

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0020 OF 2022
[Suva High Court Civil Action 193/2021]

BETWEEN : **PACIFIC ENERGY (SOUTH-WEST PACIFIC) PTE LIMITED**
Appellant

AND : **AKSHAY AMAR CHAUDHARY, RAJAN RAHUL**
CHAUDHARY and SHAMILA DEVI
1st Respondents

: **FARMERS FISH AND CHIPS HOLDING PTE LIMITED**
2nd Respondent

: **MOBIL OIL AUSTRALIA PTY LTD t/a MOBIL OIL (FIJI)**
3rd Respondent

Before : **Dr. Almeida Guneratne, P**

Counsel : **Mr W. Clarke, Ms S. Lodhia and Mrs R. Pranjivan for the Appellants**
Mr A Pal for the 1st and 2nd Respondents
Mr V. Singh for the 3rd Respondent

Date of Hearing: **8 December 2022**

Date of Ruling : **30 December 2022**

RULING

[1] This is an application for enlargement of time to appeal the interlocutory ruling of the High Court dated 23rd November, 2021 refusing to grant an interim injunction sought by the Appellant.

[2] The criteria which the Courts of Fiji should consider in exercising discretion in granting enlargement of time to appeal were laid down in the single judge decision of Gates, P writing for the Supreme Court in **NLTB v Khan** [2013] FJSC 1.

[3] For ease of reference, I shall put down below the said criteria.

- “(a) length of the delay;*
- (b) reasons for the delay (whether satisfactorily explained);*
- (c) relative prejudice to the parties; and*
- (d) reasonable prospect of the intended appeal succeeding, if extension of time is granted.”*

[4] Since that decision in **Khan’s case** (supra), it has been cited time and again with reflections and comments thereon by the Courts of Fiji with some reservations mainly on my part in some of my rulings writing for the Court of Appeal as a single judge, which I re-state here, *viz:* granting of extension of time to appeal being discretionary, the threshold criteria laid down in **Khan’s case** (a) and (b) need to be satisfied before going to the rest of the criteria (c) to (d) laid therein. I say so because, while a party who files an appeal within time is vested with an unqualified statutory right, party who seeks enlargement of time to appeal requires the exercise of the court’s discretion to earn that right. That right is earned when the aforesaid criteria (a) and (b) are satisfied.

[5] Accordingly, I gave my mind to the length and the reasons for the delay advanced by Mr Clarke for the Appellant contained in his written submissions (dated 17th August, 2022) at paragraph 3.6 to 3.8 therein, which learned Counsel elaborated on in his oral submissions at the hearing.

[6] I took special note of what Mr Clarke submitted, that, the delay was on account of a mistake on the part of the Appellant’s legal advisers. Mr Clarke relied on the Supreme

Court decision in **Fiji Industries v. National Union of Factory and Commercial Workers** (per His Lordship, Justice Keith, CBV 0008/2016).

- [7] In that case, the Supreme Court granted special leave to appeal my Court of Appeal ruling expressing the view that, the question whether mistakes on the part of lawyers should visit their clients needed looking into as being a matter of public interest though eventually dismissing the appeal itself.
- [8] Thus, while the said “*matter of public interest*” remained an open issue at that stage, more recently the present Chief Justice in a single judge ruling in **Hussain v. Prasad** [2022] FJSC 7, 3rd March, 2022 departing from a ruling of mine in the Court of Appeal, has emphatically held that, lawyers mistakes should not result in punishing litigants.
- [9] I hold myself bound by the Chief Justice’s decision in **Hussain’s case** (supra) in accordance with and as decreed in Section 98(6) of the Constitution of Fiji incorporating as it does the doctrine of *stare decisis*.
- [10] Consequently, I accept the reasons for the delay set out in the Affidavit of Alesi Macedru.
- [11] Accordingly, the arguments advanced by Mr Pal and Mr Singh for the Respondents, though made with conviction, were not sufficient to counter what I have said above in regard to the length and reasons for the delay.
- [12] In the result, I hold that, an appeal filed within time and an appeal filed outside the prescribed time limit if explained with reasons to the satisfaction of Court, stand on a par.
- [13] Once that position is reached, (as in this case as articulated above), “*the merits*” of the Appeal are left for the full Court to go into and determine.

Principles in regard to applications for enlargement of time to appeal

[14] Although for the purposes of the present application I could rest the matter there, I venture further in making the following reflections and/or comments in regard to applications for enlargement of time to appeal – viz:-

- (i) If the length and reasons for the delay, (criteria (a) and (b) laid down in **Khan's case** (supra) are explained to the satisfaction of Court (in the context of Section 20(1)(b) of the Court of Appeal Act), then the matter should be left to the full Court to determine the Appeal on the merits; (per my Ruling in the present application).
- (ii) If the threshold criteria as envisaged in (i) above are not met by an Applicant for enlargement of time to appeal, then such an application should be rejected and/or dismissed without the need to consider criteria (c) and (d) laid down in **Khan's case** (supra) referred to in paragraph [3] of this Ruling, in as much as, in such a case, the reasons I have articulated in paragraph [12] above of this Ruling would not be applicable. A distinction must be drawn between a party who explains the delay to the satisfaction of Court to be treated on a par with a timely appeal and a party who fails to explain the reasons for the failure to file a timely appeal.

[15] On the basis of the foregoing reasons I proceed to make my orders as follows:

Orders of Court

- 1) *The application for extension of time to appeal is allowed.*

- 2) *The Appellant would be required to take steps in terms of the applicable provisions of the law to prosecute the Appeal.*
- 3) *There shall be no costs in this application and costs shall await the determination of the main cause/appeal.*



A handwritten signature in blue ink, which appears to read "Justice Almeida Guneratne".

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Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL

Solicitors:

Howards Lawyers for the Appellant

AP Legal for the 1st and 2nd Respondents

Parshotam Lawyers for the 3rd Respondent