

IN THE HIGH COURT OF FIJI  
WESTERN DIVISION AT LAUTOKA  
CIVIL JURISDICTION

Civil Action No. HBC 155 of 2009  
(On Appeal from Lautoka High Court  
Civil Action No. HBC 155 of 2009)

BETWEEN : BRETT WHITTAKER and LOUISE WHITTAKER

APPELLANTS  
(ORIGINAL PLAINTIFFS)

AND : BANK OF THE SOUTH PACIFIC LIMITED

RESPONDENT  
(ORIGINAL DEFENDANT)

Appearances : Ms B. Doton with Mr J Jacobs for the appellants  
Mr J Apted with Ms W Chen for the respondent  
Date of Hearing : 3 November 2017  
Date of Written submission : 15 December 2017 & 9 February 2018 (appellants),  
26 January 2018 (respondent)  
Date of Ruling : 28 February 2018

## R U L I N G

### Introduction

[01] This is an application for leave to appeal out of time against an interlocutory ruling (*the ruling*) of the Learned Master of the High Court (*the Master*) who on 16 December 2016, struck out and dismissed the appellants' action with costs of \$1,500.00 for non-compliance with an unless order made by the court in relation to discovery of the certain documents. The documents had been referred to in the ruling as the **Khan Notes** and the **Lowing Memo**. The Master found that the plaintiff had suppressed and had failed to produce those documents for inspection in spite of the agreement to produce them for inspection.

- [02] Previously, on 16 January 2017, the appellants had filed a notice of appeal against the ruling without obtaining the leave of the court to appeal. They had to obtain leave of the court before the filing their notice of appeal, for the appeal was clearly against an interlocutory ruling of the Master. An interlocutory order or judgment of the Master cannot be appealed against without the leave of a single judge of the High Court (See Order 59, Rule 8 (2) of the High Court Rules 1988, as amended ('HCR')). The previous notice of appeal filed by the appellants was deemed abandoned by virtue of O. 59, Rule 17 (3), where the appellants had failed to file and serve, within 21 days of filing of notice appeal, a summons returnable before a judge for directions and a date for the hearing of the appeal as required by Rule 17 (2). I delivered a ruling to that effect on 15 June 2017.
- [03] By their second application filed on 19 June 2017, the appellants seek the leave of the court to appeal the ruling out of time.
- [04] An application for leave to appeal an interlocutory order or judgment must be made by summons with a supporting affidavit, filed and served within 14 days of the delivery of the order or judgment (See O.59, Rule 11).
- [05] The application for leave to appeal the ruling is made after a delay of some 5 ½ months. The application is made pursuant to Order 3, Rule 4 and Order 59, Rule 10 of the HCR and the inherent jurisdiction of this court.
- [06] The respondent had raised some preliminary points and asked me to dismiss the leave application *in limine* without considering the merits of the application. I think it would be prudent to consider the application on its merits. I would, therefore, ignore the preliminary issues raised by the respondent.
- [07] At the hearing, both parties made oral submissions. Additionally, they had also filed their respective written submissions. I am grateful to counsel for their comprehensive submissions.

### **Background Facts**

- [08] BSP, the respondent filed an application to strike out the Whittakers' (appellants') claim for failure to give inspection of the two listed documents. On 16 December 2016, the Master struck out Whittakers' claim having found contumacious conduct on their part in respect of their discovery obligation in falsely and repeatedly informing the court on 4 occasions that they had provided two listed documents

to BSP when they had not, and deliberately suppressing documents that they were required to produce.

- [09] The Whittakers' filed an appeal (without first obtaining leave of the court to appeal as required by O.59, r.8 (2)) against the Master's ruling delivered on 16 January 2017 and served it on BSP on 18 January 2017.
- [10] The Whittakers' were required to file an affidavit of service within 7 days from the service of appeal (O.59, r.17 (1)). They were also required to file a summons for direction within 21 days after the filing of the appeal (O.59, r.17 (2)). O.59, r.17 (3) provides that non-compliance with either requirement would result in the appeal automatically being deemed abandoned. Their affidavit of service was due on 25 January 2017. However, in breach of r.17 (1), they did not file their affidavit of service until 10 February 2017. I declared in my ruling of 15 June 2017, that their appeal against the Master's ruling was deemed abandoned.
- [11] In their current application filed 19 June 2017, they seek leave to appeal the Master's ruling out of time. They are about 5 ½ months late when making this application.

### **The Governing Principle**

- [12] The governing principles for the granting of leave to appeal out of time are as follows:

*"The governing principles for the granting of leave to appeal out of time are as follows:*

- (i) Length of delay;*
- (ii) Reason for the delay;*
- (iii) Chance of appeal succeeding if time for appeal is extended; and*
- (iv) Degree of Prejudice to the Respondent if application is granted.*

*(See, Herbert Construction Company (Fiji) Ltd v Fiji National Provident Fund [2010] FJCA 3; Miscellaneous Case 020.2009 (3 February 2010), Kumar v Commissioner of Police, Fiji Court of Appeal Civil Appeal No. ABU 0059 of 2004 (10 March, 2006), Nair v Prakash [2013] FJCA 147; Misc. Action 10.2011 (30 October 2013) & Tora v Housing Authority [2002] FJCA 16; ABU0036.2002S (15 November 2002))."*

## Discussion

- [13] There is no specific rule in the HCR that empowers the court to grant leave to appeal an interlocutory order or judgment of the Master out of time. In *Mohammed v Khan* [2015] FJHC 728;HBC67.2014 (2 October 2015), I held that O.59, r.10 empowers the court to enlarge the time period for filing and serving a notice of appeal or cross appeal and not the time period for filing and serving the application for leave to appeal an interlocutory order of the Master.
- [14] However, in a recent ruling in *Costerfield Ltd v Denarau International Ltd & Ors* (Civil Action No. 214 of 2012 (7 February 2018)) Justice Tuilevuka, following Justice Amaratunga's judgment in *Veilave v Naickar* [2017] FJHC 131; HBC159.2013, held that the general provision contained in Order 3 rule 4 of the High Court Rules 1988 should be relied on for the application seeking extension of time for leave to appeal against the Master's Ruling (interlocutory ruling).
- [15] The appellants rely on O.3, r.4 for seeking an extension of time to appeal the Master's interlocutory order delivered on 16 December 2016.
- [16] Following the decisions in *Costerfield and Veilave* (above), I would also hold that the appellants could rely on the general provisions in O.3, r.4 for their application for leave to appeal out of time the Master's ruling striking out their claim. I would consider their application in light of principle applicable to an application for granting of leave to appeal out of time.

### *Length of Delay*

- [17] The interlocutory order for leave to appeal out of time sought was made on 16 December 2016. The appellants must have filed their leave application by 27 January 2017 (legal vacation is excluded in calculating the time limit of 14 days prescribed in O.59, r.10). They had filed their application on 19 June 2017, which is about 5 ½ months later than the time allowed for seeking leave to appeal.
- [18] The delay of about 5 ½ months in seeking leave of the court to appeal the ruling is too long, which is substantial. The appellants had conceived that the delay is substantial.

- [19] In *Sharma v Singh* [2004] FJCA 52; Civil Appeal No. ABU0027/2003S (11 November 20004), the Fiji Court of Appeal considered 40 days a “significant period of delay” and refused leave to appeal. In *Latchmi v Moti* [1964] 10 FLR 138, leave was refused for a 47-day delay.

*Reason for the delay.*

- [20] I now turn to consider the reason for the delay.

- [21] The appellants explain the reasons in their affidavit in support namely Whittaker Affidavit and Doton Affidavit. The reasons for the delay are as follows:

*“Ms Doton went on sick leave from 13 January 2017 to 20 January 2017 (para 8, Whittaker Affidavit, para. 5, Doton Affidavit). She correctly instructed her associate on 13 January 2017 to “look at the High Court Rules and follow the rules for appeal and file the necessary documents” (para. 6, Doton Affidavit).*

*During Ms Doton’s period of sick leave, the notice of appeal was filed on 16 January 2017 and served on BSP on 18 January 2017 (paras. 5 & 6, Whittaker Affidavit). Ms Doton resumed work on 23 January 2017 (para. 9, Whittaker Affidavit).*

*That after the Justice Ajmeer’s ruling of 15 June 2017, they took timely action by filing the Summons on 19 June 2017 (para. 16, Doton Affidavit).*

- [22] Ms Doton counsel for the appellants submits that:

*Christmas and New Year intervened between the date of delivery of the Master’s Ruling and the filing and service of Notice of Appeal;*

*Neither party adverted to the “final vs interlocutory” issues during January or February, or at the hearing on 7 March 2017;*

*The ruling of Ajmeer J was handed down about three months after the hearing on 7 March 2017, which elapsed of time cannot altogether be attributed to the plaintiff (nor of course to the learned judge);*

*The plaintiffs’ solicitors were not “sitting on their hands” during the period January to June 2017.*

- [23] On the other hand, Mr Apted counsel for the respondent submits that:

*It is not disputed that she was at work from 23 January to 27 January 2017. However, there is no explanation as to why, during this period, her firm –*

- (a) failed to file an affidavit of service by the due date of 25 January 2017 (it was not filed until 10 February 2017 (para. 7, Whittaker Affidavit)) and the Appeal was therefore deemed to have been abandoned under O.59, r. 17(3);*
- (b) failed to apply for leave to appeal prior to filing the appeal; and*
- (c) did not seek leave to appeal against the interlocutory ruling of the Learned Master (as he then was) by 27 January 2017 as required Under O. 59, r.11.”*

*It is notable that the relevant rules –O.59 – are specific and clear on the procedure in terms of non-compliance. Despite the clear words of O.59, it is not explained why Ms Doton’s associate or another solicitor at Rams Law was ignorant of the law or could not have simply reviewed the law and ensured that the requirements were complied with.*

- [24] The plaintiffs’ solicitors failed to identify that the Master delivered an interlocutory ruling striking out their claim for non-complying with an unless order. The Master’s ruling was clearly an interlocutory order because it was made on an interlocutory application filed by the respondent seeking to strike the claim for failing to provide the documents for inspection.
- [25] The Court of Appeal in *Goundar v Minister for Health* [2008] FJCA 40; ABU0075.2006S (9 July 2008) cleared the doubt and said that *an application to strike out a pleading is an example of interlocutory applications.*
- [26] The plaintiffs’ solicitors filed a notice of appeal on the assumption that the Master’s ruling was a final order. The Master’s order was made on an application to strike out the claim (a pleading). Undoubtedly, the Master’s order is an interlocutory order which could be appealed against with leave of the court.
- [27] Now, the appellants seem to put the blame on their solicitors for not prosecuting an appeal against the Master’s ruling according to the law for the delay in making the application for extension of time to appeal the Master’s ruling.
- [28] A party has to bear responsibility for delay whether it be caused by his or her solicitor.

[29] In *Bank of Scotland v Pereira & Others* [2011] 3 All ER 392, Lord Neuberger MR had this to say:

*"I reject the contention that former solicitors were to blame to delay the matter rather than saying that 'this is a case where the normal rule shall apply that a party has to bear responsibility for delay whether it be caused by him or his solicitors."*

[30] In *Clark v Zip Fiji* [2014] FJCA 189; ABU0003.2014 (5 December 2014) Guneratne JA, refusing leave to appeal out of time, stressed that ignorance of the law by solicitors afforded no excuse for failing to appeal within time.

[31] The court in *Mullock v Price* [2009] EWCA Civ 1222, LTL 15/10/2009 held that a defendant could not shield behind his representatives' inaction to excuse this period of delay.

[32] In this case, the appellants have to bear responsibility for delay whether it be caused by them or their solicitors.

[33] For the reasons set out above, I find the delay of about 5 ½ months is substantial and find that the reasons for the delay as unsatisfactory.

*Chance of appeal succeeding if time for appeal is extended*

[34] The appellants seek to rely on the following ground of appeal if leave to appeal is granted:

1. *The Learned Master erred in fact in finding the Whittakers' had deliberately suppressed the documents when they had produced –*
  - (a) *The Lowing Memo on locating it after extensive searches;*
  - (b) *The Khan Notes*
  - (c) *Notes on realising it had been mis-described.*
2. *The Learned Master erred in fact in finding the Whittakers' had falsely and repeatedly misinformed the Court that they had produced the documents on 21/10/2015, 9/11/2015, 23/11/2015 and 07/12/2015 when there was no evidence before the court that the Whittakers' had instructed their solicitor to so advise the court and the Master could not have found that he had been misinformed on the 4 occasions without referring to files notes to that effect.*
3. *By reason of, inter alia, Grounds 1 & 2 and the Whittakers' evidence that one of the documents (the Khan Notes) had, at that time, been lost and that they had made extensive searches for the other documents (the Lowing Memo),*

the Learned Master erred in fact in finding they had deliberately suppressed the documents.

4. By reasons of Grounds 1, 2 & 3 and in circumstances when the documents were not material to BSP's defence, the Master erred in fact and law in dismissing the Claim for contumelious conduct.
5. The Learned Master misdirected himself and did not exercise his discretion fairly in striking out the Claim, *inter alia*, the circumstances, where there was evidence that the Whittakers' had difficulty in communicating with their Solicitor at the relevant time and no reliance was placed in the Ruling on BSP's submissions on the alleged incomplete nature of the documents.

[35] The function of this court is to consider whether any of the grounds of appeal has a chance of success and/or whether there are other compelling reasons for granting leave to appeal out of time. For this purpose, I am not going to set out the well-argued written submissions made on Mr Whittakers' behalf and in response on behalf BSP. Having gone through the proposed grounds of appeal, I could only say that the proposed grounds of appeal have no chance of success, if the time for appeal is extended, and I also find that there are no other compelling reasons involving the question of law or interpretation of any provision of the law.

*The degree of Prejudice to the Respondent if the application is granted.*

[36] In regards to prejudice, BSP submits that it will be seriously prejudiced if the Whittakers' are permitted to file a fresh notice of appeal for the following reasons:

- (a) *The Whittakers' claims primarily relate to alleged negotiations and breaches of a letter of offer for overdraft facilities entered into on 8 June 2005, now more than 12 years ago (para. 20, Prasad Affidavit). However, they failed to comply with their discovery obligations about 12 years after the event in issue and about 8 years after they filed this Action (in 2009) despite the BSP consistently pushing them to comply (paras. 19 & 20, Prasad Affidavit). Their non-compliance ultimately resulted in the striking out of the Claim on 16 December 2016.*
- (b) *The evidence is that, as one would expect, due to the passage of time, many of BSP's witnesses of facts are no longer with them and some of them, such as Mr Laurie Melsop and Mr Mike Walsh, are no longer in Fiji. There is also the risk and*



*prejudice arising from the fact that memories fade with time – especially over a decade ago (para. 20, Prasad Affidavit).*

*(c) Allowing the late re-filing of the appeal will subject BSP to further legal costs when the Whittakers' have already caused BSP to expend considerable legal fees over the last 8 years on interlocutory matters such as the 4 injunction applications filed on 27 August 2009, 17 March 2010, 13 October 2010 and 10 August 2012, and the unnecessarily lengthy discovery process when they failed to disclose and then discover documents (see summary of court attendances, annexure SSL-2, Lata Affidavit).*

[37] Whittakers argue that the granting of leave to appeal out of time will not prejudice the BSP to any extent for which an award of costs cannot compensate.

[38] For my part, I, on the facts, find that the BSP's prejudice as specific and that the granting of leave to appeal out of time will prejudice the BSP.

*Bill of Rights issue*

[39] It is submitted on the Whittakers' behalf that the circumstances surrounding the application of the Whittakers to have this proceeding dismissed, as put before the court in evidence, combined with Master's ruling, are tantamount to denying the Whittakers' right to have the dispute which is the subject of this proceeding determined by the court, in circumstances where, either on the law or the facts, that is simply not justifiable. The Whittakers rely on section 15 (2) of the 2013 Constitution in support of their Bill of Rights argument. Section 15 (2), CON dealing with access to courts or tribunal provides:

*"(2) Every party to a civil dispute has the right to have the matter determined by a court of law or if appropriate, by an independent and impartial tribunal."*

[40] The issue is whether striking out for failure to comply with procedural rules or orders is a denial of the right of access to a court.

[41] In *Canada Trust Co. v Stolzenberg* (unreported, 14 October 1998) a party who failed to comply with an unless order unsuccessfully claimed he had been deprived of the right to a fair trial contrary to art. 6 of the European Convention on Human Rights. The court held that he had deprived himself of that right by his own non-compliance.

[42] The Whittakers, under section 15 (2) of the CON, had the right of access to a court and the right to have their matter determined by a court of law. However, they had deprived themselves of that right by their own non-compliance with the procedural rules and with an unless order. As such, there is no violation of their right guaranteed under section 15 (2) CON.

### Conclusion

[43] Having found that about 5 ½ month delay as substantial and having found that the reasons for the delay as unsatisfactory, I refuse to grant leave to appeal out of time the interlocutory order of 16 December 2016 delivered by the Master striking out the Whittakers' claim in whole. I would order the Whittakers to pay a sum of \$850. 00 to the BSP for the costs of these proceedings.

### The Final Outcome

1. Leave to appeal out of time of the Master's interlocutory order dated 16 December 2016 is refused.
2. The appellants will pay costs of \$850. 00 to the respondent.

*M. H. Mohamed Ajmeer*  
28/2/18

M. H. Mohamed Ajmeer

JUDGE



At Lautoka

28 February 2018

Solicitors:

For the appellants: M/s Rams Law, Barristers & Solicitors

For the respondent: M/s Munro Leys, Solicitors