

IN THE COURT OF APPEAL, FIJI  
[On Appeal from the High Court]

CIVIL APPEAL NO. MISC 02 OF 2013  
[High Court Civil Action No. HBC 162 OF 2004]

BETWEEN : CHATTAR SINGH

Appellant/ Applicant

AND : PRAVINA LATA

Respondent

Before : Hon. Justice Prematilaka, JA

Counsel : Mr. W. Hiuare for the Appellant  
Mr. E. Narayan for the Respondent

Date of Hearing : 21 September 2016

Date of Judgment : 30 September 2016

RULING

Prematilaka, JA

- [1] The Appellant has initiated the present proceedings by way of Summons dated 01 December 2015 (sometimes called the 'Application to re-instate') purportedly under inherent jurisdiction of the Court of Appeal seeking *inter alia* to re-instate the 'Action'.

- [2] The Hon. President of the Court of Appeal had struck out the Appellant's Application for Leave to Appeal on 30 May 2014 for non-appearance of the Appellant. There had been no attorney appearing for him either. Therefore, the present Application to re-instate has been made after 01 ½ years after his Application for Leave to Appeal had been struck out.
- [3] The affidavit of the Appellant states that his solicitor at that time had advised him that the matter was still afoot. Later, he had advised his present solicitors, HM Lawyers to find out the status of the case and had been told that it had been already struck out. He also asserts that he had financial embarrassments to pay the solicitors. These two are the reasons given by him for the long delay in making the present Application.
- [4] It appears from the record that Mishra Prakash & Associates had represented the Appellant on 16 April 2014 where the Respondent had been absent and unrepresented and the Court had listed the Leave to Appeal Application to be mentioned on 30 May 2014. The Appellant had not stated in the affidavit or filed a Notice of Change of Solicitors to indicate as to when Mishra Prakash & Associates had ceased its professional relationship with him and when HM Lawyers had been retained.
- [5] I shall now trace the important events in a chronological order leading to the present Application before court.
- (i) The Appellant (then the plaintiff) had filed a Writ of Summons on 06 May 2004.
- (ii) The Master on 02 April 2008 ordered.
- 'Unless the plaintiff proceeds with the action by 30 April 2008, the matter will be struck out'* and it was adjourned to 01 May 2008.
- (iii) There being no appearance by the Appellant, the Master had ordered on 01 May 2008.
- 'Unless order applies action is struck out; cost if not agreed to be taxed'*

- (iii) The Appellant had filed Summons to re-instate the matter on 29 July 2009.
- (v) The Respondent not being present the matter had been adjourned for formal proof on 12 December 2011.
- (vi) The Learned Trial Judge delivered the Judgment in favour of the Appellant on the substantive matter on 01.06.2012.
- (vii) Plaintiff sealed Order on 10.09.2012.
- (viii) The Respondent had filed summons on 19.10.2012 and an affidavit and the same High Court Judge in the presence of counsel for both parties had declared on 14 November 2012 the said judgment dated 01.06.2012 to be null and void and set aside the same on the basis that the matter had already been struck out. The Learned High Court Judge had further ordered that the Order dated 01 May 2008 by the Master would remain in force.
- (ix) The Appellant filed a Notice of Grounds of Appeal in the Court of Appeal on 04 December 2012 against the said Order on 14 November 2012 by the said Trial Judge seeking to have it set aside or reversed and to have the Judgment delivered on 01 June 2012 re-instated or alternatively to have his application on 29 July 2009 to re-instate the action set down for hearing.
- (X) The Appellant had also filed Summons dated 30 November 2012 in the High Court challenging the Order on 14 November 2012 of the Trial Judge setting aside his own Judgment on the basis that the High Court was *functus* after the delivery of the Judgment. The Appellant, therefore, sought to have the said Order on 14 November 2012 by the Trial Judge set aside or alternatively to have it confirmed that his original action has been re-instated setting aside the order of the Master on 01 May 2008 or alternatively to have his application to re-instate the action be set down for hearing.

- (xi) The Appellant's Notice of Grounds of Appeal in the Court of Appeal had been deemed abandoned on 04 February 2013 due to security for costs application not having been filed within 07 days (in terms of Rule 17(2) of the Court of Appeal Rules).
- (xii) The Solicitors for the Appellant had filed Summons for Leave to Appeal on 26 February 2013 in the Court of Appeal purportedly pursuant to section 12 of the Court of Appeal Act seeking leave to appeal against the Order made on 14 November 2012 by the Trial Judge. This should be considered as an Application for Leave to Appeal after the expiration of the time for appealing as per Rule 26(2) of the Court of Appeal Rules for extension of time for filing a Notice of Appeal to be considered by a single Judge under section 20(1) (b) of the Court of Appeal Act, as the time for appealing under Rule 16 had already passed.
- (xiii) The Respondent had filed an affidavit on or about 25 March 2013 in reply to the Summons dated 30 November 2012 (served on the 20 February 2013) in the High Court.
- (xiv) The Appellant's Application for Leave to Appeal out of time had been struck out for non-appearance in the Court of Appeal on 30 May 2014.
- (xv) The Summons before the High Court had been heard on 08 June 2015 by another High Court Judge who had delivered the Judgment on 08 June 2015 *inter alia* dismissing the Summons subject to cost. No appeal had been preferred against the said Judgment.
- (xv) The Appellant had filed Summons and Affidavit on 01 December 2015 in the Court of Appeal seeking to re-instate the 'action' meaning the Summons for Leave to Appeal out of time.

- (xvi) The Respondent had filed an Affidavit dated 11 February 2016 in reply to the Appellant's Summons and Affidavit filed on 01 December 2015 and the Appellant had replied by way of his own affidavit filed on 12 April 2016. Both parties had filed written submissions as well.

[6] A perusal of the above chronology of events reveals the following matters.

- (i) The Appellant's Summons to re-instate the original action on 29 July 2009 that had been struck out by the Master on 01 May 2008 for non-appearance of the Appellant had not been pursued and therefore, no order had been made by the High Court for re-instatement of the original action.
- (iv) Therefore, the High Court had no action before it to proceed to hear on formal proof on the basis that the Respondent was absent and to deliver a judgment against the Respondent. Presumably, the Learned High Court had not been appraised by the Solicitors for the Appellant of this position.
- (v) In the circumstances, the High Court had the power to set aside the said *ex parte* Judgment as it had been delivered in ignorance of the legal position that the action had already been struck out and no order for re-instatement had been made by court. Thus, at that stage the High Court was not vested with legal authority to proceed to hear the case on formal notice by any statutory provision. In **Morrelle v. Wakeling** (1955) 2 W.L.R. 673; (1955) 1 All E. R. 708; (1955) 2 HB. 379 it was held that

*'As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive...' (emphasis mine)*

- (vi) I think it is a healthy and a fair practice for the parties and or their counsel to bring the error or errors to the notice of the Judge or Judges who made the order in the first instance so that he or they can correct the order. Indeed, in my view this is a matter of courtesy between the Bench and the Bar. Therefore, I conclude that Trial Judge's decision to set aside his own Judgment, allowing the Master's decision to strike out the action to remain, was correct and could be justified on the doctrine of *per incuriam*.
- (vii) Secondly, the Appellant had not challenged the Judgment of the Trial Judge dismissing the Appellant's Summons dated 30 November 2012 in the High Court challenging the Order on 14 November 2012 by the previous High Court Judge setting aside his own Judgment on formal notice. The High Court Judge had recorded in his Judgment dated 08 June 2015 that the Appellant had informed the High Court that he was not pursuing and was abandoning the Notice of Grounds of Appeal in the Court of Appeal filed 04 December 2012 against the said Order on 14 November 2012 by the previous High Court Judge. This, perhaps, explains why the Appellant had not filed an application for security for cost within 07 days and allowed the Appeal to be considered deemed abandoned on 04 February 2013 and even thereafter had not pursued the Summons for Leave to Appeal out of time filed on 26 February 2013 in the Court of Appeal which too had been struck out for non-appearance on 30 May 2014.
- (viii) Therefore, it looks as if the Appellant had waited until the High Court Judge delivered the Judgment 08 June 2015 which went against him and then decided to file Summons and Affidavit on 01 December 2015 in the Court of Appeal, after more than 1 ½ years, seeking to re-instate his Application for Leave to Appeal, contrary to what he had stated to the High Court.
- (ix) Thus, the Appellant was attempting to attack the same Order on 14 November 2012 of the High Court Judge simultaneously before two fora, namely the High Court and the Court of Appeal. In the High Court he had failed and not challenged its decision. In the Court of Appeal he is now attempting to review the

Leave to Appeal Application only after he did not succeed in the High Court. The Appellant is taking a second bite at the cherry in the Court of Appeal.

[7] Be that as it may, the Appellant has purportedly invoked 'inherent jurisdiction' of the Court of Appeal in filing Summons on 01 December 2015 seeking to re-instate the Application for Leave to Appeal which now stands struck out. In his 'Skeleton Submissions' filed on 13 April 2016, Order 12 Rule 2(a) of the Court of Appeal had been mentioned though the text cited is actually section 12 (1) (a) and 12 (2) (f) of the Court of Appeal Act. In the 'Further Submissions' filed after the hearing where the Court referred his Counsel to section 20(1) (k), the Appellant is now relying on both inherent jurisdiction and section 20(1)(k) of the Court of Appeal Act.

[8] In **Registrar of Titles v. Sharda Prasad** Civil Appeal No. ABU0009 of 2001:08 June 2001 [2001] FJCA 5 Shameem J. said:

*'I see no reason why the Court of Appeal, a creature of statute, should consider any inherent powers.'*

[8] Nevertheless, I think there is legal provision to entertain an Application to re-instate such as the one before this Court in section 20 (1) (k) of the Court of Appeal Act which *inter alia* states

*'A judge of the Court may exercise the following powers of the Court ..... (k) generally, to hear any application, make any order or give any direction that is incidental to an appeal or intended appeal.'*

[9] In **Silimaibau v. Minister for Sugar Industry & 2 Others** Civil Action No. HBC 155 of 2001 L: 05 March 2004: [2004] FJHC 530 Gates J. (as His Lordship then was) said:

*'In section 20(1) (k) the phrase "that is incidental to an appeal or intended appeal" should be interpreted narrowly so that the court could only deal with matters ancillary to an appeal which was afoot.'*

[10] The Appellant's present Summons and the undated Affidavit filed on 01 December 2015 seeking re-instatement arises from his Leave to Appeal Application for extension of time which had been struck out for want of appearance. Therefore, I think the Appellant's present Application to re-instate could be considered as incidental to an appeal or intended appeal.

[11] The judicial pronouncements on section 20(1)(b) of the Court of Appeal Act may provide some guidance as to the principles that may be adopted in the case of Applications under section 20(1) (k) as well.

[12] **Sundar v Prasad** Civil Appeal No. ABU0022 OF 1997:10 November 1997 [1997] FJCA 39 it was held:

*'The factors that are normally taken into account when dealing with an application for leave to appeal out of time are -*

*(a) the length of the delay;*

*(b) the reasons for the delay;*

*(c) the degree of prejudice to the Respondent if the application is granted;*

*(d) the prospect of the intended appeal succeeding if application is granted.*

*Nevertheless in the last analysis a Court cannot overlook a determining factor namely that an Appellant will or is likely to suffer an irreparable serious injustice if an extension is not granted.'*

*Whilst a delay of 3 months might have been reasonable in this case, the delay of over 6 months has not been satisfactorily explained. Nor can I rule out a certain amount of prejudice to the Respondent if leave is granted.'*

[13] **Sundar** has been followed in **The Official Receiver v. Petrie Limited** Civil Appeal No. ABU0049 of 1997: 28 November 1997 by Sheppard J.A. and by Byrne, JA in **Bank of Baroda v Champaneri** Civil Appeal No. ABU0028 of 2001: 18 January 2002 [2002] FJCA 92 and **Datt v. Datt** Civil Misc. Action No. 33 of 2001: 07 June 2013 2013] FJCA 58.



[14] **Datt** has quoted several previous decisions and set out a few other grounds as well. They are as to whether the appeal raises

- (i) Issues of general importance
- (ii) Important questions of law
- (iii) Issues that in the interest of justice should be considered by the Full Court

[15] **Avery v. No. 2 Public Service Appeal Board and Others** (1993) 2 NZLR 86 the New Zealand Court of Appeal stated per Richmond J. as a general principle at p.91:

*“When once the Appellant allows the time for appealing to go by, then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all the circumstances, the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal.”*

[16] Once a claim is brought to court, the litigants must be prepared to see it to the end. In **Registrar of Titles v. Sharda Prasad** (Supra) Shameem J. said:

*“The new rules send a clear message to all prospective Appellants - it is the Appellant's duty to file appeals, and to take all steps to push the appeal to a hearing.”*

The length of the delay

[17] In my view the delay of 1 ½ years is totally unreasonable, inexcusable and inordinate. ‘Inordinate’ and ‘inexcusable’ delay in prosecuting a claim has been explained as follows:

*‘Inordinate.....means so long that proper justice may not be able to be done between the parties. When it is analyzed, it seems to mean that the delay has made it more likely than not that the hearing and or the result will be so unfair vis-à-vis the Defendant as to indicate that the court was unable to carry out its duty to do justice between the parties.’*

*...Inexcusable means that there is some blame, some wrongful conduct, some conduct deserving of opprobrium as well as passage of time. It simply allows the judge to put into the scales the Plaintiff's conduct or reasons for not proceeding, as well as the lapse of time and the prejudice that would result to him from denying him opportunity from pursuing the action or perhaps any action against the defendant.'*

#### The reason of the delay

- [18] The reasons for the delay as explained by the Appellant, to me, are not strong or credible enough to excuse such a long delay. For example the old age is not a factor to be considered in relation to delay. The Appellant does not appear to have made any complaint against his previous solicitors, though he says that he was made to believe by them that his Application for Leave to Appeal for extension of time was afoot and only his present lawyers have found it to have been struck out. The Appellant's financial embarrassments and his being now helped by the children are not supported by any other affidavit. In any event, financial constraints cannot *ipso facto* be considered in relation to delay.

#### Due diligence

- [19] In my view due diligence is also a factor that should come into the equation when considering an application for re-instatement. The Appellant had commenced the proceedings as far back as in May 2004. As I have explained in detail, he does not appear to have prosecuted it with due diligence throughout. For example the Appellant was absent and his action was struck out in 2008. He did not pursue his summons to re-instate the case at all until the Trial Judge erroneously gave Judgment in his favour on formal proof in June 2012. His Notice of Grounds of Appeal filed in the Court of Appeal against the Trial Judge's setting aside the *ex parte* Judgment was rightly deemed abandoned in February 2013 (see **Ports Authority of Fiji v. C & T Marketing Ltd.** (No.1) [2001] FJCA 42; [2001] 1 FLR 76 ). This appears to be deliberate as revealed by the Judgment of the High Court Judge since he had chosen to seek his remedy in the High Court. He did not challenge the Judgment of the High Court delivered in June 2015 against him refusing to interfere with the Order of the previous High Court Judge setting aside his own judgment. He did not pursue his Leave to Appeal Application for extension of time filed in February 2013 until he sought to resurrect it in March 2014. Having done so belatedly he was once again absent and his Leave to Appeal Application for extension

of time was struck out in May 2014. Then he waited 1 ½ years to make an application to re-instate his Leave to Appeal Application for extension of time till December 2015. The Appellant has failed the test of due diligence and guilty of laches.

The degree of prejudice to the Respondent if the application is granted

- [20] In the aforesaid circumstances, I am of the view that it will cause a great deal of prejudice to the Respondent if his present application is allowed. I am reminded of the maxim in common law '*vigilantibus non dormientibus, jura subveniunt*' (the laws come to the aid of those who are vigilant, not those who sleep on their rights) and the maxim in equity '*vigilantibus non dormientibus, aequitas succurrit*' (equity comes to the aid of those who are vigilant, not those who sleep on their rights) in this instance. Both encapsulate the Appellant's plight and why he is not entitled to the indulgence of Court.

The prospect of the intended appeal succeeding if application is granted

- [21] In the backdrop of the factual matrix in this case, even if his application to reinstate is allowed, he is unlikely to succeed in his Leave to Appeal Application for extension of time. Even if the latter is allowed, the Appellant's challenge by way of a Leave to Appeal Application to this Court would be against the Order of the High Court Judge setting aside his own *ex parte* Judgment and for an order that the said Judgment be restored. This Court is very unlikely to allow such a collateral attack on the said Order of the High Court when the High Court had later refused to interfere with it and the Appellant had not appealed against the said High Court Judgment. Therefore, in my view the prospect of the intended appeal succeeding even if the present application is granted is minimal.

Irreparable serious injustice

- [22] I have also considered whether the Appellant would or would be likely to suffer an irreparable serious injustice if his Application to re-instate is not granted. I find that The High Court Judge by his Order made on 14 November 2012 has not only set aside his *ex parte* Judgment but has specifically stated that the Order by the Master striking out the original action would remain in force. That being the case, the Appellant's Summons to reinstate the action filed on 29 July 2009 is still afoot because there was no determination


on that. Consequently, there is nothing to stop him from pursuing that application in the future. However, I shall not be understood to have said anything to the effect that Appellant should succeed in his Summons to re-instate the action, for it is entirely a matter for the relevant court below to decide. Therefore, I am of the view that no irreparable serious injustice would be caused to the Appellant by not re-instating his Leave to Appeal Application for extension of time.

- [23] I have also considered whether there are issues of general importance, important questions of law and issues that in the interest of justice should be considered by the Full Court as prescribed in **Datt v. Datt** (supra). Unfortunately, I have not been able to trace any such issues of general importance or important questions of law involved here. Neither have I been able to find any issues that warrant the attention of the Full Court.
- [24] The Respondent has cited **Karan v. Chand** Civil Action No. HBC 43 of 2010:22 October 2013 [2013] FJHC 552, **Birkett v. James** [1978] A.C. 297, **Grovit and Others v Doctor and Others** [1997] UKHL 13, [1997] 1 All ER 417, [1997] 1 WLR 640, **Thomas (Fiji) Ltd v Bank of Hawaii** Civil Appeal No. ABU0052 of 2006: 24 November 2006 [2006] FJCA 77 and several other local and foreign decisions. However, they appear to be decisions where the courts have dealt with situations in which no steps have been taken in a cause or matter for the prescribed period of time and on the application of a party or the court of its own motion has struck out the action for want of prosecution or as an abuse of the process of the Court in terms of a statutory provision such as Order 25 Rule 9 (O.25, r.9) in the High Court Rules, 2008.
- [25] In view of the finding I have already arrived at I do not think it is necessary for me to consider whether same or similar considerations may or may not apply to the instant application for re-instatement under section 20 (1)(k) of the Court of Appeal.
- [26] In the circumstances, I am not inclined to allow Appellant's Application to re-instate his Application for Leave to Appeal (for extension of time for appealing).

[27] Therefore, I proceed to make the following orders.

1. The Application to re-instate the Application for Leave to Appeal is refused.
2. The Appellant is ordered to pay \$1800.00 as cost of this Application to the Respondent.



  
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**Hon. Justice C. Prematilaka**  
**JUSTICE OF APPEAL**