

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

Civil Appeal No. ABU 09 of 2022
(Suva High Court No. HBC 19 of 2016)

BETWEEN : **FUEL SUPPLIES PACIFIC PTE LIMITED**
Appellant

AND : **1. RAJNESH PRASAD & RANJEETA MALA**
1st Respondent

2. RAJNESH PRASAD & RANJEETA MALA as Parents and
Guardians of **TANVI TANISH** (Minor)

2nd Respondent

3. RAKESH PRASAD

3rd Respondent

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

Counsel : **Mr. K. Singh for the Appellant**
: **Mr. A. Khan for the 1st and 2nd Respondents**
: **3rd Respondent Absent and Unrepresented**

Dates of Hearing : **24th April, 2023.**

Date of Decision : **12th June, 2023**

DECISION

[1] This is an application by the Appellant seeking leave to appeal (out of time) (and a stay) of the judgment of the High Court dated 7th December, 2021. On 22nd February, 2022 this Court granted an interim stay by consent of parties.

- [2] The Appellant is seeking to explain “*the delay*” in seeking leave to appeal (out of time) placed before this Court at the hearing several reasons (of a procedural nature) re-iterated as it were contained in its written submissions filed on 10th January, 2023. (vide: paragraph 1.3 a and b thereof).
- [3] Apart from those reasons the Appellant advanced an additional ground that, when the impugned judgment was delivered, the Appellant was not present in Court and it received the judgment 41 days after its delivery in open Court.
- [4] Being obliged to ascertain the truth or otherwise of the Appellant’s said grounds, I called for the High Court Record which I went through and I make my observations thereon as follows.

Observations on the grounds urged by the Appellant

Re: Absence of an affidavit of service in regard to service of the Writ on the 2nd Appellant (2nd Defendant)

- [5] As a result of a query the Appellant had raised with the High Court Registry, by its response dated 11th May, 2022, the Registry confirmed that to be correct.
- [6] However, the Record reveals that, thereafter, the Appellants had filed a Statement of Defence, took part at not only a Pre-trial Conference but went through a full trial.
- [7] Accordingly, without need for any exercise in jurisprudential semantics, the said ground is reduced to a technicality (no doubt amounting to a procedural impropriety) but not having prejudiced the Appellant.

Re: the Appellant having had no notice of the impugned Judgment of the High Court

- [8] On a perusal of the High Court Record, I found that, the High Court registry had sent notifications dated 6th December, 2021 to the Plaintiffs (Respondents) lawyers, Messrs. Reddy and Nandan Lawyers “*copied to Nands Law*” (on the basis that they were the lawyers for the Appellant) that, the judgment will be delivered on 7th December, 2021.
- [9] I noted that, it was only by a notice dated 4th February, 2022 sent to the High Court, the Appellant’s Solicitors had been changed.
- [10] Thus, it is apparent that, the Appellant through the Solicitors on Record as at 7th December, 2021 had notice of the date of delivery of the Judgment.
- [11] Moreover on the 7th December, 2021 when the judgment was delivered the minute sheet recorded as follows:

“CLERKS: Sefa

IN THE HIGH COURT OF FIJI

AT SUVA

ACTION NO: HBC 19/2016

*BEFORE THE HON CHIEF JUSTICE, MR JUSTICE KAMAL KUMAR ON TUESDAY
THE 7TH DAY OF DECEMBER 2021, 2.30 O’CLOCK IN THE AFTERNOON.*

MR/MS DATT S. FOR PLAINTIFF/APPLICANT/APELLANT

MR/MS KUMAR P (on instructions of Nands Law) FOR DEFENDANT/RESPONDENT”

- [12] Consequently, I was unable to respond favourably to the Appellant’s contention in seeking to excuse the admitted delay of 41 days in preferring the present application for leave to appeal (out of time).

[13] I have held in a series of decisions of mine that, if “*the reasons for the delay*” in preferring an appeal out of time are found to be satisfactorily explained, then such a belated appeal must be treated on par with an appeal filed within time. On the flip side, if such reasons are not found to be acceptable, then, the matter needed to be regarded as putting the lid thereon (to that extent, with respect, departing from the Supreme Court decision in **NLTB v Khan** [2013] FJSC 1.

[14] Without crowding this decision with those decisions (referred to above) I shall only refer to one of them (vide: **Pacific Energy etal vs Ashay Amar etal** ABU 0020 of 2022, 30th December, 2022.

[15] Having said that however, given that **NLTB v Khan** is a Supreme Court decision, I had to fall back on the approach in **NLTB v Khan** (supra) on the criterion of the existence of “*reasonable prospect of success if leave was to be granted*” and/or “*there being an arguable case*”.

The Grounds of Appeal urged - Discussion followed by Determination

[16] The Appellant has urged eight grounds of appeal (Annexure ‘E’ to the summons seeking leave to appeal).

[17] Of the said grounds, for the reasons I have stated above, I was unable to hold with the Appellant on grounds 1 to 3 urged therein.

[18] In regard to ground 4, having tested the said ground against the impugned judgment of the High Court. I could not find a basis to fault the High Court in that regard and therefore I reject the said ground.

[19] I was also not able to agree with the Appellant’s contention that, the Learned Judge failed to consider properly whether or not there was contributory negligence (Ground 5).

[20] Indeed, the case being one concerned with personal injuries I spent time going through the entire record of evidence led at the trial.

[21] The Learned Judge addressed that issue on the facts and evidence led.

[22] The judge noted that at some point he (the 1st Plaintiff) was going past the truck (page 11 of the Judgment).

[23] The Judge also took note of the 2nd Appellant's claim that, the 1st Plaintiff (1st Respondent) drove at high speed (at 50 kmph) whereas, the 1st Defendant had been driving at 45kmph.

[24] Analysing that evidence the learned Judge concluded thus:

“45. It is therefore apparent that 1st Defendant was driving the Truck slower than the Taxi.

46. This means that there was nothing stopping the Taxi to go past the Truck when it was going at the speed of 50 km/hr which was the normal speed.

47. This Court finds that FNPF in no way contributed to his or his passengers injury from the accident.”

[25] On that analysis I could not find a basis to fault the Judge's said analysis.

[26] If the Appellant's complaint that, the Learned Judge failed to consider properly the said issue on contributory negligence, then, the Appellant was obliged to demonstrate that, in the Learned Judge's Judgment, there was some element which could be said to have amounted to a misdirection/ non-direction or something perverse.

[27] That, the Appellant has not done whether in the written submissions or in the oral submissions in this Court at the hearing before me.

[28] Accordingly, I reject the said ground 5.

[29] The grounds 6 to 8 being *ipso facto*, consequential to the said ground 5, I reject the same as well.

[30] Accordingly, I proceed to make my orders as follows.

Orders of Court:

1. *The application for leave to appeal the impugned judgment of the High Court is refused.*
2. *Consequently, the Appellant's application for "a stay" of the impugned High Court judgment is also refused and/or declined.*
3. *The Appellant shall pay to the 1st and 2nd Respondents as costs of this application in a joint sum payable to them in a sum of \$2,500.*



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

Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL

Solicitors:

KS Laws for the Appellant
Reddy & Nandan Lawyers for the 1st & 2nd Respondents