

**IN THE COURT OF APPEAL**  
**ON APPEAL FROM THE HIGH COURT**

**Miscellaneous Action No. 03 of 2012**  
**High Court Civil Action No. HBC 222 of 2005L**

**BETWEEN** : **GHIM LI FASHION (FIJI) LIMITED**

*Appellant*

**AND** : **BA TOWN COUNCIL**

*Respondent*

**Before** : **Hon. Justice Almeida Guneratne**

**Counsel** : **Mr. I. Fa for the Appellant**

**Mr. A. K. Narayan for the Respondent**

**Date of Hearing** : **28 November 2014**

**Date of Judgment** : **5 December 2014**

**RULING**

- [1] This is an application for leave to appeal out of time in terms of Section 20 (1) (b) of the Court of Appeal Act (Cap 12 as amended).

[2] In consequence of a preliminary ruling I made on 24<sup>th</sup> November, 2014 in terms of Section 20 (1) (c) of the Court of Appeal Act, the appellant has filed an amended summons and the orders sought in this application would now read as follows:

1. *That the time within which a Notice of Appeal is to be filed be extended to allow the Appellant to lodge an appeal against the decisions of the Honourable (Mr.) Justice Sosefo Inoke delivered on the 17<sup>th</sup> November 2011 and on 7<sup>th</sup> December 2011 (the underlined portion being the amendment allowed).*
2. *That the said decision of the Honourable Justice Inoke of 17<sup>th</sup> November 2011 wherein His Lordship held at paragraph 43 "I summarily set costs at \$5,000.00" be set aside.*
3. *That costs be granted on an indemnity basis or in the alternative as a gross sum of Fa and Co's Bill of Costs of FJD \$194,279.57 or such amount as the Court deems appropriate against the Respondent.*
4. *That the decisions of Justice Inoke delivered on the 7<sup>th</sup> December, 2011 in High Court Civil Action No.HBC 222 of 2005L in dismissing Order 2 of the Appellant's summons when His Lordship held that, the Appellant had to institute a new action to recover the same on the Respondent's undertaking as to damages of the 12<sup>th</sup> August 2005 and the 2<sup>nd</sup> of December 2005 be set aside and that the High Court be directed to assess the Appellants damages pursuant to the Respondent's undertaking for damages of the 12<sup>th</sup> of August 2005 and the 2<sup>nd</sup> of December 2005 in High Court Civil Action No.HBC 222 of 2005L.*

**Criteria Adapted for Allowing or Rejecting an Application for Extension of Time**

[3] These criteria have been developed in a plethora of judicial decisions. These with some modifications of my own, may be stated for convenience as follows:

- a. *the length of the delay*
- b. *the reasons for the delay including impossibility of performance and/ or proportionality of the delay to the excuse.*
- c. *the history of the case taken as a whole including the conduct of parties.*
- d. *the degree of prejudice to the respondent if the application is granted*

- e. *The prospect of the intended appeal succeeding if the application is granted.*

**Application of the requisite criteria in the context of the facts and circumstances of the Instant Case**

**Length and Reasons for the Delay**

- [4] The two impugned orders of the High Court put in issue by the Appellant are dated 17<sup>th</sup> November, 2011 and 7<sup>th</sup> December 2011.
- [5] The summons for leave to appeal out of time is dated 31 of January 2012, thus constituting a delay of 2 ½ months from the order dated 17<sup>th</sup> November and a delay of 1 ¼ months from the order dated 7<sup>th</sup> December 2011.
- [6] Indeed, the delay in relation to both those orders is not excessive.
- [7] However, even if out of time by a single day the same must be explained and excused to seek the indulgence of court to entertain an application filed out of time.

**The Summons, the two supporting Affidavits relied upon by the Appellant and Submissions**

- [8] The summons dated 31<sup>st</sup> January, 2012 make no reference to the delay aspect.

- [9] There are two affidavits filed in support of the application, by one Semi Naiku and one Jitoko Vunibola, respectively both said to be litigation clerks attached to the Appellant's Solicitors' firm.
- [10] Paragraph 4 of Semi Nauku's affidavit seeks an enlargement of time and as for the reasons for the delay it would appear that, on account of the judicial vacation that commenced on the 12th December, 2011 and ended on the 16<sup>th</sup> January, 2012, the Appellant and the Appellant's lawyers had believed that that period would be counted out on the basis of the decision of a High Court case in *Giesbrecht v. Cross* [2008] FJHC 356.
- [11] The said excuse or reason flows from a mistaken belief as to the correct applicable legal position.
- [12] As submitted by the learned counsel for the Respondent, Mr. Narayan, with biting sarcasm, the excuse flows from "a misconception as to whether the clock stopped ticking over the legal vacation."
- [13] As Blackstone once said;  
*"If ignorance of what he might know were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity"* (cited by Francis Bennion, Statutory Interpretation; 4<sup>th</sup> Ed. Butterworths, 2002 at p.29)

**The Principle Ignorantia Eorum Quae Quis Scire Tenetur Non Excusat**

- [14] That is, that ignorance of those things which everyone is bound to know affords no excuse.

[15] As Lord Atkin in *Evans v. Barlam* [1937] AC 473, put it;

*“The fact is that there is not and never has been a presumption that everyone knows the law. (But) there is the rule that ignorance of the law does not excuse a maxim of law of very different scope and application.”(at p.479).(The word ‘But’ is an interpolation by me).*

[16] Mr. Narayan has referred to several precedents in his written submissions which I found to be very useful and informative in regard to the matter under consideration.

[17] On the application and in the light of the principles I have cited I am unable to accept Mr Semi Naiku’s affidavit as excusing the delay.

#### **Affidavit of Jitoko Vunibola**

[18] The only references to the question of delay are contained in paragraphs 3 and 4 of the affidavit. Paragraph 3 does not offer any excuse and paragraph 4 merely avers that the Appellant / Defendant has explained the reasons for its delay. The summons certainly does not do so.

[19] Jitoko Vunibola’s affidavit thus does not help the Appellant’s cause at all.

#### **Submissions**

[20] The only reference to the delay is at Paragraph 2 of the Appellant’s written submissions dated 24<sup>th</sup> September, 2014 which have not addressed the reasons for the delay but has

placed reliance on the reasons adduced in Semi Naiku's affidavit which I have already rejected.

[21] Mr. Fa for the appellant was not able to go any further than that either in his oral submissions save as to re-iterate that the reason for the delay was the aforesaid mistaken belief as to the correct legal position.

[22] At this point I feel obliged to consider the grounds of appeal urged on behalf of the appellant on account of the Full Court's approach in Vimal Construction and Joinery Ltd v Vinod Patel and Company Ltd. [2008] FCA 98.

[23] In that case, having found that, the reasons for the delay were not acceptable; their Lordships had proceeded to consider the grounds of appeal as well. This was followed in the single Judge decision of Maciu Tamani Palu aka Maciu Tamanibola Palu and Australia and New Zealand Bank [Misc. 19 of 2011, 8<sup>th</sup> February 2013]. I am mindful of the fact that, there are other rulings as well which have pursued that approach.

### **The Grounds of Appeal**

[24] The grounds of Appeal urged:-

- (a) *Relate the framework of order 62 of the High Court Rules;*
- (b) *Raises the requirement of the principle of costs on a standard basis;*
- (c) *Touches on the principle applicable to costs to be worked out on an indemnity basis;*

- (d) *Relate to principles applicable to the proportion of costs or gross amount; and*
- (e) *Are directed at the proper procedure that ought to have been adapted by the High Court in the impugned Judgment for the enforcement of undertakings for damages.*

[25] In my view, at pages 12 to 16 of the written submissions tendered on behalf of the Respondent dated 17<sup>th</sup> July, 2014, those grounds have been countered questioning as those submissions do as to the possible chances of success in appeal should leave be granted.

#### **The Criteria of Prejudice to the Respondent**

[26] In regard to this criterion, on a balance, I accept the reasons adduced in the said written submissions of the Respondent at Paragraphs 5.13 to 5.15 thereof. They outweigh in my view the reasons advanced on behalf of the Appellant.

#### **Principle that ought to be followed and applied in out of time leave applications**

[27] Although I have gone on to refer to the criteria of an Appellant's possible chances of success in appeal and prejudice to parties which I felt obliged to do on account of past precedents as cited earlier in this order, I would welcome the day the Full Court or the Supreme Court would adapt the following principle which I proceed to formulate as follows in the form of three proportions; viz:

- (i) *That, even where the length and the reasons for the delay are adequately explained to the satisfaction of Court, if an appellant is unable to satisfy Court as to his or her chances of success in appeal if the application for extension is to be granted, then the application must be rejected;*

- (ii) *That, even if an appellant fails to satisfy court as to the length and reasons for the delay, nevertheless a Court shall allow an extension of time if it is satisfied that, an appellant has a reasonable chance of success should an application were to be granted;*
- (iii) *Unless the reason for the delay is owing to a mistake or misconception as to the correct applicable legal position on the part of lawyers.*

### **Striking a via Media – Need to put the law on a definite Course**

- [28] This is how I felt a *via media* could be struck in regard to applications for extension of time in an effort to put the law on a definite course.
- [29] While Proposition (i) should stand on its own, I have applied Proposition (ii) in a ruling that is being given on this very date. (vide: *Nilesh Shalen Singh etal v. Mohammed Khaiyub and others*; [Civil Appeal No. 09 of 2014, 5<sup>th</sup> December, 2014])
- [30] It is Proposition (iii) I have adapted in the instant case, and in another ruling scheduled to be delivered on this very date viz: *Gregory Clark v Zip Fiji* (Civil Appeal No. ABU 3 of 2014, 5<sup>th</sup> December, 2014) where the reason for the delay has been given as a mistake on the part of the lawyers for the appellant as to whether the judicial clock of the Court of Appeal (as opposed to the High Court) had also stopped ticking.

### **Could Lawyers mistake as to the correct legal position be an excuse?**

- [31] The genesis of this query seems to stem from a dictum of Sir Wilfred Greene M.R. in *Gatti v Shoosmith* [1939] 3 ALLER 916 cited in the New Zealand case of *Avery v. No.2*



PSA Board [1973] 2 NZLR at page 91 that, “... *if the failure to appeal in due time was due to a mistake on the part of a legal adviser this may be a sufficient cause to justify the Court in exercising its discretion.*”

[32] What did His Lordship, Greene, M.R. mean by “may be”? His Lordship said:-

*“I say ‘may be’, because it is not to be thought that it (that is, exercise of discretion, the interpolation is mine) will necessarily be exercised in every set of facts. Under the law as it was conceived to be before the amendment, such a mistake was considered to be in no circumstances a sufficient ground. What I venture to think the proper rule which this Court must follow is: there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case. There may be facts in a case which would make it unjust to allow the appellant to succeed upon that argument”.*

[33] In *Gatti v Shoosmith* (supra) the appellant’s solicitors had given notice of their intention to appeal within time, and the notice of appeal, due to the misunderstanding on the part of a legal adviser, was served only a few days late. In *Lange v Town and Country Planning Appeal Board*; (1967) NZLR 915, there was a solicitor’s error of a few days only as regards the date by which security had to be given. Notice of appeal had been served within time and all the respondents confidently expected that the appeal would be promptly prosecuted to a hearing right up to the last day when security might have been found. Leave to appeal was granted in both cases.

[34] The instant case stands on an entirely different footing. This is a straight forward case where the Appellant’s lawyers admit that they were mistaken as to the applicable legal position.

**Importance of not only the Substantive Law but also the procedural Law – the maxim *ubi ius ibi remedium***

- [35] There is substantive law and there is the procedural law. The maxim *ubi ius ibi remedium* reflects the complimentary character of the procedural law. It is by procedure that the law is put into motion.

**Requirement of time limits – Procedural law**

- [36] The court of Appeal Act (Cap: 12 as amended), needless to say, is an act of the legislature. Time limits for filing an appeal are contained in the Court of Appeal Rules sanctioned by that very Act of the legislature.
- [37] Thus, the said rules pertaining to time limits as being part of the Procedural law represent and are directed at the orderly and public functioning of the legal machinery.
- [38] Any notion of the procedural law being a mere vehicle in which parties should be safely conveyed on the road to justice, to my mind, is misleading, for it leads to the incorrect notion that, procedural law is of relatively minor importance and therefore could be disobeyed or disregarded with impunity.

**Litigation Clerks competence to swear supporting affidavits**

[39] In view of the final ruling in this matter, I do not think it necessary to go into the question whether law clerks could file supporting affidavits in an application seeking extension of time.

[40] Consequently I proceed to rule and make orders as follows:-

**The Orders in this Ruling are:**

1. The application for leave to appeal out of time is refused.
2. The Appellant is ordered to pay as costs of this application a sum of \$1,500.00 (One Thousand Five hundred dollars).
3. The said order for costs shall be in addition to the sum of \$250.00 (Two Hundred and Fifty Dollars) ordered by me in the preliminary Ruling dated 24 November, 2014 and costs awarded by the High Court.
4. The Appellant is ordered to make the aforesaid payments within 28 days of this ruling.



*Ida A. Guneratne*

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**Hon. Justice Almeida Guneratne**  
**JUSTICE OF APPEAL**