 139 (referred to at paragraph [16] of this Ruling) in refusing Relief B sought in that case.
- [38] At this point, again I go back to the additional criteria His Lordship, Calanchini, A.P (as His Lordship then was) had brought into an application of the present nature (vide: Paragraph [7] of this Ruling), based as it were on the basis that, there were matters where leave/special leave had been sought by a party against rulings/decisions of the Court of Appeal to the Supreme Court but in my view which strike common ground in regard to the principles enunciated therein with an application for extension of time to Appeal after abandonment of an initial appeal.



- [39] I do not think that I should concern myself in the “jurisdictional limits” of the two highest Courts in the judicial hierarchy in Fiji in that regard.
- [40] But, I do venture to say that, the matters urged on behalf of the Applicant do warrant consideration by the Full Court, given his lament that he was the first prize winner of the lottery, but deprived of the same for the reasons the F.C.C thought fit to deprive him, which in its wake may involve an interpretation of the provisions of the Gaming Decree, 2009 taken together with the terms and/or conditions of the lottery (and/or its conditions).
- [41] I add that, people in Fiji who place faith in lotteries conducted in the country, he/she is entitled to be told, at what point, where his/her gamble ends, having regard to the High Court Judge’s approach. That, in my view, is a matter for the Full Court to decide on for there is, a public interest issue or a matter of general importance as well to be decided upon, in addition to the matters I have articulated earlier.
- [42] Consequently, my limited role being as a single Judge exercising discretionary jurisdiction, whether or not to grant extension of time to appeal against the High Court Judgment in issue, taking Mr Lajendra’s own argument that the applicable criteria must be taken cumulatively, while I have held the criteria of length and reasons for the delay stand against the Applicant, the criteria regarding (i) Applicant’s chances of success should leave be granted (read with the said criterion’s adjunct factors which I have put down at paragraph [6] (c) above) and (ii) the prejudice criterion, I hold, outweigh the antecedent criteria relating to length and reasons for the delay.
- [43] Before I proceed to make my orders in this Ruling I pause to reflect and rule on one last matter that remains to be addressed.

**One Last Matter that remains to be addressed**

[44] Mr Lajendra, before he ventured to address on the substantive matter submitted that, the application is liable to be dismissed and/or rejected *in limine* and that he was making submissions on the said substantive matter without prejudice to the matter he was raising. He submitted that:-

- (a) the original Notice of Appeal and consequently the Appeal stood abandoned
- (b) that being so, the present application before Court does not state the grounds on which the present application is based on (in which regard the Affidavit 'SJ2' was referred to, particularly to paragraph 7 (thereof)
- (c) Therefore, there are no proposed grounds of appeal before this Court to consider.

[45] However, that contention to my mind ignores what is averred at paragraph 16 of the said Affidavit praying for leave to file a fresh Notice and Grounds of Appeal which I find is the correct course of action the Applicant was obliged to pursue as decreed in Rule 17 (3) of the Court of Appeal Rules, which the Applicant has complied with in the said Affidavit.

[46] Nevertheless, I leave that matter also to be looked into by the Full Court to be fair by learned counsel's aforesaid submission.

**The Orders of the Court are**

1. *Leave to Appeal seeking extension of time against the judgment of the High Court dated 5 October, 2016 is allowed only on ground 5. Ground 2 is rejected..*
2. *The Chief Registrar is directed to list this case on a call over date for the President of this Court to set a date for the Hearing of the Appeal.*

3. *In all the circumstances of this case, I order no costs of this application and costs shall follow the final outcome in the Appeal.*



A handwritten signature in blue ink, reading "Almeida Guneratne".

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**Hon. Justice Almeida Guneratne**  
**JUSTICE OF APPEAL**