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

CIVIL APPEAL NO. ABU 0003 of 2017
(High Court HBC No. 11 of 2012)

BETWEEN	:	**NAREND PAL**
		Appellant
AND	:	**GYANENDRA PRAKASH** **RAM PIYARE & SONS LTD.**
		Respondents
Coram	:	**Chandra RJA**
Counsel	:	**Mr S. Prasad for the Appellant** **Mr P. Kumar for the 1st Respondent** **Mr A. Sen for the 2nd Respondent**
Date of Hearing	:	**27 February 2018**
Date of Ruling	:	**5 July 2018**

RULING

[1] This is an application seeking leave to appeal out of time.

[2] The judgment was delivered after trial in favour of the Appellant on 24th November 2016. The Appellant appealed against the said judgment on 5th January 2017 and the notice of appeal was served on the Respondents who had duly acknowledged same.

[3] Although the notice and grounds of appeal were acknowledged by the Respondent, the Appellant failed to file the affidavit of service. Furthermore, the Appellant had failed to file the application for security for costs within the prescribed time.

[4] Thereafter an application was made by the Appellant on 29th March 2017 in terms of Section 20 of the Court of Appeal Act, Cap. 12, seeking leave to appeal out of time.

[5] Subsequently, the application was amended and on 7th July 2017 the Appellant filed an application to appeal out of time in terms of Rule 17(3) of the Court of Appeal Rules and section 20 of the Court of Appeal Act. A supporting affidavit was filed by the Appellant.

[6] A counter affidavit was filed by the Respondent objecting to the grant of extension of time on the basis that the Appellant had failed to take the necessary steps to prosecute his appeal and that the grounds of appeal were not likely to succeed.

[7] The Appellant filed an answering affidavit stating that the grounds of appeal are likely to succeed and that extension of time be granted to pursue his appeal.

[8] The Appellant had filed a timely notice of appeal when appealing the judgment of the learned trial Judge. However, there was a failure to follow it up by filing an affidavit of service within 7 days as stipulated in Rule 17(1) and to file an application for security for costs, which was required to be done within 28 days.

[9] Rule 17(2) grants a further 42 days for an Appellant who has failed to comply with Rule 17(1) to file a fresh notice of appeal. The Appellant failed to do so and filed an

application seeking extension of time in terms of section 20 of the Court of Appeal Act on 29th March 2017. By a further application on 7th July 2017 he sought extension of time to file an appeal in terms of Rule 17(3) and Section 20 of the Court of Appeal Act.

[10] It is observed that although the notice of appeal was filed in time, the necessary procedural steps had not been taken thereafter within the prescribed time limits, making it necessary to seek the exercise of the discretion of the Court to grant leave to appeal to prosecute the appeal.

[11] Granting of leave is at the discretion of the Court and the factors set out in the Supreme Court decision in **NLTB v. Ahmed Khan and Another** (CBV 2 of 2013; 15 March 2013) have to be considered. The factors are:

(a) the length of the delay;

(b) the reasons for the delay;

(c) whether there is a ground of merit justifying the appellate court's consideration or, where there has been a substantial delay, nonetheless is there a ground will probably succeed; and

(d) if time is enlarged will the respondent be unfairly prejudiced.

[12] The length of delay from the time that the Appellant had failed to comply with Rule 17(1) of the Court of Appeal Rules to the time when the proper application (made on 7th July 2017) was made seeking enlargement of time, is a period of about 6 months which is a substantial delay.

[13] The reasons for the delay as deposed in the affidavit of the Appellant is that the Clerk of the solicitor who was handing the file of the Appellant had resigned and had failed to diarise the entries regarding the appeal. This explanation is not quite satisfactory as it shows that there has been no proper monitoring of the work of the clerk specially when that clerk had resigned there had been a lack of accounting regarding the work of that clerk. The fault lies therefore with the Solicitor and his staff. The question that would arise is as to whether the Appellant who wished to appeal the judgment of the High Court should be deprived of what he was wanting to achieve by appealing against the judgment. Much would depend on the strength of the grounds of appeal.

[14] The intended grounds of appeal filed on behalf of the Appellant are:

> *"1. That the Learned Judge erred in law and in fact in failing to consider the pain and suffering of the Appellant/Plaintiff as a whole and only gave weight to the medical condition of the Appellant/Plaintiff as assessed in the medical report of Dr. Taloga. The awarding damages under the head of pain and suffering.*
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> *2. That the Learned Judge erred in law and in fact in failing to consider that the Judgment Sum to be paid by the 2nd Defendant/2nd Respondent under the doctrine of vicarious liability as it has been accepted by the 1st Respondent / 1st Defendant and the 2nd Respondent/2nd Defendant that the 1st Respondent/1st Defendant was the employee of the 2nd Respondent/2nd Defendant and the First Respondent /First Defendant was driving motor vehicle registration no. EU 339 under the instruction of the 2nd Respondent/2nd Defendant. The 2nd Respondent being the employer of the 1st Respondent/ 1st Defendant is vicariously liable for the act and omissions of his employee.*
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> *3. That the Learned Judge erred in law and in fact in failing to give weight to the evidence of the treating doctor, Doctor Jaoji Vulibeci who was equally qualified as Doctor Taloga.*
>
> *4. That the Learned Judge erred in law and in fact in failing to assess interest in favour of the Plaintiff correctly from the date of accident.*

5. *That the Learned Judge erred in law and in fact in failing to consider that the 2nd Defendant/2nd Respondent permitted and instructed the 1st Defendant/1st Respondent to drive vehicle with defective brakes.*

6. *That the Learned Judge erred in law and in fact in failing to adjourn the matter so as to have an assessment done by an independent and a more qualified personal injury assessor namely Dr Rauni Tikoinayau after application for such assessment was made by the Appellant's/Plaintiff's counsel during the trial.*

7. *That the Learned Judge erred in law and in fact in failing to appropriately assess the loss of earnings of the Appellant/Plaintiff for 4½ years from the date the 2nd Respondent/2nd Defendant ceased paying wages to the Appellant/Plaintiff to the date of judgment.*

8. *That the Learned Judge erred in law and in fact in failing to consider payment of FNPF contribution by the 2nd Defendant/2nd Respondent on loss of earnings of the Appellant/Plaintiff.*

9. *That the Learned Judge erred in law and in fact in failing to consider payment of $57,200.00 (Fifty Seven Thousand Two Hundred Dollars) being the sum for loss of future earnings and earning capacity for the Appellant/Plaintiff.*

10. *That the Learned Judge erred in law and in fact in failing to consider that Dr Jaoji and Dr Taloga are equally qualified assessors for impairment resulting from personal injury.*

11. *That the Learned Judge erred in law and in fact in failing to consider the medical condition of the Plaintiff to earn a living and thereby being without a job for more than 4 ½ years.*

12. *That the Learned Judge erred in law and in fact in failing to accurately assess the Appellant's/ Plaintiff's disabilities which is preventing him from obtaining a gainful employment.*

13. *That such further and/or other grounds as will be made out at the production of the Copy Record of the proceedings at the High Court."*

[15] The Appellant who was an employee of the 2nd Respondent as a driver/salesman aged 45 years, was travelling in the vehicle belonging to the 2nd Respondent which was driven by the 1st Respondent. The vehicle had veered off the road, gone down a steep slope and had ended up in a river due to the negligent driving of the 1st Respondent. The Appellant had sustained serious injuries as a result and had to be hospitalized. He had lacerations on his forehead, on his legs, left hand, subluxation of c 5-6 vertebra and had been unable to stay in one position for long.

[16] He had been hospitalized for about two and a half months during which time he had undergone surgery, skull traction to bring displaced bones back to their original places, and other treatment that was necessary. In his evidence he had stated that he had lost power in his right hand and was unable to work with that hand. He had attended clinics at Labasa Hospital regularly and had undergone physiotherapy. He was not doing any work and was staying at home. He had been paid half of his wages for about 2 years and 6 months by his employer. The Doctor's evidence had been that he would continue to suffer from pain in the future.

[17] The learned High Court Judge had awarded damages in a sum of $30,000.00 with interest in terms of section 4(1) of the Law Reform (Miscellaneous Provisions) (death and Interest) (Amendment Decree 2001) from the date of the judgment until the entire sum was paid in full, and costs in a sum of $3000.00. No compensation was awarded for loss of earnings, nor was any interest ordered to be paid on the sum of $30,000.00 from the date of issuance of the writ till the date of the judgment, referred to as pre-judgment interest. Further, no amount was awarded as special damages.

[18] The first and third grounds of appeal are regarding the award of damages by the learned High Court Judge for pain and suffering. It is arguable as to whether the Appellant should

have been eligible to get damages for current and future pain and suffering in view of the evidence given by the Doctor who was treating him.

[19] I see no merit in Grounds 2 and 5 of the grounds of appeal as liability has been based on vicarious liability.

[20] There is merit in ground 4 which refers to the non-award of pre-judgment interest, regarding which the learned High Court Judge has not made any award is arguable and is likely to succeed.

[21] There is no merit in ground 6 as proper steps should have been taken to bring whatever evidence that was required to establish the Appellant's claim.

[22] The learned High Court Judge did not grant any damages for loss of earnings as it was held that the Appellant had been paid half his salary for one and a half years. No grant was made for the entirety of the period from the accident to the conclusion of the case, nor was any award made for future loss of earnings and loss of earning capacity. I would consider that grounds 7 to 12 are matters which are arguable.

[23] Since the majority of the grounds of appeal are arguable there is merit in them as set out above. Even though there has been a procedural error by his solicitors which resulted in the delay and although the reasons for the delay are not satisfactory, the Appellant should be given the opportunity to proceed with his appeal, as his intention to appeal was clear and his original notice of appeal was filed within time.

[24] As to prejudice, although the delay in the proceeding would prejudice the Respondents, if the Appellant is deprived of what should be awarded to him for the injuries received by him and the consequences suffered by him, greater prejudice would be caused to him.

[25] In the above circumstances, extension of time is granted to the Appellant for leave to appeal.

Orders of Court:

(1) The application for extension of time to appeal is granted;

(2) Appellant to file and serve notice of appeal on the Respondents within three weeks from the date of this ruling;

(3) The parties to bear their own costs.

Hon. Justice S. Chandra
RESIDENT JUSTICE OF APPEAL