

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

CIVIL APPEAL ABU 0054 OF 2017
(High Court HBC 241 of 2015)

BETWEEN : **LAND TRANSPORT AUTHORITY**

Appellant

AND : **SAHID BEGG**

Respondent

Coram : **Calanchini P**

Counsel : **Ms T Colati for the Appellant**
Mr K Singh for the Respondent

Date of Hearing : **5 February 2018**

Date of Ruling : **27 April 2018**

RULING

- [1] This is an application for an enlargement of time within which a notice of appeal against the final judgment of the High Court may be given. The judgment was pronounced on 7 April 2017 whereby it was ordered that the Appellant and a co-defendant pay to the Respondent the sum of \$130,000.00 jointly and severally together with pre-judgment

interest at 3% and costs of \$2,500.00. The Appellant and the co-defendant were found to have breached a duty of care owed to the Respondent.

- [2] The application was made by summons filed on 26 May 2017 and was supported by an affidavit sworn on 26 May 2017 by Gabriel Stephens. The application was opposed by the Respondent on whose behalf an answering affidavit sworn on 2 June 2017 by Sahid Begg was filed. The Appellant subsequently filed a reply affidavit sworn on 4 July 2017 by Gabriel Stephens. The parties filed written submissions prior to the application being called on for hearing.
- [3] The application is made pursuant to jurisdiction given to the Court by section 13 of the Court of Appeal Act 1949 (the Act) and Rule 27 of the Court of Appeal Rules (the Rules). Pursuant to section 20(1) of the Act a judge of the Court may exercise the power of the Court of Appeal to grant an enlargement of time.
- [4] When the application came on for hearing on 17 November 2017 the Appellant sought leave to file and serve a supplementary affidavit in order to exhibit a notice setting out its proposed grounds of appeal. Leave was granted and the further hearing of the application was adjourned to 26 January 2018. On 26 January 2018 the Appellant again sought further time to file and serve a supplementary affidavit that complied with Order 41 of the High Court Rules. Leave was granted and the further hearing adjourned to 5 February 2018 on condition that the appellant pay to the respondent the sum of \$1,800.00 costs thrown away within 14 days. The hearing proceeded on 5 February and was completed on that day.
- [5] The background to the appeal may be stated briefly relying upon the undisputed material taken from the judgment of the High Court. The Respondent (Begg) was the owner of a bulldozer. The co-defendant (Ledua) was an employee of the Appellant (LTA). LTA is a statutory authority established under the Land Transport Act 1998. The bulldozer registered number FD531 (the vehicle) was transferred to a third party and the said transfer was subsequently registered by LTA. It was alleged that the transfer was

registered as a result of the negligence of Ledua who had failed to verify the material in part 3 of the Application for Transfer of Ownership of Vehicle form. The transfer was registered to Manos Jeet (Jeet) in April 2015 and was clear of any financial obligation. Ledua admitted the oversight although it was not disputed that she was not involved in the illegal act of the third party. The vehicle was subsequently sold pursuant to a Bill of Sale by a financial institution that had apparently entered into a loan agreement with the third party (Jeet) after he had obtained registration by the unlawful transfer.

- [6] The learned Judge found as a fact that Begg had not signed the Transfer of Ownership form relying on the uncontradicted evidence of Begg himself. The Judge also found as a fact that Ledua had failed to verify the particulars of the licensed driver who had purported to witness Begg signing the Transfer of Ownerships form. The Judge concluded that had Ledua performed her duties she would have noted that the particulars of the witness stated on the form did not correspond with the information contained in the LTA data base relating to that witness whose names was Ajay Chand. The Judge concluded that the failure to verify the details of the witness was a negligent act which resulted in the transfer of the vehicle to Jeet. It was as a result of that transfer that Jeet was able to borrow money from the financial institution on the security of the vehicle over which a Bill of Sale had been taken by the financial institution. As a result of Jeet's default in making payments, the financial institution exercised its rights under the Bill of Sale and auctioned the vehicle thereby depriving Begg of the vehicle as true owner.
- [7] The learned Judge concluded that Ledua owed a duty of care to check and verify the correctness of the information in Part 3 of the Transfer of Ownership Form as it was the basis of transfer of ownership. As a result of the failure to do so there was a direct loss of ownership to Begg and that loss was foreseeable. The Judge concluded that the breach of duty by Ledua resulted in a foreseeable loss to Begg. Since Ledua was an employee of the LTA acting in the course and within the scope of her employment, LTA was vicariously liable for the loss.

- [8] The principles upon which an enlargement of time may be granted are well settled and well known. They were considered by the Supreme Court in NLTB (now iTLTB) –v- Khan and Another (CBV 2 of 2013; 15 March 2013). In order to ensure that the discretion is exercised in a principled manner the Court will consider (a) the length of the delay, (b) the reasons 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. The discretion should be exercised in a manner that re-enforces the importance of compliance with the rules of court and the need to bring finality to litigation (see McCaig –v- Abhi Manu CBV 2 of 2012; 24 April 2013).
- [9] The length of time from the date of pronouncement of the final judgment on 7 April 2017 to the date of filing the summons on 26 May 2017 was 7 days. The delay is relatively short but nevertheless should be explained. The explanation is set out in paragraphs 5 and 6 of the supporting affidavit. The explanation is related to the still outstanding confirmation from LTA's insurance broker's professional indemnity insurance assessment. It is not readily apparent as to why that should be a reason for failing to comply with the 42 days' time limit for filing a notice of appeal under Rule 16 of the Rules.
- [10] Although the delay is relatively short the explanation is, at the least, unsatisfactory and unconvincing. It is necessary to consider whether there is a ground of appeal that is of sufficient merit to warrant consideration by the Court of appeal. In the supplementary affidavit filed on 1 February 2018 the Appellant sets out the grounds of appeal upon which it relies in the event that an enlargement of time is granted. Those grounds are:

"1. *The Court erred in law in not exercising its discretion to join the person who had transferred the Bulldozer as the 1st Defendant considering that the third party (Manos Jeet) was the one who fraudulently transferred the vehicle:*

- a. *That the person had fraudulently transferred the bulldozer registration number FD 531;*
 - b. *That there were actions by Manos Jeet to justify that he should be joinder of the court proceedings.*
- ii. *The Court erred in law and fact in not considering the statutory obligations of the Authority under the Land Transport Act 1998:*
 - a. *That the 1st Defendant's actions were a results of her misconduct which she is liable for.*
 - b. *That the Authority is only liable if it is shown that the act was consented to or connived at by the employer or principal.*
- iii. *That Court erred in law and in fact in failing to question the authenticity of the valuation report of the said machine that was tendered to by the Respondent/Plaintiff as it would also have been the duty of the Court to confirm this."*

[11] In so far as the first ground of appeal is based on the failure of the Court to join of its own motion the person who had obtained ownership of the vehicle by fraud, there are two observations to be made. First, ordinarily it is not the function of the Court to assist a party to identify who should or should not be joined as a party to litigation. Second, the causes of action pleaded by Begg were breach of duty, negligence and vicarious negligence. There was no requirement for Jeet to be joined when it was admitted that Ledua had failed to carry out the proper verification and that Ledua was employed by LTA.

[12] In the second ground LTA relies on the protection afforded by sections 110 and 111 of the Land Transport Act 1998. Those sections provide:

- "110 (1) *An authorized officer, employee of or any person engaged by the Authority who misconducts himself or herself in the performance of his or her duties commits an offence and is liable on conviction to the prescribed penalty.*
- (2) *Without affecting subsection(1), an authorized officer, employee of, or any person engaged by the Authority is deemed to have misconducted himself or herself in the performance o his or her duties if he or she*

fails to comply with any instrument of delegation issued by the Authority pursuant to section 12.

111 *If an offence under this Act is committed by an employee or agent of another person in the course of the employment or agency, the employer or principal, as the case may be, is also liable for the offence if it is shown that the act or omission constituting the offence-*

(a) *was consented to or connived at by the employer or principal; or*

(b) *was attributable to gross neglect on his or her part."*

[13] It is my opinion that section 110 raises misconduct to the status of a criminal offence. Section 110(2) describes the type of misconduct that will constitute the offence as being a failure "to comply with any instrument of delegation issued by the Authority pursuant to section 12." However the fact that legislation renders certain conduct to be criminal in nature does not by itself preclude possible civil responsibility for the same conduct. Whether Ledua was charged with an offence under section 110 which may have subsequently provided LTA with the statutory protection afforded by section 111 is of no consequence to the issue of civil liability for negligence, breach of duty and vicarious liability.

[14] The third ground relates to the valuation adduced as evidence to establish the quantum of the claim. As Counsel for Begg submitted, there was no objection raised at the trial in relation to this evidence and as a result LTA cannot now attach to the trial Judge an obligation to fulfill the role of counsel at the trial.

[15] For the above reasons I have concluded that there is no ground of appeal that requires the further consideration of the Court of Appeal and as a result the application for an enlargement of time is refused. The Respondent is entitled to costs fixed in the sum of \$1,800.00.

Orders:

1. *Application for enlargement of time is refused.*
2. *Appellant is to pay costs to the Respondent in the sum of \$1,800.00 within 21 days from the date of this Ruling.*



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