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

Civil Appeal No. ABU 0007 of 2018
(High Court Civil Action No. HBC147 of 2013)

BETWEEN	:	**CHANDRESH ARUN PRASAD**
		Appellant
AND	:	**VIRENDRA SINGH and SHAILENDRA PRASAD**
		Respondents
Coram	:	**Almeida Guneratne, JA**
Counsel	:	**Mr. N. R. Padarath for the Appellant** **Ms. M. Vanua for the Respondent**
Date of Hearing	:	**15 November 2018**
Date of Ruling	:	**26 November 2018**

RULING

[1] This is an application for enlargement of time to appeal from an order of the High Court dated 10th April, 2017. By that order the High Court refused leave to appeal the decision of the Master dated 9th October, 2015 wherein the Master had struck out the statement of Defence of the Appellant for non-compliance with a previous order made by him. By a subsequent order dated 8th December, 2017, the High Court refused leave to appeal its aforesaid order of 10th April, 2017 as well. It is consequent to that, that the present application has been made to a single judge of this Court as permitted by the relevant provisions of the Court of Appeal Act (Cap 12) and the Rules made thereunder.

[2] Having regard to the criteria in an application seeking enlargement of time to appeal (as judicially expounded) I did not think it necessary to trace in detail the background history of events in as much as, it is the order of 10th April 2017 that is under scrutiny in the present application.

Criteria for Enlargement of time to appeal

[3] Those criteria are well settled in the Fijian Law viz:

a) the length of the delay
b) the reasons for the delay
c) relative prejudice to the parties
d) merits of the Appeal and/or prospect of success in Appeal
(vide: NLTB v Khan & Another [CBV 002.2013] 15 March 2013)

[4] I agree with the Respondent's submissions in regard to the length and the reasons for the delay. Then there is the criterion of relative prejudice to the parties, linked as it were to the overriding and/or decisive criterion of prospects of success in the Appeal should leave be granted. A consideration of the said twin criteria involve matters relating, inter alia, to the Master's:

(a) initial order regarding discovery of documents
(b) the making of the subsequent 'unless order' and
(c) the re-activation of that 'unless order'

[5] Counsel for both parties addressed at length on those matters. However, for the purposes of making a determination as to whether leave should be granted or not I felt that, the present application warranted the consideration of an issue that goes beyond a consideration of those matters as being of a fundamental nature.

[6] Viewing the matter from that perspective I ventured to look at the principal basis on which the learned High Court Judge made his impugned order of April 10th, 2017.

The Impugned Order of the High Court

[7] As the background history of this matter reveals, the Master had struck out the Appellant's statement of Defence which constituted an "interlocutory order". This was common ground. In the Appellant's application before the High Court (which resulted in the impugned order) the Appellant had filed it within the prescribed time limit of 14 days, but had failed to serve the same on the Respondent within the said 14 days. The said facts are not in dispute.

[8] The learned Judge considered the principal applicable statutory provisions which are Order 59 Rule 11 and Order 2 Rule 1(1) of the High Court Act Rules.

> *"O59 R 11 - Any application for leave to appeal an interlocutory order or judgment shall made by summons with supporting affidavit, filed and served within 14 days of the delivery of the order or Judgment."*
>
> *"O2R1(1) - Where in the beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has by reason of anything done or let undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, Judgment or other than."*

[9] Having considered the said provisions the learned judge reasoned and concluded thus:

> *"O59 R11 of the HCR dictates specific time limits within which an application for leave to appeal any interlocutory order with a supporting affidavit must be filed and served. The word 'shall' in rule 11 denotes that the time limit prescribed therein is mandatory and must be complied with...The Master made the impugned order on 9 October 2015. The first defendant served his application for leave upon the plaintiff on 17th November, 2017. The defendant has failed to comply with the requirement of O59 R11. Non-compliance as to the specific time limit prescribed by Rule 11 is fatal and cannot be cured by invoking O2 R1 (1) of the HCR. There is no proper application for leave to appeal the Master's Order of 9 October 2015." (Vide: paragraphs [23] and [25] of the impugned order of 10th April, 2017).*

The Competing Submissions of Counsel

[10] At the hearing before me, while the learned Counsel for the Respondent defended the impugned order of the High Court relying mainly on the wording of O59R11, referring to several other rules as well contained in the High Court Act, the Appellant's Counsel laid stress on O2R1(1) adverting to other rules in the High Court as well. Both Counsel pursued the common theme that, provision contained in a statute must be read as a whole and ought not to be read in isolation.

Determination

Relevant Principles of Statutory Interpretation

[11] The matter without a doubt involves an exercise in statutory interpretation. While O59 R11 is couched in mandatory language as held by the learned Judge, an aspect that

weighed with me is the fact that, there is no rule prescribed in the rules which says that, for non-compliance thereof (of the twin procedural elements contained therein as to filing and serving) will entail the consequence of a dismissal of an application.

[12] There is also the principle of statutory interpretation that every part of a statute must be given a meaning which stands in favour of the Appellant's contention based on O2R1(1) while there is also the principle that, provisions contained in a statute must be read as a whole and not in isolation (being the common theme pursued by both counsel). The aforesaid principles are well settled as reflected in such leading works on statutory interpretation by, inter alia, Maxwell, Bennion and Craies.

[13] In the result, what provision ought to have prevailed? O59R11 or O2 R1 (1)?

[14] Sitting as a single Judge of the Court of Appeal it is not for me to resolve that apparent conflict contained in the High Court Rules. It is a matter for the full Court to finally determine and make a pronouncement thereon. With the limited jurisdiction bestowed on me under the Court of Appeal Act and the rules made thereunder I have no hesitation in saying that there is an important matter to be looked into by the full Court.

[15] Both Counsel struck consensus in submitting that there is no authoritative pronouncement by the full Court or the Supreme Court in regard to the interpretation of the said Orders (viz: O59 R 11 vis a vis O2 R1 (1) of the High Court Rules).

[16] Should the full Court hold with the Respondent on the said matter of statutory interpretation that would put the final lid on the Appeal. If it should be otherwise, then, the Appellant would have found the key to open the door to urge the other substantive grounds of appeal on merits as well which I have referred to in paragraph [4] above of this Ruling.

Conclusion

[17] For the aforesaid reasons, I proceed to make order allowing the Appellant's application. Given the fact that, the matter for determination involved the interpretation of statutory provisions on which there has not been an authoritative pronouncement by the full Court or the Supreme Court, I shall not make an order as to costs.

Orders of Court:

1. *The application for enlargement of time to Appeal is allowed.*
2. *The Appellant shall take steps in accordance with Rules 15 and 16 of the Court of Appeal Rules and all consequential steps should he intend to pursue the Appeal.*
3. *There shall be no costs.*

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Hon. Justice Almeida Guneratne

Judge of the Court of Appeal