

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL ABU 8 OF 2018
(High Court HBC 306 of 2007)

BETWEEN : MERCHANT FINANCE AND INVESTMENT LIMITED

First Appellant

AND : AUTOMART LIMITED

Second Appellant

AND : JOSEVATA WAQALIVA VULUMA
J. VULUMA AND VATUNITU & COMPANY

Respondents

Coram : Calanchini P

Counsel : Mr V Filipe and Mr T Tuitoga for the First Appellant
No appearance for the Second Appellant
Mr I Fa for the Respondents

Date of Hearing : 16 November 2018

Date of Ruling : 18 December 2018

RULING

- [1] This is an application by the First Appellant (Merchant Finance) for an enlargement of time within which a notice of appeal against the final judgment of the High Court at

Lautoka delivered on 22 November 2017 may be given. The power of the Court to extend time for filing a notice of appeal is to be found in section 13 of the Court of Appeal Act 1949 (the Act) and Rule 22 of the Court of Appeal Rules (the Rules). Pursuant to section 20(1) of the Act a single Judge of the Court of Appeal may extend time for appealing.

- [2] The application was made by summons filed on 20 February 2018 and supported by an affidavit sworn on 25 February 2018 by Roween Fong. The application was opposed. An answering affidavit sworn on 18 April 2018 by Josevata Waqalevu Vuluma was filed on behalf of both respondents. A reply affidavit sworn on 2 July 2018 by Roweena Fong was filed on behalf of the first appellant. The parties filed written submissions prior to the hearing. It must be noted that the second appellant played no part in the appeal proceedings and it is apparent that the notice of appeal was filed on behalf of Merchant Finance. The affidavit of service sworn on 5 April 2018 by Esala Cagi is not sufficient to establish effective service on the second appellant (Automart). Automart is to be regarded as having no involvement in the appeal and is not a party to the appeal.
- [3] The background facts may be stated briefly. The first respondent (Josevata Vuluma) entered into a hire purchase agreement with Merchant Finance in April 2006 for the purchase of a HINO 10 Wheeler Dump Truck and a Hitachi Excavator (to be referred to collectively as the equipment) to be supplied by Automart. The arrangements fell through. It was claimed that Merchant Finance and Automart had breached the agreement by failing to deliver the items described in the purchase agreement. There were claims by Josevata Vuluma on behalf of the respondents under section 75(1) (misleading and deceptive conduct) and section 76 (unconscionable conduct) of the Fiji Competition and Consumer Commissioner Act 2010 (the CCC Act). For the reasons stated, the Court gave judgment in favour of the respondents and made an order, amongst others, that the Merchant Finance and Automart were liable jointly and severally to pay to the respondents \$50,000.00 damages. Automart was ordered to refund to Josevata Vuluma the deposit of \$19,000.00. Interest at 8% was ordered from the date of the writ

of summons to the date of judgment together with costs on an indemnity basis (solicitor and client) to be assessed by the Master.

- [4] It must at this stage be noted that although Merchant Finance had filed a defence to the claim, there was no appearance by Merchant Finance at the hearing of the action on 21 August 2017 nor did Merchant Finance file written submissions prior to judgment. So far as Merchant Finance is concerned the trial of the action proceeded ex parte.
- [5] The factors to be considered for an enlargement of time are (1) the length of the delay, (2) the reason for the failure to comply, (3) 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 (4) if time is enlarged will the respondent be unfairly prejudiced: NLTB (now iTLTB) v- Khan [2013] FJSC 1; CBV 2 of 2013, 15 March 2013.
- [6] In this case the judgment was pronounced on 22 November 2017. The application for an enlargement of time was filed on 20 February 2018. As a final judgment the appellant should have filed a notice of appeal within 42 days of the date of pronouncement under Rule 16 of the Rules, that is by 3 January 2018. The application is almost 7 weeks late.
- [7] The explanation for the delay as stated in the supporting affidavit is that the legal practitioners were of the belief that time ran from the date of sealing of the orders by the Court Registry. Rule 16 in its form came into effect on 31 December 2008. (Government Gazette notice No.1170 of 2010 dated 9 July 2010). The explanation is wholly unsatisfactory and since the length of the delay is substantial the appellant is required to establish that its appeal is likely to succeed.
- [8] It is at this point that the appellant faces a procedural problem that affects the fate of the present application. As noted earlier in this Ruling, the trial of the action proceeded in the absence of Merchant Finance. Such a course of action is permitted under Order 35 Rule 1(2) of the High Court Rules. The respondents were entitled to proceed to prove


their claim in accordance with the pleadings. As Merchant Finance had filed an amended defence which gave use to issues in dispute the respondents were required to prove their case in terms required by the statement of claim.

- [9] When a judgment is given against a party at a trial in his absence then under Order 35 Rule 2 that party may apply for the judgment to be set aside. In **Mishra –v- Director of Public Prosecution** [2012] FJCA 40; ABU 50 of 2010, 8 June 2012 this Court concluded that the correct procedure is for the party absent at the trial of the action to apply to the High Court for setting aside and that to appeal to the Court of Appeal in such cases is an abuse of process.
- [10] As a result the application for an enlargement of time must be dismissed because the correct procedure of applying for the setting aside of the orders and a re-hearing of the action to the court below was not followed. The present application is an abuse of process. The respondents are entitled to costs fixed in total in the sum of \$2,000.00 to be paid within 28 days from the date of his ruling.

Orders:

1. *Application for enlargement of time is dismissed.*
2. *Appellant Merchant Finance is to pay to the Respondents a total of \$2,000.00 as costs within 28 days from the date of this Ruling.*




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