

previous application for enlargement of time to appeal the same had been granted, but deemed abandoned under Rule 17 (1)(a) of the Court of Appeal Rules.

[2] The Summons was heard by my predecessor, Hon Dr Justice Guneratne on 28 June, 2023, whereafter he directed that the Decision will be on Notice and in the interim, both parties were to file submissions concurrently. The Applicant filed on 11 July 2023 and the Respondent on 28 July 2023. It came before me on 28 February, 2024 and following consultation with both Counsel over time whether the Court can and should proceed, without hearing the arguments afresh, the matter was heard on 18 July, 2024 with both Counsel given the opportunity to make very brief submissions.

Background

[3] The Applicant is in the business of making plastic water tank products. In and around 2010 – 2011, the Applicant entered into a building construction contract after a tender process with the Respondent. The tender was worth \$655,059.52. A dispute between the parties arose on the delay and the Applicant terminated the contract around 2013.

[4] The parties referred the dispute to an arbitrator as provided for under the terms of the contract. A Mr Frazer Clark who had knowledge of the industry, was identified and appointed on 5 March 2012 by mutual agreement. Submissions by both parties were made to the arbitrator and almost a year later, an Award was handed down on 20 February 2013 the arbitrator, in favour of the Respondent in the sum of \$127,819.31.

[5] The Applicant, aggrieved by the award, filed on 12 April, 2013 an Originating Summons in the Lautoka High Court to set aside the arbitrators award. In the meantime, the Respondent was filing a petition to wind up the Applicant for non-payment of the judgment sum.

[6] The application to set aside the award were based principally on the arbitrator going beyond his mandate, taking account of irrelevant considerations and not taking into

account relevant considerations, and the long and unnecessary delay in handing down the award.

[7] The High Court's Ruling did not set aside the award. It instead remitted the matter back to the Arbitrator but only in respect of specific matters stated under paragraph 80 (release of material and prefabricated steel to the Applicant) and paragraphs 81 – 82 (whether the Arbitrator has exceeded his jurisdiction).

[8] In granting leave to appeal the interlocutory Ruling, the Court, inter alia conceded that there were serious issues to be considered by the appellate Court as they deserve further arguments.

[9] The Applicant's Notice and Grounds of Appeal was filed on 20 October, 2016, Civil Appeal ABU 114 of 2016 ("*the original appeal*"). Security for Costs of \$3,000.00 were paid into Court, but the appeal was deemed abandoned on 28 June 2019 pursuant to Rule 18(5) of the Court of Appeal (Amendment) Rules 1999.

[10] On 14 August 2019 the Applicant filed a Summons seeking extension of time to file fresh Notice and Grounds of Appeal.

[11] On 3 December 2021, the Court granted the Applicant's summons with costs of \$2,000.00, which costs were duly paid. The Notice and Grounds of Appeal (Civil Appeal No. ABU 0070 of 2019) was filed on 30 December, 2021 and served on the Respondent, on 17 January, 2022, and the latter responded on 24 January, 2022.

[12] The Court notes that on 29 March 2022 the Applicant's solicitors wrote to the Respondent's solicitors to consult on the preparation of the record in accordance with Rule 18(5) of the Court of Appeal Rules. However, on 6 April, the Respondent's wrote to the Registrar advising that the Applicant had not complied with Rule 17(1) of the Court of Appeal Rules by failing to file an affidavit of service and summons for security for costs within 7 days after the service of the notice of appeal and therefore pursuant to Rule

17(2) the appeal is deemed to be abandoned on 25 January, 2022. The Court of Appeal later confirmed the Applicant (on 13 April 2022), that the appeal is abandoned.

Consideration

Length of Delay

[13] The Applicant concedes that the length of delay is at least two(2) months from the time the appeal was deemed to have been abandoned Counsel referred to cases of **Abcco Builders Limited v. New India Assurance Company Ltd**, FJCA 66, and **Reddy v Devi** [2016] FJCA 17, where delay of 15 months and 2 years respectively, did not prevent, former President of the Court of Justice, Hon Justice Calanchini, that the delay was excusable or there were merits in the appeal that should be permitted to allow the matter to be considered by the full Court.

[14] Applicant also referred Chandra J's decision in **Formscaff (Fiji) Ltd v. Naidu** [2019] FJCA137 ABU0017.2017 (27 June 2019) that allowed the extension of time, even although the delay and the reasons thereof are unsatisfactory.

[15] Paragraphs [9] to [11] are relevant and states:

*[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 Appellant 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.

[16] In this instance, the Appellant's solicitors in his affidavit, had gone into great length to explain the reasons for his delay in attending to the client's application. As far as the Respondent is concerned, the Applicant did not act immediately from the beginning to set aside the Arbitrator's award of 20 February 2013 but only moved to do so on 12 April 2013 after the Respondent had filed a petition to wind up the Applicant for non-payment of the award. Thereafter, the Applicant and its solicitors' dilatory conduct from Tuilevuka J's decision forward, only complicated the matter further.

[17] The fact that this is the third leave application is self-evident of the unhasty conduct of the Applicant.

[18] There is no doubt that the Applicant and/or its solicitors had been dilatory and at times, neglectful of their responsibilities to progress their action. However, the reasons for the delay, and the circumstances in which they occur, seems to this Court, unfortunately unavoidable, and in all the circumstances, excusable.

Prejudice

[19] The Court notes that there has been considerable time that has lapsed from when the contract was terminated on 23rd May 2011 to the present and the Respondent refers to the 6 years limitation under Section 4(1) of the Limitation Act 1971 to exemplify the importance of time in the Court proceedings leading to finite conclusion within reasonable time.

[20] It must be noted that the delays were not caused solely by the Applicant and/or solicitors, but equally by the Arbitrator himself and as well as the Court.

[21] As to the costs of litigation, it is for the parties to the proceedings to ask for costs from the Court in the course of or at the end of the hearing.

Merits of the Appeal

[22] Contrary to the submissions by the Respondent, this Court agrees and shares the conclusion reached by Gunaratne, P, in His Lordship's Decision of 3 December, 2021, that not only was there merits in the appeal and reasonable chance or prospect of success. But even if the merits of the appeal are not high or good, then the Court shares the view of the Supreme Court Keith J in *Fiji Industries Ltd v. National Union of Factory and Commercial Workers* [2017] FJSC 30; CBV008.2016 (27 October 2017) at paragraph 24:

“...There maybe cases where the merits of the appeal may not be that good, but where the overall interests of justice mean that the litigant should be denied the opportunity of having his appeal heard.”

[23] The merit of the appeal and especially where they raise serious issues of law and should be considered by the full court of appeal is recognized by the Ruling in the High Court.

[24] As to the exercise of this Court's discretion in the application of extension of time, it holds the view that Rule 27 gives this Court jurisdiction to deal with extension of time.

The Lateef Affidavit

[25] As to the legality or otherwise of the Lateef supporting affidavit, the Counsel for the Appellant has correctly referred to R **B Patel Group Ltd v Central Board of Health & Others**; Civil Appeal No: ABU 0003 of 2022 (Civil Action: HBC 231 of 2020) in which the Court of Appeal had carefully considered the prevailing law of affidavits deposed on behalf of a company under the new Companies Act 2015 *vis a vis* Order 41 of the High Court Rules. Applying the same interpretation of the law to this case, will allow Mr Lateef's affidavit to be filed in support of the Summons.


Conclusion

[26] In the ultimate, I agree that leave should be granted and orders as follows:

Orders:

- (1) *The Appellant is granted extension of time to file fresh Notice and Grounds of Appeal against the judgment of Tuilevuka, J of 17 November, 2015;*
- (2) *That the new appeal to proceed in the normal way, including security for payment for costs;*
- (3) *Costs of \$2,000.00 is awarded to the Respondent, to be paid within 21 days of the Ruling.*




HON. JUSTICE FILIMONE JITOKO
PRESIDENT, COURT OF APPEAL