IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL MISC. 4 OF 2013
(High Court HBC 185 of 2012L)
(Magistrates Court 59 of 2009 Nadi)

BETWEEN	:	**SUNIL PRASAD MISHRA**
		Appellant
AND	:	**PRA CONTRACTORS (Fiji) COMPANY LIMITED**
		Respondent
Coram	:	**Calanchini P**
Counsel	:	**Mr S Nandan for the Appellant** **Mr P Sharma for the Respondent**
Date of Hearing	:	**13 June 2014**
Date of Decision	:	**15 July 2014**

DECISION

[1] This is an application by the Appellant for an order that the time for filing a notice of appeal be enlarged. The application was made by Summons filed on 12 March 2013.

There was some delay on the part of the Appellant before the documents were collected from the Registry and served on the Respondent.

[2] The application was supported by an affidavit sworn on 19 March 2014 by Siddarth Nandan. The Respondent did not file an answering affidavit. Both parties filed written submissions and when the application was called on for hearing on 13 June 2014 Counsel informed the Court that they relied on their written submissions and did not intend to make any further oral submissions.

[3] In April 2009 the present Respondent (PRA Contractors) commenced proceedings by writ of summons in the Magistrates Court at Nadi claiming $26,580.00 as the balance owing for goods supplied and services provided between about 5 August 2007 and about 19 November 2007. A statement of defence was filed on 7 July 2009 by the present Appellant (Mishra) and subsequently served on PRA Contractors. On the day fixed for hearing being 2 August 2011 neither Mishra nor his Counsel appeared. Counsel for PRA Contractors applied to proceed ex parte and formally prove the claim. The Magistrates Court agreed to the application. PRA Contractors proceeded to prove the claim and judgment was entered against Mishra on the same day.

[4] Mishra then filed an application for the ex parte judgment to be set aside and presumably for an order that the matter be re-heard. On 24 July 2012 the Magistrate delivered a written Ruling dismissing Mishra's application to have the ex parte judgment entered on 2 August 2011 set aside. For the reasons stated in his Ruling the Magistrate was not satisfied with the explanation for the non-appearance of either Counsel or Mishra on the day of the hearing. Furthermore the Magistrate concluded that Mishra's affidavit had not established a defence on the merits. The Magistrate ordered Mishra to pay costs summarily fixed at $450.00.

[5] Mishra then filed an appeal out of time in the High Court against the decision of the Magistrate Court dated 24 July 2012 refusing to set aside the ex parte judgment entered on 2 August 2011. Leave to appeal out of time was granted and in a written judgment dated 6 November 2012 the High Court dismissed the appeal and ordered Mishra to pay costs summarily assessed in the sum of $600.00. The learned High Court Judge noted that in order to have an ex parte judgment set aside the applicant

must explain his non-appearance at the hearing and establish the existence of a meritorious defence which must be apparent from either the defence filed prior to the date fixed for the hearing or from the affidavit material in support of the application to set aside. The Judge considered that the Magistrate had correctly applied the two tests and concluded that there was no reason to interfere with the decision of the Magistrate. It is against the judgment dated 6 November 2012 that Mishra now seeks leave to appeal out of time.

[6] It would appear that Mishra filed a notice of appeal against the decision of the High Court in the Court of Appeal on 30 November 2012. An affidavit of service sworn on 7 February 2013 by Margaret Ng deposes that service of the Notice of Appeal was effected on the legal practitioners acting for PRA Contractors on 29 January 2013.

[7] Pursuant to Rule 16 of the Court of Appeal Rules the Appellant Mishra was required to file and serve his notice of appeal within 42 days or 6 weeks from the date on which the judgment was pronounced in the High Court. The effect of Rule 16 is that Mishra was required to file and serve his notice of appeal by 19 December 2012. Although his notice of appeal was filed within time, it was not served until 29 January 2013.

[8] As a result and quite correctly the appeal was deemed to have been abandoned on 19 December 2012 by the Court of Appeal Registry. Rule 17 was amended in 1999 and in its present form has no application to a case where an appellant has not complied with Rule 16. In such a case the correct procedure is to apply for an enlargement of time to file and serve a notice of appeal to this Court. Pursuant to section 20 of the Court of Appeal Act Cap 12 a single judge of the Court of Appeal may exercise the power of the Court to extend the time to file and serve a notice of appeal.

[9] In determining an application for an enlargement of time the Court has a discretion which must be exercised judicially. In **McCaig –v- Manu** (unreported CBV 2 of 2012 delivered 27 August 2012) the President of the Supreme Court (Gates CJ) in delivering a ruling in a similar application set out the five factors that are usually considered *"to ensure a principled approach to the exercise of a judicial discretion."* They are (a) the length of the delay; (b) the reason for the delay; (c) whether there is a

ground of merit justifying the appellate court's consideration; (d) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed and (e) if time is enlarged, will the respondent be unfairly prejudiced? In the same appeal the Full Court in its judgment delivered on 24 April 2013 affirmed the tests adopted by the learned President of the Court as the appropriate tests to be applied in such an application.

[10] In the present case the length of the delay is determined by calculating the length of time between the last day on which Mishra was required to have filed and served his notice of appeal to the date on which he filed and served his application for an enlargement of time.

[11] As noted earlier in this decision, the Appellant was required to file and serve his notice of appeal no later than 19 December 2012. The application was filed on 12 March 2013. However it was not served on PRA Contractors until 25 April 2014. The delay in filing was one week short of 3 months. The delay in serving was considerably longer and was to some extent due to a delay in allocating a first mention date due to the large number of outstanding singe judge applications. In this case it is appropriate to consider only the delay up to the filing of the application. Nevertheless that delay is still substantial.

[12] The explanation for the delay is set out in paragraph 5 of the supporting affidavit. Unfortunately it relates to non-compliance with Rule 17 and the failure to file a summons to fix security for costs. As noted earlier, on account of the failure to comply with Rule 16 of the Rules, the requirements of Rule 17 have no application in this case. Rule 17 only becomes relevant if the Appellant has complied with Rule 16.

[13] The Appellant's submissions filed on 29 May 2014 refer to a number of matters that should have been deposed to in affidavit form and are either legally incorrect or irrelevant.

[14] In my judgment to the extent that any explanation has been put forward on oath that explanation fails to provide a reasonable or satisfactory explanation for the delay of

almost three months. The importance of an honest, frank and reasonable explanation is clearly demonstrated by the decision of the Supreme Court in **McCaig** (supra).

[15] However even in the absence of a reasonable or satisfactory explanation for a substantial delay of almost 3 months, it is still necessary to consider whether there is a ground of appeal that will probably succeed in order to excuse the non-compliance with the Rules.

[16] There is attached to the supporting affidavit a notice of appeal in which the Appellant has identified one ground of appeal upon which he relies in the event that an enlargement of time is granted. That ground states:

> *"That the learned Judge erred in law and in fact in holding that there was no meaningful defence filed on behalf of the defendant in terms of its defence dated 7 July 2009."*

[17] In considering any appeal from the High Court exercising its appellate jurisdiction, it is always necessary to recall section 12 (1) (c) of the Court of Appeal Act. The effect of this provision is that there is a right to appeal to the Court of Appeal on any ground of appeal which involves a question of law only from any decision of the High Court in the exercise if its appellate jurisdiction under any enactment which does not prohibit a further appeal to the Court of Appeal. Section 36 of the Magistrates Court Act Cap 14 gives an unrestricted right of appeal to the High Court in respect of any final or interlocutory judgment or decision given by a resident magistrate. There is no restriction in that Act on any subsequent right to appeal to the Court of Appeal from the decision of the High Court in the exercise of its appellate jurisdiction. The only restriction is that imposed by section 12(1) (c) of the Court of Appeal Act. The question is whether the one ground of appeal raised by the Appellant involves a question of law only.

[18] In order to answer that question it is necessary to go back in time. It must be recalled that this case was concerned with a situation where on the date fixed for hearing Mishra as Defendant failed to appear. When a defendant fails to appear on the date fixed for hearing, Order XXX of the Magistrates Court is to be applied. Order XXX is headed *"Non-Attendance of Parties of Hearing."* Order XXX Rule 3 states:

> *"If the Plaintiff appears, and the defendant does not appear, or sufficiently excuses his absence, or neglects to answer when duly called, the court may, upon proof of service of the summons proceed to hear the cause and give judgment on the evidence adduced by the Plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the Defendant."*

[19] It is not disputed that the Magistrate proceeded in accordance with Rule 3 to hear the claim by calling upon PRA Contractors to lead evidence to prove the claim. The Magistrate then entered judgment for the amount claimed.

[20] Order XXX Rule 5 states:

> *"Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the court, upon such terms as may seen fit."*

Rule 5 calls for the exercise of a discretion by the Magistrate when deciding whether to set aside any judgment obtained in the absence of a party at the trial. The discretion is to be exercised in favour of the applicant upon sufficient cause having been shown. The question then becomes what is meant by sufficient cause.

[21] In his written ruling dated 24 July 2012 in dismissing the application to set aside the ex parte judgment, the Magistrate referred to the High Court decision of **Nand v Chand** (HBC 223 of 2007L); 7 November 2008). However that case was concerned with a situation where no defence was filed and where judgment in default was entered by the Magistrate at the request of the Plaintiff in the absence of the Defendant on the first mention date. In the case **Kaur v Singh** (App. Case 61 of 2008L; 5 August 2008), judgment was entered by the Magistrate on the hearing date under Order XXX Rule 3 in the absence of the Defendant without hearing any evidence from the Plaintiff but where a defence had been filed. The facts of the present case are different from facts in the two cases cited above. The first issue to be determined in both **Nand** (supra) and **Kaur** (supra) was whether the judgment had been entered in accordance with the Rules. In the present case there was no dispute on that issue.

[22] It is not clear whether the extract from Volume 37 of Halsbury's Laws of England that was quoted by the Magistrate applies to a judgment entered in default or a judgment obtained on the hearing day in the absence of the defendant in accordance with Order XXX Rule 3. Upon a careful reading of the authorities it is quite clear that the tests to be applied in exercising the discretion to set aside a judgment entered in default and an ex parte judgment are not the same. The Magistrate also refers to the decision of "**Slocked –v- Goldschmidt**" for which no citation has been provided. I am not satisfied that the Magistrate has applied the correct test for an application under Order XXX Rule 5 of the Magistrates Courts Rules. The learned High Court Judge has not discussed the law on the subject. Having considered some of the facts the learned Judge concluded that the Magistrate has *"given his mind to the two fundamental factors."*

[23] I am not satisfied that the Magistrate and the learned High Court Judge have fully appreciated the distinction between situations where judgments have been regularly entered in default of compliance with the Rules of the Court and judgments that have been regularly entered ex parte or in the absence of the defendant at the hearing. In the latter case, regularly entered means for the purposes of this application, entered in accordance with Order XXX Rule 3 of the Magistrates Court Rules. In my view it is sufficiently important for the Court of Appeal to consider what constitutes *"sufficient cause"* for the purposes of Order XXX Rule 5 to justify making an order to enlarge time to appeal. The question is a question of law. The ground raised by Mishra has been sufficiently drafted so as to give rise to this question as a preliminary issue.

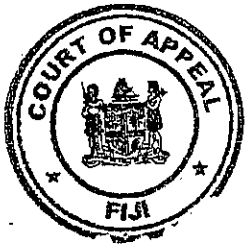
Orders:

(1) *Application to enlarge time to file and serve notice of appeal is granted.*

(2) The Appellant is to file and serve notice of appeal within 21 days from today.

(3) Thereafter the appeal is to proceed in accordance with Rule 17 and 18 of the Court of Appeal Rules.

[4] Costs of the application are to be costs in the appeal.



W. Calanchini

HON. MR JUSTICE CALANCHINI
PRESIDENT, COURT OF APPEAL