IN THE COURT OF APPEAL, FIJI
APPELLATE JURISDICTION

MISCELLANEOUS ACTION NO. 36 of 2011
High Court Civil Action No. HBC 479 of 2006

BETWEEN	:	1.	**COLONIAL INSURANCE AGENTS ASSOCIATION**
		2.	**MIKAELE RADRODRO**
			Appellants
AND	:	1.	**BANK SOUTH PACIFIC (FIJI) LIFE LIMITED**
		2.	**FIJI NATIONAL PROVIDENT FUND**
			Respondents

Coram : **Chandra RJA**

Counsel : **Mr. A. Singh for the Appellants**
Mr. J. Apted for the 1st Respondent
Ms. S. Saro for the 2nd Respondent

Date of Hearing : **24.10.13**

Date of Ruling : **5.12.13**

RULING

[1] This is an application for an enlargement of time to file a notice and grounds of appeal.

[2] The Appellant commenced proceedings on 31 October 2006 against the First Respondent and by an amendment filed on 20 August 2007, by which time the Second Appellant and the Second Respondent had been joined as parties to the proceedings.

[3] On 8 June 2011 a further originating summons was filed setting out the amended relief claimed by the Appellants to the following effect:

> *"1] A Declaration that the 1st Defendant as employer within the meaning of the Act, is under a mandatory legal obligation as the employer to contribute to the Fund in respect of each and every member of the 1st Plaintiff and the 2nd Plaintiff and the 2nd Defendant to take all legal and appropriate steps to enforce the Act.*
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> *2] A Declaration that the purported exercise of the contractual right of the 1st Defendant under the written agreement to reduce the compensation of the members of the 1st Plaintiff and the 2nd Plaintiff on the coming into force of the FNPF Amendment Act represents for the purposes of the Act a deduction from the wages of the Sales Representatives an amount greater than that permitted under the Act; and constitutes a breach of sub-section 13(2) of the Act.*
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> *3] A further Declaration that under the provision of the Act, it is not lawful for the 1st Defendant as an employer to unilaterally reduce the compensation payable to the members of the 1st Plaintiff and 2nd Plaintiff with the effect thereby to recover more than fifty percent (50%) of the minimum contribution from the employees, that is, the members of the 1st Plaintiff and the 2nd Plaintiff.*
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> *4] Further, and for the removal of doubt, a Declaration that the 1st Defendant is not permitted by law, notwithstanding any provision to the contrary in the written agreement to reduce the compensation payable to the Plaintiffs so as to recover more than fifty per cent (50%) of its contribution to the Fund from the members of the 1st Plaintiff and the 2nd Plaintiff.*
>
> *5] A Declaration that the 1st Defendant's intention to recover one hundred per cent (100%) of the contribution to the Fund from the members of the 1st Plaintiff and the 2nd Plaintiff is contrary to law and in contravention of the Act.*
>
> *6] A Declaration that the 1st Defendant's failure to contribute to the Fund since the Act came into effect in respect of*

members of the 1st Plaintiff and 2nd Plaintiff under the provisions of the Act constitutes a contravention of the Act.

7] A mandatory injunction directed against the 1st Defendant compelling the 1st Defendant to make the appropriate sixteen per cent (16%) in a complete dollar of the employees' commission payment to the Fund from the date of coming into force of the Act and the 2nd Defendant do take appropriate legal steps to implement the provision of the Act.

8] An Order to restrain the 1st Defendant whether by its servants or agent or howsoever from deducting and or reducing the 1st Plaintiff's members or the 2nd Plaintiff's commission or benefit under the written agreement to an amount exceeding fifty per cent (50%) of the 1st Defendant's minimum contribution to the Fund.

9] For damages to be summarily assessed for or an Order for assessment of damages for the default or dereliction of the statutory obligation of the 1st Defendant to make statutory contribution of the superannuation to the 2nd Defendant in respect of members of the 1st Plaintiff and the 2nd Plaintiff."

[4] The Learned High Court Judge by his judgment dated 29 July 2011 refused the Declarations, the mandatory injunction, the prohibitory injunction, damages and costs that were sought by the Appellants.

[5] The Appellants by application dated 7 September 2011 but filed on the 15 September 2011 sought leave to appeal out of time against the judgment dated 29 July 2011.

[6] The Appellants filed the affidavit of Neha Natasha Chand dated 14th September 2011 and a supplementary affidavit of Paras Sukul dated 9th August 2012 in support of their application for extension of time to appeal.

[7] The 1st Respondent filed the affidavit of Glenis Yee dated 27 August 2012 in opposition to the application of the Appellants.

[8] The Appellants and the 1st Respondent filed written submissions and at the hearing of the application on 24 October 2013 Counsel for the Appellants and the Respondents made oral submissions.

Applicable Law

[9] Section 20(1) of the Fiji Court of Appeal Act (Cap 12) sets out the applicable provision of Law.

> *"20(1) A judge of the Court may exercise the following powers of the Court –*
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> *(a) To give leave to appeal;*
> *(b) To extend the time within which a notice of appeal or an application for leave to appeal may be given or within which any other matter or thing may be done;*
> *(c) ……."*

[10] The consideration of applications for an enlarge of time to appeal has been the subject of several decisions of the Supreme Court and the Court of Appeal. In **Palu –v- Australia and New Zealand Bank** [2013] FJCA 11; Miscellaneous 19.2011 (8

February 2013) Justice Calanchini, Acting President (as he then was) in dealing with such an application stated:

*"[11] The factors which are taken into account in deciding whether to grant an extension of time were conveniently discussed by Byrne JA in **Mokosoi Products Fiji Ltd -v- Pure Fiji Export Limited** (unreported ABU 17/2008) delivered 7 September 2009). At page 10 of the unreported decision Byrne JA stated:*

> *'In **Bahadur Ali and Ors -v- Ilaitia Boila and Chirk Yam and Ors**, Civil Appeal No.ABU 0030 of 2002 Reddy, P then President of Court Appeal said at p7 –*
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> *"The power to extend the time for appeal is discretionary, and has to be exercised judicially, having regard to established principles (see **Hart -v- Air Pacific Limited**, Civil Appeal No,.23 of 1983). The onus is on the Appellants to satisfy the court, that in the circumstances, justice of the case requires that they be given the opportunity to attach the Order .... And the judgment .... The following factors are normally taking into account in deciding whether to grant an extension of time –*
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> *1. The length of delay*
> *2. Reasons for delay*
> *3. The chances of the appeal succeeding if time is extended*
> *4. Prejudice to the respondent."*

*More recently, this Court has taken a much stricter approach to applications for leave to extend the time to appeal. In **Vimal Construction and Joinery Works Ltd -v- Vinod Patel and Company Ltd** (2008) FJCA 98; the court of which I was a member said at paragraph 15, signaling the new stricter approach, at para [15] –*

'[15] .....in 2008 litigants should not assume that leave will be given to bring or maintain appeals or other applications where those appeals or applications are out of time unless there are clear and cogent reasons for doing so. 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 (**R -v- Birks** (1990 NSWLR 677) is required."*

[11] The Supreme Court in **Rasaku –v- State** [FJSC] 4; CAV0009, 0013.2009 (24 April 2013) considered a belated application for special leave to appeal and stated as follows:

> *"[56] ……………., the grant of extension of time for a belated application for special leave to appeal is a matter for the discretion of Court. In exercising this discretion, the court would look at the totality of the circumstances that led to the delay, the length of the delay, whether the grant of time would be futile due to the unmeritorious nature of the grounds of appeal advanced by the applicants and the possible prejudice to the Respondent, and balance these factors against the need to preserve the sanctity of the rules and the need to have finality in litigation."*

[12] The applicable principles are stricter in Civil Appellate jurisdiction than in criminal matters and a delay of two days was not allowed in **McCaig –v- Manu** [2012] FJSC 18; CBV 0002.2012 (27 August 2012). The insistence of time limits being obeyed had been stated repeatedly in relation to applications for extension of time for appealing unless there are very good, exceptional reasons for the rules not being obeyed. **Regina –v- Donald Burley** [1994] Times LR 565.

The Present Application

[13] The application seeking extension for time has been filed on the 15 September 2011 which was 6 days after the due date which was the 9 September 2011 although the Appellants had in their written submissions stated that the lateness in the lodgment was by a day only.

[14] The reasons for the delay as set out by the Appellant has been a mix up in the Solicitor's Office as stated in the Affidavits filed in support of the application. Apparently according to the affidavit of Naha Chand the application for leave had been ready by the 7 September 2011 however it had been filed only on the 15 September 2011. Is such an excuse acceptable in an application for enlargement of time?

[15] The affidavit of Naha Chand has been signed on 14 September 2011. Since the last day for filing the appeal was 9 September 2011 there should have been an explanation as to why it took time up to 14th to swear the affidavit. Further there is no evidence in the said affidavit regarding the unsuccessful attempt to file the notice of appeal on 9 September 2011 as deposed to in the said affidavit.

[16] The affidavit of Sukul which was filed on 13 September 2012 almost one year after the filing of the affidavit of Naha Chand is to the same effect as the affidavit of Naha Chand. Both affidavits have not set out any matter relating to the prejudice that would be caused to the Appellants.

[17] The 1st Respondent filed an opposing affidavit on 27 August 2012 addressing the issues set out in the affidavits of Naha Chand and Sukul and setting out the inconsistencies in them. It also set out the prejudice to the 1st Respondent. The Appellants who had the opportunity to challenge the affidavit of the 1st Respondent, have not countered the affidavit of the 1st Respondent nor have they challenged the position regarding the prejudice to the 1st Respondent.

[18] A lapse on the part of the Solicitor's office as an excuse has been the subject of much discussion and it has been held in numerous decisions that such a delay is not a satisfactory excuse as it is the duty of the Solicitor to ensure that time limits are strictly

adhered to when filing applications through their offices. There has to be proper supervision of their staff in seeing that instructions are followed strictly. Therefore the excuse that there was a mix up in the office of the Solicitor cannot be accepted as a satisfactory excuse.

[19] When there has been a delay in filing the appeal, if the appeal has good prospects of success, that would be a ground which would be considered in granting an extension of time. The main reason adduced by the Appellants is that the learned Judge erred in law and in fact in holding that the Appellants did not have a locus to bring the proceedings against the Respondent.

[20] The declarations that were sought by the Appellants in their action were on the basis that there had been a breach of the provisions of the FNPF Act by the 1st Respondent. The FNPF Act enables the FNPF Board (2nd Respondent) to take necessary steps regarding the implementation of the provisions of the Act. The learned trial Judge has in his judgment stated that the FNPF Board has the authority to bring criminal and civil proceedings in respect of any breaches of the provisions of the Act. The right to bring any proceedings against any errant employer in respect of any breach or non compliance of any of the provisions of the Act is on the FNPF Board.

[21] When a Statute confers authority on a Statutory Authority regarding the operation or implementation of the provisions of such a Statute, could any person who is aggrieved as a result of the non compliance or breach of any statutory provisions in a position to commence proceedings on his own? This was the question before the High Court and thus related to the *locus standi* of the Appellants. The learned High Court Judge concluded that the Appellants did not have the locus to institute the action.

[22] The declarations sought are regarding the manner in which the provisions of the FNPF Act should be carried out by the 1st Respondent and also regarding alleged breaches of the provisions by the 1st Respondent. It is the FNPF Board which has the authority to deal with such matters and the Appellants would have no *locus standi* to commence proceedings against the 1st Respondent. The learned trial Judge has analysed the provisions of the FNPF Act in relation to the declarations, injunctions and damages sought and refused the declarations and injunctions and dismissed the action of the Appellants for damages. The said judgment cannot be faulted on the basis of the said analysis. Consequently, the chances of the appeal being successful would be remote.

[23] The other issue that has been considered in relation to granting of extended time to appeal is the question of prejudice to the Respondent. The 1st Respondent in their affidavit set out the prejudice that would be caused to them which was not challenged by the Appellants. The Appellants have not addressed this aspect in their submissions.

[24] For the reasons set out above, the application of the Appellants for extended time is refused.

[25] Parties will bear their own costs.

Suresh Chandra
Resident Justice of Appeal