

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

Civil Appeal No. ABU 0009 of 2014
High Court Civil Action No.HBC 97 of 2009L

BETWEEN : **NILESH SHALEN SINGH**
1st Appellant

: **LAUTOKA GENERAL BUSES LIMITED**
2nd Appellant

AND : **MOHAMMED KHAIYUB**
1st Respondent

: **ABDUL NADEEM**
2nd Respondent

: **4R ELECTRICAL & GENERAL CONTRACTORS LIMITED**
3rd Respondent

BEFORE : Hon. Justice Almeida Guneratne

Counsel : Ms. R. Naidu for 1st and 2nd Appellants
Mr. M. A. Khan for 1st Respondent
Mr. K. Naidu for 2nd and 3rd Respondents

Date of Hearing : 13 November 2014

Date of Judgment : 5 December 2014

RULING

- [1] This is an application by way of Notice of Motion for leave to appeal out of time dated 24th February, 2014 against a judgment of the Lautoka High Court dated 29th February, 2012.
- [2] The application is made under the provisions of Section 20 (1) (b) of the Court of Appeal Act (Cap 12).
- [3] In order to succeed in their application the appellants have to satisfy me in regard to the criteria applicable to the granting of leave to appeal out of time.
- [4] These criteria have been laid down in a plethora of past precedents which I propose to examine in the light of the facts and circumstances of the preset case.

Facts and Circumstances Pertaining to and Impacting on the Length and Reasons for the Delay

- [5] These criteria are intrinsically connected in the present case for which reason I shall consider them accordingly.

Length of Delay

- [6] The present application is nearly two years after the pronouncement of the judgment of the High Court.
- [7] However, the original Notice and grounds of Appeal had been filed on 27th March, 2012 in ABU 0016/12 and therefore within the statutorily mandated period stated in Rule 16 (b) of the Court of Appeal Rules.
- [8] On a perusal of the case record it appears that, various incidental steps in the case had been taken by the Solicitors of the Appellants and moreover some orders also had been obtained by Court thereafter.

- [9] Be that as it may, owing to the copy Record being returned, the Appeal bearing No. ABU0016 of 2012 had been abandoned on 19th March 2013.
- [10] Thereafter, the Appellant had been able to find new solicitors only in June 2013 owing to the principal of his former solicitors having taken ill and eventually becoming deceased.
- [11] Consequently, the new solicitors had requested for extension of time till the end of November, 2013 but had been informed that, the Appeal had been abandoned on 19th March, 2013.
- [12] Eventually the notice of motion and affidavit in support for leave to appeal out of time was filed on 24th February, 2014.
- [13] On those facts, Learned Counsel for the Appellants contended that, at the most there has been only a delay of three months (calculated from November, 2013 to February, 2014).
- [14] Even if I were to lean in favour of that contention for the time being, it is necessary to assess the reasons for the delay beginning from, if not March, 2013 at least from November, 2013.

Reasons for the Delay

- [15] Several reasons were adduced on behalf of the Appellants in this regard. What struck me as the main reasons may be recapped as follows:

- (a) *That, the appellants' then solicitor, Mr. Suresh Maharaj who was in charge of the matter had taken ill and had become deceased on 12th March 2013.*
- (b) *That, it was on 18th November, 2013 that the appellant came to know that the original appeal bearing no. ABU 0016/2012 had been abandoned on 19th March 2013 for not filing the Copy Record within time when a communication was received from the Court of Appeal to that effect whereas on 19/03/13 – a single judge had even granted an adjournment.*
- (c) *That the second (Applicant) Appellant being a company has had several cases to attend to during the period in question.*

Counter Submissions Advanced on behalf of the 1st Respondent

[16] Mr. A Khan with absolute forensic flair submitted in counter posing the following questions: -

- (a) *Could a solicitor firm be excused just because its senior partner had become indisposed due to illness? Was there no other lawyer in that firm to keep track of a case it had undertaken to look after?*
- (b) *Could the Appellant who is said to have been unaware as to what happened from 19/03/2014 himself be excused for not keeping track of his case?*
- (c) *Could the December vacation in 2013 (a point advanced on behalf of the Appellant to bridge the delay criteria) be regarded as an excuse for not filing relevant papers when the Court Registry was functional, save for public holidays?*
- (d) *For those reasons, would it not be reasonable to argue that, there has been a total disregard for the time line in which the court system works?*
- (e) *Could the fact that, the 2nd Applicant (Appellant) being a reputed company having several cases to attend to be taken into consideration as excusing the length of delay and the reasons for the same?*

Assessment of the Rival Contentions on the Length and reasons for the Delay in the light of Past Precedents

The facts and Circumstances of a Case as a Criterion to Assess the Length and Reasons for the Delay

- [17] Taking into consideration the facts and circumstances criterion, in *Peter Sujendra Sundar and Concave Investments Ltd v Chandrika Prasad* (1997 FJCA 39, 10th November 1997, it was stated that; “Whilst a delay of 3 months might have been reasonable in this case, the delay of over 6 months has not been satisfactorily explained.” (per: Sir Moti Tikaram, P).

- [18] In *Bank of Baroda v Mohanlal Champaneri* (2002) ABU 28/01 December 18, January 2002 Byrne, JA had held that, there was a failure to satisfactorily explain its delay of 3 months from the time the appeal was deemed abandoned.

- [19] In *Krishna Sami Naidu and Anor v Saliman Khan* (2010) ABU 10/09, 27th January 2010, there had been a delay of 9 months before application for leave to appeal was sought counsel having failed to appear at an adjourned hearing.

- [20] In the recent case of *Suresh Prasad v Housing Authority* (Misc. No. 22/2011, 26th March 2014), a five year delay in prosecuting the action was held not to have been explained on the material placed before court.

- [21] In *Maciu Tamani Palu aka Maciu Tamanibola Palu v Australia and New Zealand Bank* (Misc No. 19 of 2011, 8th February 2013) the delay involved had been a mere 14 days.

- [22] The explanation offered had been that, the Appellant had had no funds to instruct Counsel to prepare the appeal. Counsel had also explained that he was appearing “*de bono*” but had only recently become involved in the proceedings.
- [23] The court (as per Justice Calanchini, A.P.) observed that, “the reasons given for the delay were not adequately explained in the Appellants supporting affidavit...although the delay is not excessive and the reasons for the delay may be understandable”.
- [24] In an earlier case viz: *Vimal Construction and Joinery Works Ltd v Vinod Patel & Company Ltd*. (2008) and *JCA 98* citing the Australian Decision of *R v Birks* (1990) NSWLR 677, it was stated that, “A contention as to incompetence of legal advisors will rarely be sufficient.”
- [25] These past precedents are all cases where in their facts and circumstances the threshold bars pertaining to the length and the reasons for the delay were held not to have been overcome.

Some Observations on the Criterion of Delay

- [26] An analysis of the aforecited cases reveals that, it is not so much as to the length of the delay but the reasons for the delay that would matter although the length inevitably would stand drawn to the inquiry in as much as if there has not been any delay the further question of the reasons for the delay would not arise.
- [27] This is demonstrated in the case of *Maciu Tamani Palu* (infra) at one end of the spectrum (where the delay was a mere 14 days) and the *Suresh Prasad* case (supra) (where the delay was as much as 5 years) on the other.

[28] In either case the reasons were not regarded as the decisive factor.

[29] In the light of the judicial thinking reflected in the aforecited cases, I have paid regard to the several affidavits filed on behalf of the parties together with the rival contentions of counsel which I have recapped earlier. I have gone through the written submissions filed on behalf of the parties as well.

[30] The delay may very well be understandable and perhaps may even be regarded as not too excessive. But, I am compelled to conclude that, in all the facts and circumstances of this case, the reasons adduced for the delay have not been adequately explained, although M/S R. Naidu made a valiant effort to explain every phase of what appeared to be a delay which both Mr. Khan and Mr. K. Naidu in my view, were able to successfully counter.

[31] In particular, I am inclined to accept the arguments put forward by Mr. Khan posed in question form which I have recapped at paragraph [16] of this order.

[32] Accordingly, I hold that, the Appellants have failed to adequately explain the delay after the abandonment of the Appeal in ABU 0016 of 2012.

Where an appellant fails to satisfy court as to the reasons for the delay, is the Court obliged to go further?

[33] Stated as a general principle, my personal view is that the court ought to go only thus far and no further for two reasons viz: (a) for otherwise it would place an applicant who has been lax in regard to time limits and who has failed to have the delay excused on par with an appellant who has complied with such time limits and (b) should a court go further

looking for other criteria to grant extension of time, that would be contrary to the intention of the legislature which has thought it fit to set down time limits.

The Judicial Trend as reflected in Past Precedents

- [34] However, having regard to past precedents which have gone onto consider the further criteria of (a) possible chances of an appeal succeeding should leave be granted and (b) prejudice or not that may result to a respondent should leave be granted, I am compelled to go into those aspects whilst adding a qualification to that approach, that, there could very well arise instances where, that judicial trend could be distinguished, (and not necessarily be construed as having departed from), an approach I have adapted in two rulings handed down on this very date.
(vide: *Ghim Li Fashion (Fiji) Ltd v Ba Town Council*; Misc.Action No. 03/ 2012, 5th December, 2014 and *Gregory Clark v Zip Fiji* (Civil Appeal No. ABU 03 of 2014, 5th December, 2014).
- [35] In so far as the present case is concerned, in the light of the judicial approach adapted in past precedents, to name a few, (*Reddy's Enterprises Ltd v. The Governor of the Reserve Bank of Fiji* (1991) FJCA 4; ABU 67d.90s, 9th August, 1991); *Maciu Tamani Palu aka Maciu Tamanibola Palu v Australia and New Zealand Bank* (Misc. Case No. 19/2011, 8th February 2010); *Herbert Construction Company (Fiji) Ltd v Fiji National Provident Fund* (Misc. Case No. 20 of 2009, 24th August 2009); I proceed to look at the grounds of appeal raised by the Appellants bearing in mind that, as *inter alia*, the aforecited cases have stated, it is not the function of a single judge to assess the actual merits but only to see whether *prima facie* it is obvious that, the appeal is unmeritorious or wholly unlikely to succeed, the important point being as to whether there is a serious question for adjudication as opposed to it being frivolous or vexatious.

The Thread that runs through the fabric of that judicial thinking

- [36] That is the thread that runs through the fabric of those judicial precedents which judicial thinking is contained in several decisions such as *Bahadur Ali and Others v Ilaitia Boila, Chirk Yam and Others* (per Reddy, P ; ABU 0030/2003); *Mokosoi Production Fiji Ltd v. Pure Fiji Export Ltd* (per Byrne , JA; ABU 17/2008, 7th September 2009); *Palu v ANZ Bank*, (supra); per Calanchini A.P, (as His Lordship then was); and *Worwich and Peterborough Buildings Society v Steel* (1991) 2 ALLER 880, CA); *Avery v Public Service Appeal Board* (No.2) [1973] 2 NZLR 861.

How does a Court determine that there is a *prima facie* case without going to the merits in detail?

- [37] This is a question I spent some time grappling with.
- [38] There are dicta in some of the precedents referred to by me earlier that, “although a Court should not delve into the merits of a proposed appeal, it is necessary to examine those grounds in some detail to determine whether or not any of them are likely to succeed if time is extended.” (vide: in particular in *Maciu Tamani Palu* (supra) per Justice Calanchini at page 4 of the judgment.
- [39] For my part, I choose to follow that approach for if *Reddy’s* approach (supra) was to be followed, to determine whether the grounds of appeal are frivolous or vexatious, it would necessarily involve a consideration of the merits.
- [40] Likewise, as suggested in *Reddy’s case* (supra), if the subject matter involves serious question for adjudication or points raised are novel justifying leave, the court in my view would still be obliged to look at the merits.

- [41] How does an applicant for leave to appeal out of time satisfy that there are serious questions for adjudication or novel points?
- [42] Could the same be raised *in vacuo*?, bearing in mind that, the copy record is not made available to a single judge at the leave stage?
- [43] If the Copy Record is sent for by a single judge at the leave stage would he not then be delving into the merits thus rendering the leave to appeal stage and the appeal stage a distinction without a difference?

Examination of the “grounds of Appeal in some detail”

- [44] Confronted with those issues, re: the construction that ought to be placed on the “grounds of appeal in some detail”; I venture to lay down as follows – viz:

“an appellant ‘should be required to demonstrate on the face of the impugned judgment of the lower Court (without going into the merits in detail) in relation to the grounds of appeal urged and in the light of the Affidavits filed with sufficient specification as to the evidential aspects as that there are serious questions of law for adjudication or novel points of law to be determined in an appeal supported by written submissions as well.”

Application of the Principles enunciated above to the instant case

- [45] The appellants have raised several grounds of appeal dated 27th March, 2012 as being meritorious and substantive for the full court to consider should leave be granted.

- [46] Elaborating on this, Ms Naidu sought to demonstrate that, the learned trial Judge had failed to consider various items of evidence which were unchallenged and admitted by consent of all the parties. This evidence included police statements, caution interviews and documents tendered on behalf of the Appellants that negated negligence on their part, the cause of action being based on negligence resulting in personal injuries.
- [47] A perusal of the judgment of the learned trial Judge reveals otherwise (vide: paragraphs 15 to 24 of the Judgment).
- [48] Without specifying what other items of evidence which the Appellants submit as having been unchallenged and admitted by consent of all parties, I am unable to accept that ground urged on behalf of the Appellants.

Are there any other grounds warranting the grant of leave to appeal out of time?

- [49] The grounds so urged are:-

- (1) *that, the learned trial judge refused further medical examination of the Plaintiff (Respondent) sought by Counsel on behalf of the Appellants and medical reports as well;*
- (2) *that, the learned trial judge erred in not finding as a fact that, the 1st Respondent and others were travelling in the vehicle in question when the accident in issue occurred during and in the course of their employment under the 3rd Respondent and the total liability therefore was on the 2nd and 3rd Respondents and not on the Appellants.*
- (3) *that, the total award of damages and compensation is contrary to the evidence produced at the trial and is grossly excessive considering the injuries sustained by the Plaintiff (1st Respondent).*

- (4) *that, the learned judge ordered the parties to file evidence in chief in the form of Affidavits which caused grave injustice to the defendants (the Appellants) and amounted to more or less a trial by evidence not permitted by the High Court Rules.*

[50] I shall deal with those grounds *seriatim* as follows:

[51] In so far as ground (1) as recapped above is concerned, on the approach formulated by me earlier, I find there is a yawning gap in the Notice of Appeal of 11th March, 2012 in that, there is a sheer lack of specific details on the same.

[52] The same holds good in regard to ground (3) as recapped above.

[53] Accordingly, I reject the same.

Grounds (2) and (4) recapped above

[54] However, the said grounds in (2) and (4) stand on a different footing.

[55] While in my view, and in regard to the said ground (2), informed as I was on the concepts of *causa sine qua non* and *causa causans*, I found them as being subsumed in the said ground with no submission made in that regard by Mr. M.A. Khan or Mr. K. Naidu for the opposing respondents in counter.

[56] Asked by me as regards the law relating to remoteness of damage, the response was the same on the part of Counsel.

[57] Further, it is my considered view that, aspects of the law relating to vicarious liability in both its form and content may arise for consideration in the context of the said ground.

[58] Ground (4) as recapped above, to my mind stands as a pure question of law that warrants a determination by the Full Court.

Matters for the Full Court after leave

[59] For the aforesaid reasons, I am of the view that, the said grounds referred to above in Paragraph 49(2) and (4) above are grounds fit for the granting of leave for the full Court to determine in Appeal.

Consideration of the criterion of Prejudice to the Respondents should leave be granted to Appeal

[60] This is the final matter I have to address.

Rival contentions advanced on behalf of the Appellants

[61] Learned Counsel for the Appellants submitted that, if leave is granted, the 3rd and 4th Respondents would still have an opportunity to prefer a cross-appeal and in so far as the 1st Respondent is concerned he has already been paid and benefitted.

[62] Ms. Naidu thus contended that, should the Court find favour with the Appellants in regard to their chances of success in the appeal, Court will not lightly deny them of the opportunity to take forward this appeal.

- [63] As against that, Mr. M.A. Khan for the 1st Respondent contended that, on account of the delay in filing this appeal, the 1st Respondent already having been paid the claim, should leave be granted it will clearly prejudice his client together with the other Respondents which prejudice will include waste of time and excessive costs which his client, the 1st Respondent cannot afford.
- [64] Making submissions on behalf of the 2nd and 3rd Respondents, Mr. K. Naidu submitted that, his clients have already paid the 1st Respondent as decreed by the High Court in its judgment notwithstanding the fact that the order issued by the High Court staying the execution of the same had no application to his clients.
- [65] However, on a balance, I am of the view that, the criterion of prejudice even if it is not to be regarded as standing in favour of the Appellants, at the same time, it cannot be held against them either.

Some Final Comments on out of Time Leave to Appeal Applications

- [66] I do not feel constrained in saying that if an applicant seeking leave to appeal out of time is unable to satisfy court that the delay and reasons are not inordinate in the context of the facts and circumstances of his case by purging his default, such an applicant should not be allowed to go any further to prevail on Court to consider the possibility of success in the appeal. I have stated my reasons for saying so earlier in this order, but I am obliged to leave to the Full Court or the Supreme Court to deal with that matter in the future.

Conclusion

[67] In so far as the instant case is concerned, I have considered the written submissions filed on behalf of the parties, the oral submissions made by Counsel and the several affidavits tendered.

[68] For the aforesaid reasons, I make order and rule that, the Appellants are entitled to leave to appeal but only on grounds (6) and (8) urged in the Notice of Motion and Grounds of Appeal dated 22nd March, 2012 in Civil Appeal No. ABU 0016/2012 as sought in Paragraph 22 of the supporting affidavit of Thomas Naua dated 24th February, 2014 which I have recounted at paragraph (59) of this order.

In the matter of awarding costs – Applicable Principles when granting leave to appeal out of time

[69] This is an appeal filed out of time and the Appellants therefore cannot seek to appeal as a matter of right but as a matter of indulgence granted by Court.

[70] Accordingly, although I have allowed the application for leave to appeal on two limited grounds, the general principle that costs follow the event would not be applicable.

The Orders of the Court are:

- (1) Leave to appeal is granted on grounds (6) and (8) only urged in the Notice of Motion dated 22nd March, 2012 in Civil Appeal No. ABU 0016/2012 as urged in Paragraph 22 of the supporting affidavit of Thomas Naua dated 24th February, 2014.
- (2) The Appellants shall jointly pay as costs \$1,000.00 (One thousand dollars) to each of the Respondents within 28 days from the date of this ruling.
- (3) The Registrar is directed to mention this matter on a call over date to fix a date for the hearing of the Appeal by the Full Court.



Idest Almeida Guneratne

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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL