

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

CIVIL APPEAL ABU 0095 OF 2017
(High Court HBC 49 of 2009 at Lautoka)

BETWEEN : **NILESH RAM**

Appellant

AND : **CORAL SURF RESORT LIMITED**

Respondent

Coram : **Calanchini P**

Counsel : **Mr D Singh for the Appellant**
Mr R Singh for the Respondent

Date of Hearing : **26 February 2018**

Date of Ruling : **27 April 2018**

RULING

[1] This is an application for an enlargement of time to file a notice of appeal against the final judgment of the High Court delivered on 30 May 2016. The High Court ordered that the Appellant Ram be paid the sum of \$1,629.00 as special damages with interest at 4% but dismissed his claims for general damages by way of pain and suffering, loss of

amenities, future loss of earning capacity and future medical and nursing expenses. Each party was ordered to pay their own costs.

- [2] The application was made by summons filed on 8 August 2017 and was supported by an affidavit sworn on a date that is not specified and filed on 8 August 2017. The application was opposed. The respondent filed an answering affidavit sworn on 27 October 2017 by Kamlesh Narayan. Both parties filed written submissions prior to the hearing of the application.
- [3] Although the summons states that the application is made pursuant to section 17(3) of the Court of Appeal Rules, the word "*section*" should be read as "*rule*." However and more importantly, the issue in this application is not related to the operation of rule 17 but rather an application for an enlargement of time to file a notice of appeal under rule 27 of the Court of Appeal Rules (the Rules). The reason for this is that the date of the judgment is 30 May 2016 and a notice of appeal was initially filed in the Registry on 8 July and served on the respondent on 14 July 2016. Pursuant to Rule 16 the notice of appeal was required to have been filed and served within 42 days from the date of pronouncement of the judgment. The date for compliance was therefore 11 July 2016. Since service was effected on the respondent on 14 July 2016, service was out of time by three days and as a result there was no proper appeal before the Court.
- [4] The power of the Court of Appeal to extend time exists by virtue of section 13 of the Court of Appeal Act 1949 (the Act) which provides that the Court of Appeal has all the power, authority and jurisdiction of the High Court. Section 20(1) of the Act provides that a judge of the Court of Appeal may exercise the powers of the Court to extend the time within which a notice of appeal may be given.
- [5] The principles upon which an enlargement of time may be granted are well settled and well known. They were considered by the Supreme Court in *NLTB (now iTLTB -v- Ahmed Khan and Another)* (CBV 2 of 2013; 15 March 2013). In summary, the Court considers (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 substantial delay, nonetheless is there a ground that will probably succeed and (d) if time is enlarged, will the respondent be unfairly prejudiced? Apart from being exercised in a principled manner the discretion also should be exercised in a manner that re-enforces the importance of compliance with the rules of Court and the need to bring finality to litigation (see McCaig -v- Abhi Manu CBV 2 of 2012; 24 April 2013).

[6] The length of the delay from the period of 42 days after the date of pronouncement of the judgment being 11 July 2016 to the date of the application for an enlargement of time being 8 August 2017 is a period of about 13 months.

[7] The reason for the delay appears to be related to a misunderstanding of the court rules followed by a lengthy period of inaction for which no explanation was provided. The delay is substantial and the reasons for that delay are both unsatisfactory and unconvincing. As a result the Court is required to consider whether there is a ground of appeal that is likely to succeed. This does not involve a detailed consideration of the grounds of appeal nor does it amount to an attempt at this stage to determine the appeal. However it is necessary to assess the merits of the appeal in order to determine whether there is sufficient basis to excuse the substantial delay and to allow the appeal to proceed to the Court of Appeal. In the event that an enlargement of time were to be granted the Appellant's proposed grounds of appeal are set out in the supporting affidavit as follows:

- i. *THAT the Learned Trial Judge erred in Law and/or in fact in finding Doctor Taloga's evidence as more credible in concluding the Appellant was a malingerer who is pretending to be paralysed contrary to the medical reports of other Doctors tendered as exhibits and the evidence of Doctor Mareko at the Trial.*
- ii. *THAT the Learned Trial Judge erred in law and/or in fact in finding Mr Anirudh Kumar as a credible witness and in finding Mr Shailendra Kumar a doubtful independent witness contrary to the evidence at Trial.*
- iii. *THAT the Learned Trial Judge erred in law and/or in fact in finding the Appellant was not entitled to damages for pain and*

suffering, loss of amenities of life and loss of caring capacity and loss of future medical expenses and nursing care.

- iv. *THAT the Learned Trial Judge erred in law and/or fact in not awarding any Compensation under the Workmen's Compensation Act."*

- [8] Before considering the grounds of appeal it would be useful to set out briefly the background facts to the litigation. The appellant claimed damages in negligence and in the alternative compensation under the Workmen's Compensation Act 1964 for injuries suffered on 26 June 2008 during and in the course of employment as a chef in the Wicked Walu restaurant at the respondent's Warwick Resort. The Appellant was working in the said restaurant when at about 9.00pm a forceful sea surge swept over and into the restaurant resulting in tables and equipment being thrown around. The appellant was thrown about and pinned against the wall by kitchen equipment. The appellant alleged that as a result of his injuries he became paralysed from the waist down rendering him a paraplegic. At the trial both parties called medical evidence and investigators. The judge accepted the evidence of Dr Taloga and concluded that the appellant was a malinger pretending to be paralysed and was entitled only to special damages. The judge also concluded that there was no need to consider whether the appellant was entitled to compensation under the Workmen's Compensation Act.
- [9] Of the four grounds of appeal upon which the Appellant intended to rely, at the hearing of the application Counsel for the appellant addressed the court on the issue of workmen's compensation only as the basis of the application. There were no written submissions at all on any of the grounds of appeal. At this stage it should be noted that the respondent admitted in its amended Defence that the appellant had suffered some injuries on 26 June 2008 but challenged the extent of those injuries and certainly opposed the claim of paralysis.
- [10] The appellant's entitlement to be paid compensation under the Workmen's Compensation Act 1964 is found in section 5. The entitlement arises if a worker suffers personal injury by accident arising out of and in the course of his employment. The situation in this case

should be considered by reference to section 25 of the Workmen's Compensation Act.
Section 25 states:

- "(1) When the injury was caused by the personal negligence or willful act of the employer or of some other person for whose act or default the employer is responsible, nothing in this Act shall prevent proceedings to recover damages being instituted against the employer in a civil court independently of this Act, provided that-*
- (a) a judgment in such proceedings whether for or against the employer shall be a bar to proceedings at the suit of any person by whom, or on whose behalf, such proceedings were taken, in respect of the same injury under this Act;*
 - (b) a judgment in proceedings under this Act whether for or against the employer shall be a bar to proceedings at the suit of any person by whom, or on whose behalf, such proceedings were taken, in respect of the same injury independently of this Act;*
 - (c) an agreement come to between the employer and the workman under the provisions of section 16(1) shall be a bar to proceedings by the workman in respect of the same injury independently of this Act.*
- (2) If in proceedings independently of this Act or on appeal it is determined that the employer is not liable under such proceedings, the court in which such proceedings are taken or the appellate tribunal shall, if the plaintiff so chooses, proceed to determine whether compensation under this Act is liable to be paid to the plaintiff and shall assess the amount of compensation so payable, but may deduct from such compensation any extra costs which in the opinion of the court or appellate tribunal have been incurred by the employer by reason of the proceedings have been taken independently of this Act."*

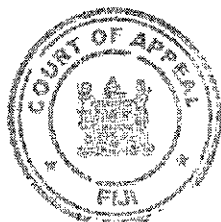
[11] Section 25(1) has the effect of providing that when the injury is caused by the negligence of the employer, a worker may commence proceedings to recover damages against the employer in a civil action independently of the Workmen's Compensation Act. Furthermore, for the purposes of the present application under section 25(2), as an alternative when the employer is not liable in negligence then the court shall if the plaintiff so chooses, proceed to determine whether compensation under the Act is liable to be paid to the plaintiff and also proceed to assess the amount of compensation.


[12] Although the respondent was found to be liable in negligence, neither general damages nor compensation was awarded. It was not disputed that the personal injuries that were admitted by the respondent were the result of an accident in the course of and as a result of the appellant's employment. Nor was it disputed that the occurrence was an accident. The problem for the appellant is that at all material times he claimed to have suffered 95% "total incapacity (non-sexual)." The medical evidence that was accepted by the trial Judge did not support that claim. Furthermore the evidence that was accepted by the Judge was to the effect that the appellant was a malinger (i.e. pretending). There was no evidence upon which the judge could rely in order to determine the extent of his incapacity, if any, as a result of the accident. Once the judge had rejected the appellant's medical evidence as a basis for determining incapacity in awarding damages, it was not permissible for him to rely on that evidence to determine incapacity for the purposes of compensation under the Workmen's Compensation Act. Put simply, the accepted evidence did not support the claim that the appellant had suffered permanent or temporary, total or partial, incapacity or disability.

[13] In my opinion the appeal does not meet the necessary threshold for granting an enlargement of time in this case and as a result the application is refused and costs awarded to the respondent.

Orders:

1. *Application for enlargement of time is refused.*
2. *Appellant is to pay costs fixed in the amount of \$1,800.00 to the respondent within 21 days from the date of this ruling.*




Hon Mr Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL