

IN THE HIGH COURT OF FIJI AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 86 of 2018

BETWEEN : JUDITH ANN ZUNDEL on behalf of DAVID WILLIAM  
ZUNDEL

FIRST APPLICANT

AND : ROBYN FERRIER-WATSON

SECOND APPLICANT

AND : CARPENTERS PROPERTIES LIMITED

FIRST RESPONDENT

AND : JITEN SINGH

SECOND RESPONDENT

Coram : The Hon. Mr Justice David Alfred

Counsel : Ms M. Muir for the Applicants  
Mr E Narayan for the First Respondent  
Mr R Prakash for the Second Respondent

Date of Hearing : 23 August 2018  
Date of Ruling : 27 August 2018

## RULING

1. This is the Applicants' Summons for Extension of Time within which to serve the Notice of Originating Motion (O.M.) (to set aside an arbitration award) filed on 28 March 2018 on the First and Second Respondents and the time for service be enlarged until 12 April 2018.
  
2. The Affidavit in Support is deposed by Elisha Kissun (Kissun) who says deposed as follows:
  - (1) He is a legal clerk with the Applicant's solicitors.
  - (2) On 28 March 2018 he filed at the High Court Registry, the O.M. and affidavit in support of the First Applicant. He checked the next day and on 3 April 2018 but the O.M. had not been issued.
  - (3) Josefa Ginigini informed him, that he, Ginigini, had checked on 4, 5 and on 6 April 2018 but the O.M. had not been issued by the Registry.
  - (4) Ginigini informed him that he found the O.M. in the firm's folder in the registry on 9 April 2018 and served it on the First Respondent's solicitors on 9 April 2018 and on the Second Respondent on 12 April 2018.
  
3. The Affidavit in Response is deposed by Daniel Kingston Whippy the Managing Director of the First Respondent who says as follows:
  - (1) The affidavit of Kissun is that of a law clerk and is a nullity;
  - (2) The application was filed on 28 March 2018, 2 days before the expiry of the time limit. It was served on 9 April 2018. Both the application and its service should have been effected before 30 March 2018.

4. At the outset of the hearing Mr Prakash informed the Court that the Second Respondent would abide by the decision of the Court and would not be objecting to the extension of time.
5. Ms Muir submitting for the Applicants said the O.M. was filed on 28 March 2018 and thereafter, before of the Good Friday and Easter public holidays, was only extracted on 9 April 2018 and served on the First Respondent's solicitors on the same day. She said it should have been served on 3 April. There was only a minimal delay. They had a good case and she applied orally to correct the name of the deponent of the affidavit in support.
6. Mr Narayan then submitted. He said the Applicants and not the clerk should have deposed the affidavit. He stressed the O.M. was filed on the 19<sup>th</sup> day of a 21 day period.
7. At the conclusion of the arguments I said I would take time to consider my decision.
8. This is a very minor issue on the facts of the matter. In my considered opinion the court when seised of a case ought to consider the salient facts that arise in the particular matter before it and make its decision based thereon. The facts that obtained in other similar situations should not be given an overriding effect.
9. If I may say so with respect, the First Respondent cannot fasten exclusive responsibility for the delay on the Applicant. It is clear that the O.M was filed within time. I have not been advised that such a pleading cannot be filed at the 11<sup>th</sup> hour. It was not served within the specified time frame because it could not

be extracted due to the supervening public holidays. There is therefore no call for the Court to single out any party/person on whose shoulders should be placed the blame.

10. I find and I so hold that the delay was minimal and there was no prejudice to the Respondents. By my decision now the substantive matter of whether the arbitration award should be set aside can move forward to be heard.
11. Before I pronounce my decision I wish to say that while it is trite that a legal clerk should not affirm an affidavit pertaining to the facts of a matter which is being litigated, there is nothing stopping him from affirming an affidavit pertaining to the filing, extracting and serving of a document which are within his knowledge but which are outside the ken of the Applicants.
12. In the result, the extension of time to the 12<sup>th</sup> April 2018 for service of the O.M. Is hereby granted. The First and Second Applicants are to pay the First Respondent only the costs of this summons summarily assessed at \$250 by 29 August 2018.

Delivered at Suva this 27<sup>th</sup> day of August 2018.



David Alfred  
JUDGE  
High Court of Fiji