

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

CIVIL APPEAL NO. ABU 0010 of 2022
(High Court Civil Action ERCA: 01 of 2019)

BETWEEN : **LAND TRANSPORT AUTHORITY**

Appellant

AND : **KUNAL CHAND**

Respondent

Coram : **Dr. Almeida Guneratne, P**

Counsel : **Mr A. Prasad for the Appellant**
Mr A Kohli and Ms S Naidu for the Respondent

Date of Hearing : **5 January, 2023**

Date of Ruling : **17 February, 2023**

RULING

[1] This is an application for leave to file and serve notice and grounds of appeal out of time against the judgment of the Employment Relations Court (ERC).

[2] Although “*the Appeal*” itself was filed within time, the Appellant failed to pay security for costs of the appeal within the time prescribed by Rule 17(1) of the Court of Appeal Rules.

[3] Bearing in mind the fact that, both the substantive law as well as the procedural law are complementary, this Court therefore being obliged to take both those criteria into consideration in exercising its discretion whether or not to grant extension of time to appeal the present appeal, I shall proceed to give my mind to the matter as follows.

Discussion in the light of the relative submissions made on behalf of parties on the said criteria

[4] The length of the delay (**conceded by the Appellant**).

[5] On that, I need only to say that, “*the length of delay*” will depend on the “*facts and circumstances*” of each case. While one day’s delay could be held to be crucial or decisive, even a number of years delay could be excused if the reasons are adduced to the satisfaction of Court to exercise its discretion.

[6] I shall not consume paper in this Ruling commenting further on that aspect, save as to say, whatever the length of the delay involved “*the reasons for the same*” is the criterion that would be *prima facie* decisive, I say *prima facie* because, the criteria of “*relative prejudice to parties*” (which would necessarily bring back “*the length of the delay criterion*”) against which “the reasonable chance/prospects/arguable case if leave was to be granted would need to be addressed on the basis of the established Judicial jurisprudence in Fiji.

[7] Indeed, I shall in my determination address the said criteria taking them cumulatively, adopting a holistic approach but before doing that, I felt it would be best to first address the said *prima facie* criteria.

Reasons for the delay

- [8] Mr Prasad for the Appellant relied on several precedents in support of his argument that, the delay was due to:-
- (a) administrative delays that inevitably occur in an institutional context.
 - (b) the administrative delays in the present case were on account of decisions the Appellant as an institution had to await pending its “*Management Board decisions.*”
- [9] In his counter submissions Mr Kohli submitted that, “*the reasons for the delay*” in the Appellant’s own admission was due to its internal institutional lapses or breakdowns and even assuming the delay was on account of their lawyers, the lawyers were “*in house lawyers*” of the Appellant’s institution and therefore ought not to be treated on par with an ordinary litigant who retains lawyers to espouse his/her cause.
- [10] Mr Kohli was obliged to make that submission when I intervened and referred him to the recent single Judge decision of the Supreme Court in **Hussain v Prasad**, wherein, the Supreme Court granted leave to appeal against my Ruling in the Court of Appeal (*vide*: [2022] FJSC 7, 3rd March, 2022).
- [11] Consequently, Mr Kohli argued that, if this Court was to look at the supporting affidavit of the Appellant (the affidavit of Ms Mereseini Siliva), the reasons for the delay are fairly and squarely placed on what has been re-capped in paragraph [8] above and therefore ought not to be excused for the reason recapped in paragraph [9] above.
- [12] Having considered the relative submissions, I agree with Mr Kohli’s submissions and conclude in saying that, the reasons for the delay have not been explained to the satisfaction of this Court.
- [13] Consequently, having reached my assessment thereon, I addressed my mind to the question in regard to the criterion of possible success in appeal should leave

notwithstanding the lapse of time was to be granted. (vide: **Khan –v- NLTB** [2013] FJSC 1) and the precedents following in its wake)

My Interpretation and approach to the said past precedents

- [14] In a recent Ruling of mine I laid down that, if reasons for the delay in filing an appeal are found to be acceptable to Court, then “*that intended appeal*” (though out of time) must be accorded the same status as “*an appeal*” filed with time, and consequently a single judge is not required to look any further. (vide: **Pacific Energy etal v. Ashay Amar & Others**, ABU0020 of 2022, 30 December, 2022).
- [15] In the instant case, I am not satisfied that the delay in filing “*the appeal*” has been excused to the satisfaction of Court.
- [16] Notwithstanding that, I asked myself the question whether I was nevertheless required to look into the grounds of appeal urged to grant leave to appeal. I do not think so.
- [17] My considered view on that is that, if the reasons for the delay are not explained to the satisfaction of this Court, the matter must end there and an application for extension of time to appeal out of time must necessarily be rejected in the exercise of this Court’s discretion without the need to go into the aspect of “*possible or reasonable prospects of success.*”

The Resulting Position in the light of the rival submissions as recapped above

- [18] While Mr Prasad’s submission was that, the alleged lapse on the part of his client was due to the mistakes attributable to the lawyers thus coming within the Supreme Court (Single judge) ruling in **Hussain v. Prasad** (supra), Mr Kohli made the point that, the instant case needed to be distinguished for the reason that, the lawyers involved were “*in house lawyers*” of the Appellant’s institution and not retained outside lawyers. Mr Prasad’s counter to Mr Kohli’s said submission was that, the distinction drawn by Mr Kohli was a

thin distinction in as much as the situation his client had come to be placed in was on the broader proposition that, “*the lapse in issue*” was due to the acts or omissions on the part of lawyers and therefore his client (the Appellant) ought not to be penalized.

[19] Mr Kohli impliedly contended (on the prejudice criterion to his client), and asked what difference would it make to his client whether the delay was on account of “*in house lawyers*” or “*outside retained lawyers?*”

[20] That is the issue that remained to be determined in arriving at a decision whether to grant leave to appeal or not.

Factors I gave my mind to before making my determination

1. The jurisdiction of the High Court in that regard

[21] The full Court of the Court of Appeal went into many aspects of the High Court’s jurisdiction in that regard in **Vanualevu Hardware etal v. Labasa Town Council** [ABU 0019/2018, 27th May, 2022].

[22] In that decision, the issue of negligence on the part of lawyers loomed large which had been urged as a ground of appeal *viz*:

“That the learned Judge erred in law when he failed to hold that the initial appeal was deemed abandoned due to the negligence of the Appellant’s former Counsel and as such Appellant should not be punished for it.”
(Reference is made to paragraph [27] of the said judgment).”

[23] In that regard, after considering the learned High Court Judge’s analysis of the provisions of the High Court Act and the Rules made thereunder namely, Order 59 Rules 10 and 17, the full Court dismissed the appeal.

2. The jurisdiction of the Court of Appeal in regard to the issue of an out of time application for leave to appeal, the excuse urged being the negligence of lawyers

[24] The full Court in **Vanualevu Hardware** (supra) laid down as follows:

“[28] *This is an issue that has occupied the judicial annals of this country for some time.*

[29] *To cite some of the decisions there is the case of **Vunimoli Sawmil Limited etal –v- Amrit Sen** (ABU 0028/2013 where Calanchini P, in the course of his ruling referred to the English case of **Gatti –v- Shoosmith** [1939] 3AllER 916 where some dicta appear to support ground (c) of the appeal. (paragraph [13] of His Lordship’s ruling).*

[30] *In **Vimal Construction & Joinery Works Limited and Anor. –v- Vinod Patel and Company Limited** (ABU 93 of 2006) where Calanchini P, said that,*

“A contention as to incompetence of legal advisers will rarely be sufficient and where it is, evidence in the nature of flagrant or serious incompetence ___ is required.”

[31] *I myself have addressed the issue in a long line of Rulings viz: **Gregory Clark –v- Zip Fiji** ABU 003 of 2014; **Ghim Li Fashion (Fiji) Ltd –v- Ba Town Council** Misc.No.3 of 2012; **The Chief Registrar –v- Devanesh Prakash Sharma & Anor.** ABU 0012 of 2016 and **Fiji Industries Ltd –v- National Union Factory and Commercial Workers** ABU 0007 of 2016 and **Jone Batinika –v- iTaukei Land Trust Board** ABU 007 of 2020.*

[32] *In the **Fiji Industries Limited** case (supra), I ruled that a misunderstanding in interpreting a Practice Direction (of the Chief Justice) by the lawyers stood visited upon their clients. The Supreme Court in CBV 0008 of 2016 granted special leave to appeal against the said ruling but eventually dismissed the appeal.*

Resulting Position

[33] *The resulting position in construing the decided precedents may be stated as follows.*

The Rule

[34] *That generally, mistake by lawyers must stand visited upon their clients.*

The Exceptions

[35] *That rule may be qualified in “appropriate circumstances” (**Herbert Construction Company (Fiji) Ltd –v- Fiji National Provident Fund** HBC 190 of 2009).*

What are the situations that may amount to appropriate circumstances?

[36] (a) Where “sufficient reasons” could be shown.

(The Chief Registrar –v- Devanesh Sharma & Anr. (supra)

(b) For “flagrant or serious incompetence.”

(Vimal Construction & Joinery Works Limited (supra)

(a) Where a “breakdown of communications” could be shown between the lawyers and their client Jone Batinika’s case (supra)”

Jurisdiction of the Supreme Court in granting applications for leave to appeal and determining the consequent appeal

[25] Needless to say, the said jurisdiction of the highest Court of the land stands on a different level to the other Courts where it is constitutionally empowered to grant leave to appeal and dismiss the appeal eventually at one and the same hearing.

(vide: Fiji Industries Limited –v- National Union of Factory and Commercial Workers, CBV 0008/2016, 27th October, 2017)

[26] Thus, in my assessment, the issue of “*lawyers lapses*” still remain an open issue.

[27] I say that, for the reason that, though my Court of Appeal single judge ruling stands on review on account of the Supreme Court (Single Judge) decision in Hussain v Prasad (supra), notwithstanding the fact that, I, in Instant Holdings T/A Hire Services v. Sanjay Singh Verma [ABU0022 of 2021] and in Vitilevu Construction [ABU0101 of 2020] held myself bound by the said single judge Supreme Court Ruling in an over zealous interpretation of the provisions of Section 98(6) of the Constitution, in having overlooked the provisions of Section 98(1)(a) and (b) of the Constitution.

[28] I quote below the said sections of the Constitution.

“98(6) *Decision of the Supreme Court are, subject to subsection (7), binding on all other courts of the State.*”

“98(1)(a) the Chief Justice, who is the President of the Supreme Court; and (b) such other Judges as are appointed as Judges of the Supreme Court, to serve as the occasion requires.”

[29] In that regard, while in all Judicial humility I plead *mea culpa*, I hark back to the full (Supreme Court) decision in **Fiji Industries Limited** (supra) referred to in paragraph [25] above, wherein the Supreme Court, while granting leave to appeal against my Court of Appeal Ruling on the basis that there was a “*public interest issue*” nevertheless dismissed the appeal.

Resulting Position and Determination

[30] Lawyers lapses being the central issue, the said issue remains an open issue for the full Court of the Supreme Court to lay down the law.

[31] In so far as the present matter is concerned, I am not inclined to grant leave to appeal (the present application), taking cumulatively the criteria referred to above, and the Respondent’s lament being the decisive factor that weighed with me – *viz.* Mr Kohli’s submission being that:

“The respondent was summarily dismissed on the 16th of February, 2017. His grievance was heard by the Employment Tribunal on the 28th of August, 2018. Judgment was delivered on the 22nd of March, 2018. The judgment was appealed to the Employment Relations Court. The appeal was dismissed on the 10th of August, 2021.

It is more than 5 years since the respondent was summarily dismissed and all this time he has suffered. If the application is granted then the appeal will take another one year and by the time he gets the judgment could well be in 2024.”

[32] That is “*the prejudice criterion*” I spoke of earlier, and in my view, must, taken with the other criteria which have occupied the judicial annals of Fiji, in the instant case, must be resolved in favour of the Respondent.

One outstanding issue that needed to be addressed

[33] And that is, in regard to the costs in a sum of \$8,000.00 ordered by the High Court.

[34] After some deliberation on the matter Mr.Kohli agreed that the said sum could be reduced to \$3,000.00.

Orders of Court

- 1) *The Appellant's application for leave to appeal of the High Court (ERC) judgment is refused.*
- 2) *The costs ordered by the High Court (ERC) is reduced from \$8,000.00 to \$3,000.00 by consent.*
- 3) *In addition to the resulting sum of \$3,000.00 in consequence of Order 2 above, the Appellant shall pay as costs of this application a further sum of \$3,000.00 to the Respondent, making a total sum of \$6,000.00 within 21 days of notice of delivery of this Order.*



A handwritten signature in purple ink, which appears to read "Almeida Guneratne".

Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL

Solicitors:

Land Transport Authority (In-house Counsel) for the Appellant
Kohli & Singh, Labasa for the Respondent