

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

CIVIL APPEAL NO. ABU 0096 of 2017
(High Court HBC 284 of 2009)

BETWEEN : **SUSHIL CHAND**

Appellant

AND : **ALDEX TRADING**

Respondent

Coram : **Chandra RJA**

Counsel : **Mr. D. Singh for the Appellant**
Mr. E. Narayan for the Respondent

Date of Hearing : **26 February 2018**

Date of Ruling : **7 May 2018**

RULING

[1] This is an application for leave to appeal pursuant to Section 17(3) of the Court of Appeal Rules.

[2] The Appellant has filed the affidavit of Kinisimere Raiqiso, Law Clerk, in support of the application.

- [3] The Appellant had instituted action in the High Court at Suva claiming damages consequent upon his receiving injuries while being employed.
- [4] The High Court of Suva after trial by judgment 17th May 2016 dismissed the action of the Appellant.
- [5] The Appellant filed notice of appeal seeking to appeal the judgment of 17th May 2016 on 27th June 2016.
- [6] The Appellant failed to file the security for costs application as required by section 17(1)(a)(ii).
- [7] Thereafter the Appellant by summons dated 8th August 2017 filed the application for leave to appeal the said judgment.
- [8] The Respondent filed an affidavit in opposition and deposed:

- “(a) that the affidavit filed by the Appellant was that of a law clerk in the employ of Messrs Daniel Singh Lawyers , solicitors for the Appellant and that he does not have the natural rights accorded to the Appellant.*
- (b) that it is not appropriate for a law clerk to depose the affidavit in support of the application.*
- (c) that since the filing of the notice of appeal, 15months had lapsed till the Appellant filed the present application.*
- (d) that the Applicant does not have meritorious grounds of appeal.”*

Consideration of the application

- [9] Section 17 of the Court of Appeal Rules states:

- “17(1) The appellant must -*
(a) Within 7 days after service of the notice of appeal –

- (i) *file a copy endorsed with a certificate of the date the notice was served; and*
 - (ii) *apply to the Registrar to fix the amount of the security to be given by the appellant for the prosecution of the appeal, and or the payment of all such costs as may be ordered to be paid;*
- (b) *within such time as the Registrar directs, being not less than 14 days and not more than 28 days, deposit with the Registrar the sum fixed as security for costs.*
- (2) *If paragraph (1) is not complied with, the appeal is deemed to be abandoned, but a fresh notice of appeal may be filed before the expiration of—*
- (a) *in the case of an appeal from an interlocutory order – 21 days;*
 - or*
 - (b) *in any other case – 42 days, calculated from the date the appeal is deemed to be abandoned.*
- (3) *Except with the leave of the Court of Appeal, no appeal may be filed after the expiration of time specified in paragraph (2)''.*

[10] This is an application in terms of section 17(3) of the Court of Appeal Rules.

[11] Where a notice of appeal has been filed within time by an Appellant but has failed to comply with section 17(1)(a)(ii), such an appeal is deemed to be abandoned according to Section 17(2). But section 17(2) permits such an appellant to file a fresh notice of appeal before the expiration of 21 days in an interlocutory appeal and before the expiry of 42 days in any other case.

[12] In the present case the notice of appeal filed was against a final judgment of the High Court and therefore had to be filed before the expiry of 42 days from the time that the appeal was deemed to be abandoned. The Appellant has failed to do so.

- [13] The Appellant having failed to take steps under section 17(2) has filed the present application seeking leave in terms of section 17(3).
- [14] 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.
- [15] The Appellant has filed the present application after a lapse of 14 months which is a substantial delay.
- [16] In the affidavit filed in support of this application, the reasons that have been given regarding the delay are that enquiries were made with the Registry orally as to why the security of costs and affidavit of service documents were rejected and that no response was forthcoming. Further, that no fresh application was made as no letter was received from the Court of Appeal that the appeal was abandoned.
- [17] If the provisions of Rule 17(1) are not complied with by a prospective appellant, the appeal is deemed to be abandoned and the Registry does not send letters to the party concerned regarding the abandonment of their appeal. Therefore to state that a response was awaited by the Appellant is not a satisfactory reason for the delay.
- [18] The affidavit filed in support has been deposed to not by the Appellant but by a law clerk in the employ of the Appellant's solicitor. The Respondent has taken strong objection to

this affidavit on the basis that it is not an appropriate affidavit as matters therein could not be deposed to on behalf of the Appellant by the deponent.

[19] The grounds of appeal proposed by the Appellant are as follows:

- i. That the learned Trial Judge erred in law and in fact in failing to properly evaluate the evidence of the witnesses and exhibits tendered in Court to find that a duty of care was owed to the Plaintiff which was breached resulting in injury loss and damages to the Plaintiff*
- ii. That the learned Trial Judge erred in law and in fact in finding that at the time of the accident that what the Plaintiff was doing at the time of the accident was not within the purview of his duties as General Manager, Production and Marketing and the accident was foreseeable.*
- iii. That the learned Trial Judge erred in law and in fact in not finding that the Plaintiff was paid wages of \$270 per week by holding no documentary proof was provided to substantiate it contrary to oral evidence in Court.*
- iv. That the learned Trial Judge erred in law and in fact in holding that sole proprietorship of business registered in the name of the Plaintiff's wife negates liability against the Plaintiff contrary to the Workmen's Compensation Act.*
- v. That the learned Trial Judge erred in law and fact in not making any award under Common Law or under the Workmen's Compensation's Act was tendered in evidence as an exhibit."*

[20] The claim of the Appellant was based on negligence on the part of the Respondent. Although reference has been made to statutory compensation in terms of the Workmen' Compensation Act and the Health and Safety at Work Act 1996 in the grounds of appeal, no evidence had been led before the learned High Court Judge to satisfy his claim under those provisions. The statement of claim filed before the High Court had no reference to the Workmens' Compensation Act.

- [21] The evidence led by the Appellant had failed to establish negligence on the part of the Defendant regarding the injuries suffered by him as per the findings of the learned High Court Judge.
- [22] The grounds of appeal are based on questions of fact. The material placed before Court has been considered by the learned High Court Judge in arriving at his decision that the claim of the Appellant had not been established.
- [23] A substantial period of time has lapsed since the delivery of the judgment by the High Court, and this by itself would prejudice the Respondent. In **Official Receiver as Trustee in Bankruptcy for Estate of Karim v. Petrie Ltd** (unreported, Fiji Court of Appeal, Civil Appeal No.ABU0049 of 1997, 28 November 1997) it was stated that any delay is prejudicial.
- [24] As the Appellant has failed to satisfy this Court on the factors required for the grant of extension of time to appeal as required by Section 17(3) of the Court of Appeal Rules, the application of the Appellant is refused.

Orders of Court:

- (1) *Application for leave to appeal out of time is refused.*
- (2) *The parties shall bear their own costs.*




Hon. Justice S. Chandra
RESIDENT JUSTICE OF APPEAL