

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

CIVIL APPEAL NO. ABU 0017 OF 2017
(High Court No: HBC 341 of 2008)

BETWEEN : FORMSCAFF (Fiji) LIMITED
Appellant

AND : RAJESH NAIDU
AMBE CONSTRUCTION LIMITED
Respondents

Coram : Chandra, RJA

Counsel : Mr E Narayan with Mr N R Nand for the Appellant
Ms S Devan for the Respondents

Date of Hearing : 26 February, 2019

Date of Ruling : 27 June, 2019

RULING

- [1] This is an application seeking an enlargement of time for filing and serving a notice of appeal in respect of the judgment of the High Court delivered on 25th November 2016.
- [2] The 1st Respondent commenced an action in the High Court claiming damages against the Appellant and the Second Respondent in respect of injuries suffered by him during the course of his employment with the Second Respondent.
- [3] The trial of the action was heard by Kotigalage J and the Appellant and the 2nd Respondent were found to be jointly responsible for the accident and were each ordered to pay 40% of the damages awarded to the 1st Respondent who was found to be 20% responsible for his own injuries by way of contributory negligence.
- [4] The Appellant filed a notice of appeal on 6 January 2017 which was the 42nd day after pronouncement of the judgment. A copy of the notice of appeal was served on the 1st and 2nd Respondents 46 days after pronouncement of the judgment.
- [5] The appeal thereafter had proceeded under Rule 17(2) by way of a second notice of appeal.
- [6] A summons had been filed on 28 April 2017 by the Appellant in terms of Rule 17(3) of the Court of Appeal Rules seeking an enlargement of time to file and serve a notice of appeal.
- [7] By a Ruling dated 23rd October 2018, the President of the Court of Appeal ruled that the summons filed on 28 April 2017 be regarded as an application for an enlargement of time under Rule 27 of the Rules as at the time of the filing, and ordered that the application be heard before a single judge of the Court of Appeal on a date to be fixed as affidavits and submissions had been filed.
- [8] The application seeking an extension of time to file an appeal has to be considered on the principles set out in the Supreme Court decision in NLTB v Ahmed Khan and Another (CBV 2 of 2013; 15 March 2013). The factors to be considered being (a) 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 that will probably succeed and (d) if time is enlarged will the respondent be unfairly prejudiced.

- [9] The application seeking enlargement of time was filed on 28 April 2017 which is about 5 months after the delivery of the judgment on 26th November 2016. This was after the Appellant had filed a notice of appeal in time on 10 January 2017 which was deemed abandoned due to security for costs not being paid. A second notice of appeal had been filed on 23 March 2017 which again was deemed abandoned as there was a failure to take steps to fix security of costs within time.
- [10] Considering the length of the delay and the reasons for the delay, the explanation offered may be considered to be unsatisfactory as the delay had been due to the Appellants not taking the steps necessary to proceed with the appeal within time having initiated the appeal on time.
- [11] However, there is sufficient authority to state that in spite of the delay and the reasons being not satisfactory, if there are grounds that will probably succeed, extension of time would be granted in the exercise of discretion of the Court.
- [12] The Appellant has proposed the following grounds of appeal (stated herein without including the particulars set out under the different grounds) in its annexure to the Affidavit supporting the application seeking extension of time:

- 1.0 That the Learned Judge erred in law and in fact in assuming jurisdiction to conclude the hearing of the matter by pronouncing a judgment based on trial of proceedings heard and to be determined by Mr. Justice Kotigalage and thereby rendering the said judgment irregular and giving rise to prejudice and/or injustice to the parties.*
- 2.0 The Learned Judge erred in law and in fact in not ordering a trial denovo in all the circumstances.*
- 3.0 That the Learned Judge erred in law and in fact in holding at Paragraph 1 of the Judgment that "The matter was taken up for trial before Justice Kotigalage and was concluded before him*

and parties agreed to adopt the proceedings and also relied on the written submissions filed before the said judge.

- 4.0 *That the Learned Judge erred in fact and in law by not having the matter reheard de novo as the matter was a contested negligence based action with serious conflict on evidence and where the trial judge did not have the benefit of observing the demeanour of witnesses and drawing the necessary inferences on credibility therefrom.*
- 5.0 *That the Learned Judge erred in law and in fact by holding on the available evidence that the Appellant owed a duty of care and breached that duty of care owed to the First Respondent including being grossly negligent and as a result the First Respondent being entitled to damages.*
- 6.0 *That the Learned Judge erred in law and in fact in making assessments of contributory negligence as between the parties on the available evidence in proportion 40/40/20.*
- 7.0 *That the Learned Judge erred in law and in fact in making a high award of quantum of damages and which was in all circumstances excessive and/or unsupported by evidence or any credible evidence."*

[13] To consider these proposed grounds, specially, grounds 1 and 3 where it is stated that the parties did not agree to adopt the proceedings before Justice Amaratunga as the trial was before Justice Kotigalage, it is necessary to consider the affidavit filed by the Appellant in support of the application seeking extension of time and the affidavit filed opposing the application filed by the 1st Respondent.

[14] The salient matters regarding the said grounds of appeal that have been deposed in the affidavit of Subashini Prasad filed on behalf of the Appellant are:

"4. That the matter in the High Court Civil Action No.HBC 341 of 2008 , was heard by Mr.Justice Kotigalage on 16th and 17th of October 2013.

Paragraph 5 refers to the fact that a letter was received on 11th November 2016, from the High Court registry stating that the High Court matter was listed before a Judge of the High Court for judgment on 14th November 2016, on which date the Ruling date had been vacated and adjourned to 18th November 2016. Paragraphs 6 to 9 state that on 18th November a similar letter had been received stating that the matter was listed for 22nd November 2016 on which date another letter had been

issued vacating the Ruling and was relisted for 25th November 2016 on which date the judgment had been delivered by Justice Amaratunga.

Paragraph 11 refers to the fact that a decision was taken to appeal the said judgment where it was noted that although the Hearing was conducted by Justice Kotigalage, a ruling was however delivered by Justice Amaratunga and stated in Paragraph 1 of the judgment that :

“..The matter was taken up for trial before Justice Kotigalage and was concluded before him and parties agreed to adopt the proceedings and also relied on the written submissions filed before the said judge.”

The Appellants Solicitors endeavoured to undertake a file search in the matter to ascertain whether the parties had agreed as referred to by Justice Amaratunga. Having undertaken a file search it had been found that there was no record of when the matter was heard or any court minutes sheets for years 2014 onwards.

The Appellant nor their Solicitors was issued with any NOAH or any letter seeking any confirmation agreeing to the course as recorded in paragraph 1 of His Lordship's judgment.

27. That I am advised and verily believe it to be true that as per discussions made by with my Solicitors for the First Respondent and the Second Respondents, the Solicitors of the Respondents respectively had advised that there was “no consent given to Justice Amaratunga as stated in Paragraph 1 of the judgment thus if time is enlarged by this Court to determine on the intended grounds of Appeal, the same will not unfairly prejudice the Respondents and subsequent file search of the court file confirmed the same.”

- [15] In the affidavit filed by the 1st Respondent opposing the application of the Appellant, the averments in the Appellant's affidavit regarding the sequence of events from the 16th and 17th of October 2013 to the 25th of November 2016 (the date of the delivery of the judgment) have been agreed upon.
- [16] I would consider the averments deposed to in paragraph 27 of the Appellant's (cited above at paragraph 14) as crucial regarding the position taken up by the Appellant.
- [17] In the averments in the 1st Respondent's affidavit answering paragraph 27 aforesaid, what he states is that he is disagreeing with paragraph 27 and goes on to say that he is the one

who is prejudiced as he had to wait for long to get judgment. There is no specific denial or acceptance of what has been deposed to in the Appellant's affidavit in paragraph 27.


- [18] At paragraph 19 of the affidavit the 1st Respondent states that in respect of paragraph 27, he verily believes that the Appellant intends to use the court process to merely delay the finality of his matter.
- [19] In paragraph 13 the 1st Respondent has stated that the Solicitors of the Appellant should have inquired from the Registry before whom the judgment would be delivered and that when the judgment was pronounced should have sought clarification from Justice Amaratunga as to why the judgment was not being delivered by Justice Kotigalage. The written submissions filed on behalf of the 1st Respondent are on similar lines taking up a position that the Solicitors of the Appellant should have been diligent and should have sought clarification before the delivery of the judgment.
- [20] Further, in the written submissions filed on behalf of the Appellant, in paragraph it is stated that the Solicitors of the 1st respondent had advised that there was no consent given to Justice Amaratunga as stated in paragraph 1 of the Judgment. Again in paragraph 39 it is stated that when the matter was called before the Court of Appeal on 31st May 2017, the Solicitors of the First Respondent had admitted that their office did not give consent to Justice Amaratunga as stated in paragraph 1 of the Judgment. These submissions have not been refuted by Counsel for the 1st Respondent.
- [21] In the above situation I would consider the averment in paragraph 27 of the affidavit of the Appellant as one which brings about a situation which would imply that the Solicitors for the 1st Respondent too were aware that the parties had not given their consent to Justice Amaratunga as stated in paragraph 1 of the judgment.
- [22] As regards the prejudice that would appear to be caused to the 1st Respondent in that there would be a delay in the final conclusion of this matter, the prejudice caused to the Appellant would outweigh that prejudice as the Solicitors of the 1st Respondent would appear to have been aware of the situation as set out by the Appellant.

- [23] I would consider that grounds of appeal 1 and 3 are likely to succeed and the other grounds too would be arguable. I would grant the application seeking extension of time for filing and serving of notice of appeal in respect of the judgment of 25th November 2016.
- [24] The grounds of appeal set out by the Appellant are very lengthy and includes reasons for urging them by giving particulars. It would be better for the Appellant to be more precise in setting out the grounds of appeal.

Orders of Court:

- (1) *Application for extension of time is granted.*
- (2) *Appellant to file and serve Notice of Appeal on all parties within 21 days from the date of this Ruling.*
- (3) *Thereafter appeal to proceed under Rules 17 and 18 of the Court of Appeal Rules.*
- (4) *Costs in the appeal.*




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Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL