IN THE COURT OF APPEAL, FIJI

[ON APPEAL FROM THE HIGH COURT]

Civil Appeal No. ABU 102 of 2017

(Consolidated with ABU 019 of 2016

(HBC No. 021 of 2013)

BETWEEN	:	**MOHAMMED YASAD ALI**
		Appellant
AND	:	**MOHAMMED WAHID KHAN**
		1st Respondent
AND	:	**ATTORNEY GENERAL OF FIJI**
		2nd Respondent
Coram	:	**Almeida Guneratne, JA**
Counsel	:	**Ms. S. Nayacalevu for the Appellant on 28 Sept, 2020**
	:	**Ms. B. Qioniwasa for the Respondent on 17 Sept, 2020.**
Date of Hearing	:	**28 September 2020**
Date of Ruling	:	**16 October 2020**

RULING

[1] On 28 September, 2020 which was a mention date, learned Counsel for the Appellant (the Respondent) being absent and unrepresented) submitted that she will rely on the written submissions filed on 8th September, 2020. Previous to that, on 17th September, 2020 also being a mention date, learned Counsel for the Respondent submitted that she also would rely on her written submissions filed on the 8th September, 2020 on which date the Appellant was absent and unrepresented.

[2] In the said circumstances, on 28th September, 2020, I said I will proceed to make my ruling on the respective written submissions filed on behalf of the parties.

Background to and the Nature of the Appellant's application

[3] This is an application bearing No. ABU/102/17 consolidated with ABU 019/2016 (order dated 6th October, 2017 per Calanchini, P.); ABU 019/2016 was an interlocutory appeal. Pending that application the substantive matter in the High Court was heard and Judgment pronounced against which ABU/102/17 was filed.

[4] Thereafter, the Appeal had been "deemed abandoned" which the Appellant in his written submissions dated 8th September, 2020 has submitted that he had notice of in May 2020. Much of the views expressed by me in a recent ruling of mine (vide: Alspec Holdings Ltd v MTWPU & AG of Fiji in ABU 0064/2018, 8th October, 2020) thus stood distinguished.

[5] Be that as it may, in the month of May itself the present application for re-instatement of the "deemed abandoned" appeal was filed.

Consideration of the Submissions of Respective Parties

[6] Although the judgment of the High Court, had been delivered in May, 2017 and the present application for re-instatement of the Appeal is after 3 years, the reasons for the delay have been explained in the affidavit of Salendra Kumar dated 26th May, 2020, though a law clerk attached to the Appellant's solicitors firm, with a letter of authority to do so from the Appellant of even date thus effectively addressing the reasons on the non-acceptability of affidavits filed by lawyers clerks. (Vide: Gulf Seafood (Fiji) Ltd v I-Taukei Land Trust Board; ABU 0079/2019, 28th August, 2020).

[7] The Appellant has addressed the reasons for that delay in his written submissions filed on 8th September 2020 as well being that the Judge's notes not being made available until 21st July, 2020, they were eventually prepared and filed in Court on 20th August, 2020.

[8] As against that, the Respondent in his written submissions filed on 08 September, 2020 has submitted that;

> *"The Respondent opposes the re-instatement on one ground. In particular, that the Appellant has not advanced any grounds on merits."* (Paragraph 1).

[9] At this point, I say without hesitation that I accept the reasons adduced by the Appellant in seeking re-instatement of the Appeal on the criteria of length and reasons resulting in the delay.

Is there a distinction between "entertaining an application for re-instatement" of an appeal and an "application for successfully obtaining leave to appeal and extension of time for leave to appeal?

[10] Although procedurally the two kinds of application have got inter mixed, that distinction is necessary to be drawn in as much as:

(a) Re-instatement of an appeal means an appeal which ought not have been taken off the cause list of appeals on the basis of "abandonment" *per se* or for some other reason to meet time limits prescribed by the Rules of Court if blame could not be shown to have fallen squarely on an appellant, in the result therefore, an Appellant's right to appeal conferred by the Legislature is kept alive.

(b) In contrast, leave to appeal and enlargement of time to appeal arises when, on the criteria laid down in the Supreme Court decision in NLTB v Khan [2013] FJSC1, 15th March, 2013,(in addition to the criteria referred to in paragraph [9] above), criteria such as prejudice to parties and merits of the case having prospects of success, are required to be considered.

[11] I pause here to make some interim reflections on (a) and (b) above.

Some Interim Reflections

[12] Being bound by that decision I myself in several rulings have in the past faithfully followed that decision, although my own view is that, if an appellant has been at fault as to time limits which he/she/it cannot explain as to the length and reasons for the same, there is no room to go beyond to merits/prospects of success in as much as, then, an appeal filed within time and an intended appeal to file seeking extension of time to file would be rendered to be on par. Thus, extensions of time to appeal being a matter of discretion, should an appellant fail to overcome the threshold bars as to the length and reasons for the same, an application for extension of time to appeal must be refused.

[13] For the said reasons, I would welcome the day the full Court or the Supreme Court would address that issue from that perspective, which to some extent the Supreme Court is seen to have addressed expressing the view that the criteria laid down in the NLTB case (Supra) must be taken in the overall. (Fiji Industries Ltd. v. National Union of Factory and Commercial Workers, CAV 008/2016, 27 October, 2017).

[14] Although His Lordship, Justice Keith in that case expressed that view in the context of an application for leave to appeal and extension of time to appeal, I found that view to have similar force in an application for re-instatement of an appeal which the Appellant has submitted in saying that:

> "The Appellant did nothing wrong... and the delay was caused (because) ... the copy records could not be prepared and filed due to the unavailability of the Judges notes being supplied to him".

[15] It is unfortunate that the Appellant, in that regard should have blamed the matter on the Registry. The Registry had done nothing more or nothing less than acting in pursuance of the powers and/or powers conferred upon it under the Court of Appeal Act and Rules (Vide: Rule 17) and the Practice Directions. However, I do agree with the Appellant's submission that blame could not have been visited upon the Appellant in that regard.

[16] However, I felt it necessary, to make a few observations and notes of caution to solicitors and parties in the future.

Need to strike a Via Media between the Registrar's powers and functions and the Complaints of litigants

[17] The delays resulting from the inability to prepare, file and have copy records certified occur like a recurring decimal.

[18] How then are party litigants and their solicitors to take steps to come within the Rules and Practice Directors both of which are sanctioned by the Court of Appeal Act?

[19] While the Rules and Practice Directions are necessary, if not imperative, to regularize the procedure in Courts, in as much as, although procedural rules are the handmaid of substantive rights, it is through the conduit of procedural rules that a litigant could vindicate those rights. Thus, both are complementary to work out the administration of Justice System.

[20] Accordingly, the litigants and their solicitors must be mindful of these two twin aspects.

[21] Consequently, in a case such as the instant one, they should file, prepare and submit to the Registrar for certification whatever of the Copy Record that has been supplied within the time limits prescribed and then move court to file a supplementary record with the material they say (Such as judges notes and sound recordings) once the same are made available to them.

[22] This is how to my thinking a meaningful and practical via media could be struck. Comply and complain ought to be the rule.

Scope and Content of Rules and Practice Directions and their application

[23] Remaining on that need to strike a via media in some recent decisions I have held when such rules and practice directions cannot be applied as contemplated by them.

[24] The first is where, for non-compliance of time limits in regard to the filing of written submissions and appeal is "deemed to have been abandoned" on the rationale that, the failure to file written submissions cannot deprive a party's right to make oral submissions consumed in the basic constitutional right to "a hearing" (Vide: Sun (Fiji) News v Kewal Chand, ABU 58 /2019, 28 August, 2020).

[25] The second is where the directions state when an appeal is "deemed to be abandoned" no notice of it need be given for it is an automatic consequence. On that, I have expressed the view that, the same offends the basic tenets of natural justice in which regard I have given my reasons for saying so. (Vide: Maria Vani Marieta Vunisa v Emosi & Ors; ABU 20/2020, 3 September, 2020 and Sun Fiji News v Kewal Chand, ABU 58/2019, 28 August, 2020(Supra).

[26] However, the present matter warrants different considerations on account of what I have reflected at paragraph [4] taken together with what I have said at paragraph [21] of this Ruling.

[27] I shall now take my mind back to the present application.

[28] What I have in contemplation is in a sense a converse situation to the thinking in the NLTB case (supra).

[29] While the approach in the NLTB case is that even if an Appellant fails to satisfy the criteria of length and reasons for the delay, nevertheless the merits with prospects of success need to be looked at. What I asked myself in even where the criteria of length and reasons for the delay are satisfactorily explained (which I have found in favour of the

Appellant), should leave to appeal and extension of time to appeal be allowed should Court find that there are no "merits with prospect of success" if leave was to be granted to appeal taken with the criterion of "prejudice to parties"?

In an application for Re-instatement of an appeal should a Single Judge of this Court look into the judgment of the High Court to ascertain whether there are merits against it with prospects of success should the Application for re-instatement be granted?

[30] This is the question, in fact, what appears to be the sole ground urged by the Respondent on his written submission opposing the Appellant's application. (Paragraph 1 of the Respondent's written submissions).

[31] I did not have the benefit of oral submissions of counsel on that question. The respective Written Submissions also have not addressed that question. Consequently, I had to do some reading of my own, although I have looked at the Judgment of the High Court as against the grounds of appeal urged by the Appellant, I could not find any prospect of success in appeal in as much as, the matter being reduced to the interpretation of Section 4 of the Limitation Act (Cap 35), the Respondent's cause of action was well within the 6 year time prescribed and not 3 years as sought to be contended by the Appellant. I wish to add that I could not find a semblance of a non-direction or a misdirection in the reasoning of His Lordship in the High Court both as to the interpretation of Section 4 of the Limitation Act or substantive merits on the damages award.

Entertainment as opposed to allowing an application for re-instatement

[32] Adopting a beneficial construction of the provisions of Section 20 (1) taken together with the concept of "inherent powers of Court" I have entertained the Appellant's application. However, allowing the same stands in my view on a different footing.

[33] In that regard, while looking at some decisions of foreign courts, I was inclined more to be guided by a considered ruling of the High Court of this country itself which laid down

the following principles in the case of Chandra Kant Umaria v Rauhanisi OFA Albert (HBA 9 and 10.00 and HBM 0024/991, 21 May, 2001).

[34] In that case, Justice Gates (as he then was) laid down the following principles (viz:

"(i) The reason for the failure to comply;

(ii) The length of the delay;

(iii) Is there a question which justifies serious consideration?

(iv) (a) If there has been a substantial delay,

(b) Have any of the grounds such merit they will probably succeed?

(v) The degree of prejudice to the Respondent in enlarging time."

(The breaking up of (iv) into (a) & (b) is my interpolation).

[35] Justice Gates referred to *inter alia* to the case of the Queen v Brown (1963) SASR 190 at 191 wherein it was said;

"The practice is that if any reasonable explanation is forthcoming, and if the delay is relatively, slight, say for a few days or even a week or two the Court will readily extend the time, provided that there is question which justifies serious consideration."

[36] Before I make my final determination and conclude on this matter, I pause and venture to make a few observations and enunciate some propositions.

The persuasive value of precedents

[37] As Rupert Cross on "Precedent in English Law" (1991 Clarendon) says, whether it be a decision of a subordinate Court or of a foreign jurisdiction, the same, though certainly not binding carry persuasive value.

[38] For my part, for the purposes of this matter I adopt the principles laid down in the case of Chandra Kant Umaria (supra) which therefore would amount to a precedent unless at some future time the full court or the Supreme Court sees fit to depart therefrom.

[39] In saying that, I have answered the question I raised after paragraph [29] above of this Ruling with my reasoning following thereafter along with the preceding aspects referred to. That is to say, the criteria applicable to an application for leave to appeal and extension of time to appeal in an application for re-instatement of an appeal.

Application of the principles articulated above to the instant case

[40] In so far as principles (i), (ii) and (iv) (a) (referred to in paragraph [34] above are concerned, I have found in favour of the Appellant. However, those factors go to the entertainment of an application for reinstatement but as to whether the same ought to be allowed would need to be determined on the principles referred to at paragraph [34] (iii) (iv) (b) and (v) above, taken with what I have stated in paragraph [29] above.

[41] To that, I feel no constraint in adding as principle (v) **the conduct of the Appellant.**

[42] The action being one for damages arising out of personal injuries, the judgment (as the record reveals) was delivered by the learned High Court Judge on 5th May, 2017. The award of $52, 890 with costs in a sum of $2,500.00 have not been paid (as the record reveals) the reason why (quite legitimately) the Respondent in his written submissions has lamented that he has been deprived of "the fruits of the judgment."

Determination and Conclusion

[43] Accordingly, although I did entertain the application for re-instatement, for the aforesaid reasons I did not see any basis to allow the same and proceed to make my orders as follows:

Orders of Court

1. The application to reinstate the Appeal ABU/102/2017 consolidated with ABU/0019/2016 is refused and accordingly dismissed.

2. The Appellant is ordered to pay as costs of this application a sum of $1,500.00 within 21 days of notice of this Ruling.

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Almeida Guneratne
JUSTICE OF APPEAL