

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL ABU 26 of 2013
(High Court HBC 341 of 2006L)

BETWEEN : RAM CHANDAR REDDY
Appellant

AND : SUBADRA DEVI
First Respondent

AND : THE DIRECTOR OF LANDS
Second Respondent

Coram : Calanchini P

Counsel : Mr D S Naidu for the Appellant
Mr R K Naidu for the First Respondent
Mr R Green for the Second Respondent

Date of Hearing : 8 October 2015

Date of Ruling : 26 February 2016

RULING

- [1] This is an application for leave to appeal under Rule 17(3) of the Court of Appeal Rules (the Rules). It is in effect an application for an enlargement of time as a result

of non-compliance with Rule 17 of the Rules. The Appellant seeks leave to appeal the final judgment of the High Court delivered on 15 December 2011. In addition the Appellant seeks an order that the order fixing the security for costs made on 15 February 2012 be re-instated. In the alternative to that order, the Appellant seeks an order that an enlargement of time be granted to appeal the orders made by the Chief Registrar on 15 February 2012 fixing the amount of security for costs to prosecute the appeal.

- [2] The application was made by an amended notice of motion filed on 16 October 2014. In support of the application the Appellant filed affidavits sworn by Krishneel Kunal Kumar on 4 June 2013 and 14 August 2014. The application was opposed. The First Respondent filed an answering affidavit sworn on 27 May 2014 by Satyakar Prasad. The Second Respondent filed an answering affidavit sworn on 23 May 2014 by Thomas Fesau. The Appellant filed a further affidavit sworn on 23 July 2015 by Salote Veitokiyaki. All parties filed written submissions prior to the hearing.
- [3] As previously noted this application is made under Rule 17(3) of the Rules. The initial breach of Rule 17(1) was the failure by the Appellant to pay the amount fixed as security for costs within the time prescribed by the Chief Registrar. Subsequent default occurred when the Appellant failed to file and serve a fresh notice of appeal in accordance with Rule 17(2) of the Rules. Pursuant to section 20(1) of the Court of Appeal Act Cap 12 (the Act) the jurisdiction of the Court of Appeal to hear and determine the application for leave to appeal under Rule 17(3) may be exercised by a justice of appeal.
- [4] In the judgment delivered on 15 December 2011 the High Court dismissed the Appellant's claim for specific performance and other relief. The Appellant was ordered to pay costs of \$3000.00 to each Respondent within 21 days from the date of the judgment.
- [5] The background facts to the claim were conveniently summarized by the learned High Court Judge in his judgment. Apart from changing the designation of the parties I acknowledge that what follows is based on the summary of facts from that judgment. The claim was for specific performance of a sale and purchase agreement dated 23

November 2004 entered into between the Appellant and the First Respondent for the purchase of the First Respondent's sugar cane farm by the Appellant. The farm was on crown land under a protected lease and therefore the agreement required the consent of the Director of Lands. The Director initially gave his consent to the sale on 24 November 2004 and the Appellant subsequently paid the deposit and took possession. However the Director on 9 November 2005 withdrew his consent and the First Respondent terminated the agreement and evicted the Appellant. The Appellant made further representations to the Director who re-granted consent on 9 December 2005. The First Respondent refused to let the Appellant back into possession and pay the balance of the purchase price. The Appellant then commenced an action claiming specific performance of the sale and purchase agreement.

[6] The learned Judge considered that the only issue to be determined was whether the agreement remained on foot after the Director withdrew his consent on 9 November 2005. If the agreement became null and void ab initio then the giving of consent by the Director on the second occasion was of no consequence since there was then no longer any agreement in existence to give consent to. The Appellant sought specific performance of the agreement and damages by way of compensation for loss of sugar cane proceeds. The Appellant did not seek damages for breach of the sale and purchase agreement as an alternative to the claim for specific performance. The Judge noted also that it was not necessary for him to determine whether the termination of the agreement by the First Respondent was effective since once the Director had withdrawn his consent there was no longer any agreement to terminate. The learned Judge also noted that the issue concerning whether the Director had acted unlawfully when he withdrew his consent was not raised by the parties in the pleadings nor was it raised at the hearing. The Appellant did not seek any relief against the Second Respondent.

[7] Rule 17(3) of the Rules provides that except with the leave of the Court of Appeal no appeal may be filed after the expiration of the time specified in Rule 17(2). Rule 17(2) provides that in the event that an appeal is deemed to have been abandoned for non-compliance with the requirements specified in Rule 17(1), a fresh notice of appeal may be filed before the expiration of 42 days in the case of a final judgment calculated from the date the appeal is deemed to have been abandoned. As was noted

earlier the issue raised in an application under Rule 17(3) is essentially whether the Appellant should be granted an enlargement of time.

- [8] Whether leave should be granted in the form of an enlargement of time to enable the Appellant to prosecute his appeal involves the exercise of a discretion. The factors to be considered by a court in order to ensure that the discretion is exercised in a principled manner are similar to those discussed by the Supreme Court in NLTB (now TLTB) –v- Ahmed Khan and Another (CBV 2 of 2013; 15 March 2013). They are (a) the length of the delay; (b) the reason for the delay; (c) whether there is a ground of merit justifying the appellate court's consideration or, where there has been substantial delay, nonetheless is there a ground that will probably succeed and (d) if time is enlarged, will the respondent be unfairly prejudiced? These are matters to be considered in the context of the question whether it would be just in all the circumstances to grant or refuse the application. The onus is on the applicant to show that in all the circumstances the application should be granted.
- [9] In this case the final judgment of the High Court was pronounced on 15 December 2011. Pursuant to Rule 16 of the Rules the Appellant was required to file and serve the notice of appeal within 42 days from that date, that is, by 26 January 2012. The notice of appeal was filed within time on 26 January 2012. However the notice of appeal was not served on the Respondents until 2 February 2012 and was therefore served out of time in breach of Rule 16. Unfortunately this non-compliance with the Rules was not noticed by the Registry. In fact there was, after 26 January 2012, no appeal on foot.
- [10] Be that as it may the Appellant then purported to comply with Rule 17(1) of the Rules by (1) filing copies of the notice of appeal endorsed with certificates of the dates of service and (2) applying to the Registrar to fix security for costs to prosecute the appeal, both within the prescribed seven days from the date of service of the notice of appeal.
- [11] On 15 February 2012 the Registrar ordered that security for costs fixed in the sum of \$1000.00 for each Respondent be paid by the Appellant within 28 days. The Appellant was required pursuant to Rule 17(1)(b) to deposit with the Registrar the

sum of \$2000.00 no later than 15 March 2012. It would appear that the Appellant did not comply with this order and as a result, pursuant to Rule 17(2) of the Rules, the appeal was deemed to have been abandoned with effect from 15 March 2012. However, under Rule 17(2) a fresh notice of appeal could have been filed before the expiration of 42 days calculated from the date the appeal was deemed to have been abandoned. The effect of this provision was that the Appellant could have filed as of right a fresh notice of appeal provided that he did so no later than 26 April 2012. The Appellant failed to take advantage of this opportunity under Rule 17(2). The result of that non-compliance was that the Appellant could not file a notice of appeal after 26 April 2012 except with the leave of the Court of Appeal under Rule 17(3) of the Rules.

- [12] Subsequently the Appellant filed on 6 February 2013 a notice of motion seeking an enlargement of time to appeal under Rule 17 (3) together with a supporting affidavit. On 19 April 2013 the Appellant's application was struck out due to his non-appearance on the return of a mention date for further directions.
- [13] As a result, the length of the delay may be considered as the time between the date the appeal was first deemed to have been abandoned, being 15 March 2012 and the date on which the Appellant served the present application for leave to appeal under Rule 17(3), being 25 March 2014. On the basis of those dates the delay was about 2 years. On the other hand if the delay is calculated by reference to the time allowed under Rule 17(2) to file a fresh notice of appeal, then the delay is about 22 months. In any event the delay can only be described as substantial if not inordinate.
- [14] The affidavit material filed by the Appellant offers explanations for the various instances of non-compliance with the Rules or non-attendance at court. However there is no explanation provided for (1) the delay between 26 April 2012 and 6 February 2013 or (2) the delay between 19 April 2013 and 25 March 2014. These periods represent substantial periods of inactivity on the part of the Appellant for which an explanation should have been provided but instead the affidavit material is silent in respect of both periods.

[15] In view of the substantial delay and the lack of any satisfactory explanation for the lengthy periods when no action was taken to prosecute the appeal, it is necessary to determine whether there is any ground of appeal that will probably succeed. In the event that leave, in the form of an enlargement of time, were to be granted under Rule 17(3) of the Rules, the supplementary affidavit filed on 23 July 2015 on behalf of the Appellant exhibited an attachment in the form of a draft notice of appeal that set out 16 grounds of appeal upon which the Appellant intends to rely in support of his appeal. Those grounds are:

- "1. **THAT** the Learned Trial Judge erred in law and in fact in holding that the consent endorsed on the Memorandum of Agreement dated 23rd November 2004 by the Director of Lands on the 24th day of November 2004 and subsequently withdrawn by the Director of Lands on 9th November 2005 caused the agreement to be null and void ab initio.
2. **THAT** the Learned Trial Judge erred in law and in fact in interpreting that the reinstatement of the consent by the Director of Lands on 9th December 2005 was a separate and second grant of consent and not a reinstatement of the original consent rendering the Memorandum of Agreement dated 23rd November 2004 to be in full force and effect.
3. **THAT** the Learned Trial Judge erred in law and in fact in not granting specific performance for the purchase of Crown Lease Number 12639 by the Plaintiff/Appellant.
4. **THAT** the Learned Trial Judge erred in law and in fact in not giving judgment in favour of the Plaintiff/Appellant for the nett proceeds of sugar cane harvested for season 2005 and 2006.
5. **THAT** the Learned Trial Judge erred in law and in fact in not allowing judgment in favour of the Plaintiff/Appellant for the purchase of fertilizer from the Defendant/Respondent in the sum of \$1,443.00.
6. **THAT** the Learned Trial Judge erred in law and in fact in not granting Judgment in favour of the Plaintiff/Appellant for the refund of the deposit of \$8,000.00 in lieu of an Order for specific performance.
7. **THAT** the Learned Trial Judge erred in law and in fact in not allowing judgment in favour of the Plaintiff/Appellant for damages and interest.

8. **THAT** the Learned Trial Judge erred in law and in fact in holding that the 2nd Defendant/2nd Respondent had power to unilaterally withdraw its consent once the same had been granted despite non compliance with the rules of natural justice and/or that such withdrawal of consent by the 2nd Defendant/2nd Respondent was valid and lawful.
9. **THAT** the Learned Trial Judge erred in law and in fact in dismissing the Plaintiff/Appellant's claim and in awarding costs of \$3,000.00 each to the Defendants/Respondents.
10. **THAT** the Learned Trial Judge erred in law and in fact holding that the Memorandum of Agreement dated 23rd November 2004 was rendered null and void ab initio upon the purported withdrawal of consent by the 2nd Defendant/2nd Respondent on 9th November 2004 though the same was reinstated as though it was never withdrawn by letter dated 9th December 2005.
11. **THAT** the Learned Trial Judge erred in law and in fact in failing to hold that the 2nd Defendant was required to act according to the rules of natural justice and within its statutory powers granted under Section 13(1) of the Crown Lands Act Cap 132.
12. **THAT** the Learned Trial Judge erred in law and in fact in failing to consider that the 2nd Defendant/2nd Respondent could not act arbitrarily in withdrawing its consent on policy grounds when the same was never made known to the Plaintiff/Appellant and the 1st Defendant/1st Respondent prior to the endorsement of the 2nd Defendant/2nd Respondent's consent on the said Memorandum of Agreement.
13. **THAT** the Learned Trial Judge erred in law and in fact in upholding the arbitrary/unilateral withdrawal of the consent of the 2nd Defendant/2nd Respondent without first taking into consideration the harsh and penal effect of such withdrawal of consent.
14. **THAT** the Learned Trial Judge erred in law and in fact in failing to consider the 1st Defendant/1st Respondent's concession that he was agreeable to refund the Plaintiff/Appellant his share of the nett proceeds from sugar cane harvested in the years 2005 and 2006.
15. **THAT** the Learned Trial Judge failed to hold that the 2nd Defendant/2nd Respondent did not have an absolute power under Section 13(1) of the Crown Lands Act Cap 132 but

was bound to act in accordance with the rules of natural justice and public policy.

16. ***THAT** the Learned Trial Judge failed to hold that the 2nd Defendant/2nd Respondent owed a duty of care to the Plaintiff/Appellant when acting in accordance with its statutory powers and that the 2nd Defendant/2nd Respondent failed to discharge this duty."*

- [16] The grounds of appeal raise three issues. The first issue is raised by grounds 8, 11 and 12. They claim that the learned Judge erred in his findings concerning the legality of the cancellation or withdrawal of consent by the Director of Lands on 9 November 2005. The consent to the sale, which was required under section 13 of the State Lands Act Cap 132, had been given on 24 November 2004. However the legality of the cancellation of consent had not been raised by the Appellant in his amended Statement of Claim. Even if the agreed issues set out in the minutes of the pre-trial conference purported to raise the issue, the pleadings did not raise the issue. The learned trial Judge made no findings on the legality of the Second Respondent's decision to cancel the consent that had been given on 24 November 2004.
- [17] The next issue raised by the grounds of appeal relates to the effect on the agreement dated 23 November 2004 of the cancellation on 9 November 2005 of consent given by the Director of Lands in 24 November 2004.
- [18] Finally there is the issue of the claim for compensation by the Appellant and whether the First Respondent can be said to have been enriched unjustly when he took back possession.
- [19] The principal issue raised by the pleadings was whether the agreement dated 23 November 2004 was capable of being specifically enforced when consent to the sale had been cancelled by the Director on 9 November 2005.
- [20] The consent of the Director of Lands was required on account of the lease being a protected lease under section 13 of the State Lands Act Cap 132 which for the purposes of this application provides that in the case of a protected lease:

"___ it shall not be lawful the lessee thereof to alienate or deal with the land ___ whether by sale, transfer or sub-lease ___ without the written consent of the Director of Lands first had and obtained ___ . Any sale, transfer, sub-lease ___ or other alienation or dealing effected without such consent shall be null and void."

[21] It is accepted that the Director gave his consent on 24 November 2004. It does not appear to be in dispute that the Director of Lands purported to withdraw and/or cancel that consent by letter dated 9 November 2005. There was evidence at the hearing in the court below that the Director by letter dated 9 December 2005 purported to reinstate his consent.

[22] In paragraph 11 of the First Respondent's amended Defence dated 18 April 2008 it pleaded that the First Respondent terminated the agreement because of breach of the Terms and Conditions of the agreement by the Appellant. There are no particulars as to the nature of the alleged breach. Paragraph 11 was pleaded to the claim in paragraph 14 of the amended Statement of Claim that the First Respondent had "attempted to terminate" the agreement because the Second Respondent had withdrawn its consent by letter dated 9 November 2005. However without pleading further facts the First Respondent could not reasonably claim that the withdrawal of the Director's consent constituted a breach of contract by the Appellant that entitled the First Respondent to terminate the agreement. In his reply the Appellant pleaded that even if the agreement was terminated by the First Respondent (which was denied) the First Respondent had no right to do so. The allegation that the Appellant had breached the agreement thereby entitling the First Respondent to cancel the agreement was repeated in paragraph 21 of the amended Defence.

[23] However the First Respondent pleaded his position with greater clarity in paragraph 19.3 of the amended Defence by stating:

"That the subject memorandum of Agreement consent issued by the 2nd Defendant was cancelled and/or withdrawn by the 2nd Defendant entitling the 1st Defendant at law to repudiate and/or cancel the subject memorandum of agreement."

[24] It is necessary to examine in greater detail the meaning and effect of section 13 of the State Lands Act. It is not necessary to determine whether the Director of Lands acted

lawfully when he purported to cancel or withdraw his consent. That issue can be put to one side. The Appellant challenges the conclusion of the learned trial Judge that the withdrawal of consent rendered the agreement null and void ab initio.

- [25] The question for the Court is whether there is any or, for that matter in this case, sufficient merit to that challenge. Section 13 requires the consent of the Director to be first obtained in respect of any alienation or dealing by way of sale, transfer or sub lease of a state lease. In the absence of such prior consent then that alienation or dealing is null and void. It is also apparent from the wording of section 13 that the party responsible for obtaining that consent is the lessee of the State lease since under section 13(3) any lessee aggrieved by the refusal of the Director to give the required consent may appeal to the Minister.
- [26] However the point that needs to be emphasized is that the consent is not required for the entering into of a contract for the alienation or the dealing. The contract does not constitute the act of alienation or dealing. The consent is required prior to the alienation or the dealing being effected. In other words prior to the sale, transfer or sub lease being effected. The position is different under section 6 of the Land Sales Act Cap 137 where the responsible Minister's consent is required prior to a non-resident purchaser entering into a contract to purchase land.
- [27] The consent of the Director that is required under section 13 of the State Lands Act may be regarded as a condition precedent to performance. The consent of the Minister that is regarded under section 6 of the Land Sales Act may be regarded as a condition precedent to formation of the contract. The consent required under section 13 of the State Lands Act was obtained the day after the contract was made and prior to any act of performance of the contract. The condition precedent to performance had been satisfied. The parties then began to give effect to the contract by implementing its terms. The purchaser complied with his obligation by paying part of the purchase price and the vendor permitted the purchaser to enter into possession in accordance with the contract.
- [28] Then, almost 12 months later, the Director withdrew or canceled his consent. As noted earlier in this decision, for the purpose of this application, the withdrawal of

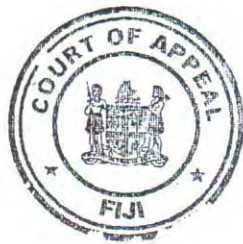
consent is not in issue and must be taken as a given. The issue then is how does that event affect the agreement made by the parties and in respect of which they have both partially performed their obligations. In my judgment the ability of each party to continue performing their obligations after 9 November 2005 has been frustrated by the cancellation of consent by the Director. However alongside the issue of frustration it must not be forgotten that the contract has by that time conferred an equitable interest on the purchaser. This issue brings into focus the distinction between property and contract.

- [29] In my judgment section 13 does not provide the answer to the problem. Section 13 only requires that the Director's consent be obtained prior to performance of the agreement. It is only if consent is not obtained prior to performance that subsequent acts of performance become null and void. The section is not concerned with a situation where consent given and acted upon is subsequently withdrawn or cancelled.
- [30] The question that arises in this appeal is whether the contract for the sale of the State lease can be regarded as having been frustrated by the withdrawal of consent by the Director. The appeal raises a significant issue that should be considered by the Court of Appeal. As a result I am prepared to grant leave to appeal to the Appellant under Rule 17(3). However leave is granted on condition that the Appellant pay the First Respondent's costs of the application fixed in the sum of \$1800.00 and the Second Respondent's costs fixed in the sum of \$800.00 both within 14 days from the date of this judgment.

Orders:

1. *Leave to appeal is granted.*
2. *Appellant is to pay costs to the First Respondent in the sum of \$1,800.00 and to the Second Respondent in the sum of \$800.00 within 14 days from the date of this judgment.*
3. *The Appellant is to file and serve a notice of appeal within 21 days from the date of his judgment.*

4. *Thereafter the appeal is to proceed in accordance with Rules 17 and 18 of the Court of Appeal Rules.*
5. *In default of either Order 2 or 3 above by the Appellant the appeal is deemed to have been abandoned with immediate effect.*



W. Calanchini

Hon. Mr Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL