

**THE COURT OF APPEAL, FIJI**  
**[ON APPEAL FROM THE HIGH COURT]**

**Civil Appeal No. ABU 143 of 2018**  
**(Lautoka Civil Action No. HBC 211 of 1988)**

**BETWEEN** : **DOMINION AUTOPARTS AND ACCESSORIES LTD**

***1<sup>st</sup> Appellant***

**AND** : **RAHMAT ALI**

***2<sup>nd</sup> Appellant***

**AND** : **THE NEW INDIA ASSURANCE COMPANY LTD**

***Respondent***

**Coram** : Almeida Guneratne, JA

**Counsel** : Mr. N. K. Padarath for the Appellants

: Mr. S. Krishna for the Respondent

**Dates of Hearing** : 17<sup>th</sup> March 2021

**Date of Ruling** : 1<sup>st</sup> April, 2021

**RULING**

**Background to the present Application**

[1] The impugned decision of the High Court is dated 26<sup>th</sup> October, 2018. The Notice and Grounds of Appeal were filed on 7<sup>th</sup> December, 2018 but served on 11<sup>th</sup> December. Thus, although the Notice and Grounds of Appeal had been filed within the period

envisaged in Section 16 of the Court of Appeal Act ('Act'), they had been served 4 days outside the time as contemplated by Sections 15(4) and 16 of the Act.

- [2] In the circumstances, the Applicants are seeking to have the period of time to serve notice (and grounds of appeal) extended.

### **The Relevant Statutory Provisions and Applicable criteria in regard to an application for enlargement of time to Appeal**

- [3] Section 20 (1) (b) of the Court of Appeal Act (Act) confers power on a single Judge of Appeal to grant enlargement (extension) of time as has been sought in the present application.

- [4] The applicable criteria in granting such applications have been laid down in the Supreme Court decision in NLTB v Ahmed Khan & Another (CBV 2 of 2013, 15<sup>th</sup> March, 2013). That decision has been consistently followed by our Courts. Whatever questions that may have been reflected on in regard to their application (including some of my own past rulings), that decision of the Supreme Court is a binding precedent (vide: Section 98 (6) of the Constitution of Fiji).

### **What are those applicable criteria?**

#### **The length of delay**

- [5] The applicants filed the Notice of Appeal within time but served it after a lapse of 4 days.

#### **Reasons for the Delay**

- [6] The applicants in their affidavit filed in support of the Summons seeking enlargement of time have adduced their reasons for the delay.

[7] Mr. Krishna (for the Respondent) argued at the hearing that, the said reasons are not acceptable.

### **The Prejudice Criterion**

[8] Even if I were to agree with Mr. Krishna, I felt it incumbent on me to consider the criterion of Prejudice on account of the said delay of 4 days in serving the impugned Notice of Appeal.

[9] In that regard I could not see what prejudice could have been caused to the Respondent in that period of 4 days of delay in serving the Notice of Appeal, given the additional fact that *per se* the delay could not have been said to be substantial by any stretch of imagination, while acknowledging the fact that statutorily decreed procedural requirements must as a rule must be complied with.

### **The Conduct of Parties**

[10] Taking the aforesaid criterion, I did not find any reason to admonish the Applicants in regard to their conduct either, even assuming that, the reasons for the default in serving the Notice of Appeal are not acceptable.

### **Criterion of Prospects of success should leave for extension of time to appeal is to be granted**

[11] Construing as I do the Judicial thinking in **NLTB v Khan** (supra) this is the overriding criterion to consider (if not the decisive) for which reason I looked at the grounds of appeal urged by the Applicants.

### **The Grounds of Appeal urged**

[12] The Applicants have urged as their grounds of Appeal against the Judgment of the High Court thus:-

- “1. The learned Judge erred in law when he did not hold the Respondent liable to indemnify the Appellant under the insurance policy after having found that the Respondent had failed to prove there was material disclosure.*
- 2. The learned Judge erred in law and in fact in holding that the question of loss claimed by the Appellant had not been proved when the Appellant had given evidence confirming his damages and there was no contrary evidence to dispute this.*
- 3. The learned Judge erred in law in the interpretation of the Fiji Supreme Court in **Jaswant Lal v New India Assurance Limited** (Civil Appeal; CBV 0003 of 2003; particularly :
  - 3.1 By holding that special damages must be strictly proved when the decision of **Jaswant Lal v New India Assurance Limited** (supra) had said that there was no necessity to determine whether losses under insurance contracts fell under the head of special or general damages.*
  - 3.2 The decision of **Jaswant Lal v New India Assurance Limited** (supra) held that the insured had to establish the loss that he had suffered when claiming damages as opposed to strict proof under the head of special damages.” (Vide: the grounds of appeal dated 6<sup>th</sup> December, 2018).**

### **The Rival contentions advanced by respective Counsel**

[13] While Mr. Padarath addressed on the grounds of appeal urged (as reproduced above). Mr. Krishna relied on the reasoning of the High Court Judgment which I thought was not necessary to reproduce here, in as much as, the said grounds of Appeal urged reveals the basis on which the High Court had made its determination.

### **The Judicial Precedents that weighed with me in making the ensuing determination**

[14] I begin with by harking back to a consideration of two Supreme Court decisions.

#### **The NLTB v Khan case (Supra)**

[15] As I have reflected on earlier, that binding precedent lays down that, (in effect) the decisive criterion is the criterion of “prospects of success”.

#### **The views expressed by Justice Keith in the Supreme Court decision in **Fiji Industries Ltd v National Workers** (CAV 008 of 2016, 27<sup>th</sup> October, 2017)**

[16] In that case, in the exercise of the Supreme Court’s Constitutional Jurisdiction, though special leave to appeal was granted against this Court’s Ruling (a ruling of mine), the Appeal itself was dismissed.

[17] In contrast, similar jurisdiction is not vested in me as a Single Judge of this Court and my task is to see whether there is an arguable area in seeking leave to appeal the impugned judgment of the High Court on the basis that there could lie reasonable prospects of success for the Full Court to go into and make a final determination. And, I do say that it is not my task to determine and say that, the learned High Court Judge was wrong in his judgment.

[18] My task in considering an application that has been put before me for consideration being one whether there are reasonable prospects of success if leave for enlargement of time is to be granted (in other words, whether there is an arguable area to urge in appeal as contemplated by Lord Diplock in the case of **Inland Revenue Commissioners v. NFSE & S Industries Ltd** [1981] 2 ALLER 93 at p.106 (though said in the context of a judicial review application, the principle enunciated therein being applicable in the present context as well).

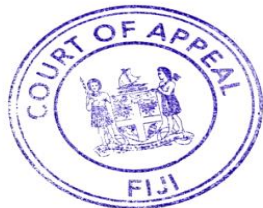
## **Final Assessment and Determination**

[19] Consequently, whether on the decisive criterion of “prospects of success” (**NLTB v Khan** (supra) or on the “overall consideration of the applicable criteria (**Fiji Industries Ltd Case** (supra), I was inclined to the view that this is a fit case to grant leave for extension of time to appeal so that the Full Court would be in a position to determine on the grounds of appeal urged as against the reasoning of the judgment of the High Court given the important issues involved in relation to “Insurance Contracts”, conduct of parties in relation thereto, the consequential claims as to general and special damages flowing therefrom and how such damages ought to be pleaded.

[20] Accordingly, I make my orders as follows:

## **Orders of Court**

1. The application of the Applicants in seeking enlargement of time to serve the Notice of Appeal is allowed.
2. However, before prosecuting the Appeal, the Applicants (now in the capacity of Appellants) are required and ordered to pay as costs of their application a sum of \$1,000/= to the Respondent within 21 days of notice of this Ruling.
3. Should the Appellants fail to comply with Order 2 above, Order 1 above re: the present application for leave for extension of Notice to Appeal shall stand vacated and dismissed.
4. The Honourable Registrar of this Court is directed to submit the file upon the expiry of the said time limit of 21 days referred to in Order 2 hereof on a convenient date for this Court to ascertain whether there has been compliance thereof and to make appropriate consequential orders.



*Almeida Guneratne*

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**Almeida Guneratne**  
**JUSTICE OF APPEAL**