

**IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION**

**Civil Action No. HBC 209 of 2021**

**BETWEEN:** PONIPATE VONUGAGA of Wainibuku, Nasinu, 9 Miles.  
**PLAINTIFF**

**AND:** THE COMMISIONER OF POLICE.  
**1<sup>st</sup> DEFENDANT**

**AND:** THE DIRECTOR PUBLIC PROSECUTIONS.  
**2<sup>nd</sup> DEFENDANT**

**AND:** THE ATTORNEY GENERAL OF FIJI.  
**3<sup>rd</sup> DEFENDANT**

**Appearance:**

**Plaintiff:** Mr. R. A. Matebalavu (Esesimarm & Co).  
**For the 1<sup>st</sup> to the 3<sup>rd</sup> Defendant:** Ms N. Narayan (Attorney-General's Office).

**Date of Hearing:** 29<sup>th</sup> April 2024

**RULING**

**A. Introduction**

[1] The Plaintiff had filed summons for **leave and for extension of time to appeal** against the final order pronounced by Master Lal on 26<sup>th</sup> October 2023. An affidavit of the Plaintiff accompanied the summons. An affidavit in opposition of Tevita Cagilaba of the office of the Attorney General was subsequently filed. Later the Plaintiff filed an affidavit in response.

**B. Brief History**

[2] The Plaintiff on 19<sup>th</sup> October 2021 filed a Writ of Summons against the 3 Defendants seeking damages and costs for wrongful arrest and malicious prosecution. The Defendants filed an acknowledgement of service on 1<sup>st</sup> November 2021. The statement of defence of the Defendants was filed on 19<sup>th</sup> November 2021. On 17<sup>th</sup> December 2021 a Reply to Defence was filed. The summons for directions was filed on 14<sup>th</sup> January 2022. Matter was then called on 11<sup>th</sup> February 2022 and the Learned

Master ordered the filing of Affidavit Verifying List of Documents (AVLD). The matter was then called on 15<sup>th</sup> February, 20<sup>th</sup> May and 9<sup>th</sup> August 2002 to check for compliance. The Plaintiffs filed AVLD on 4<sup>th</sup> October 2022, while Defendants filed it on 23<sup>rd</sup> January 2023. In February 2023 the Defendants filed summons to strike out. It was heard on 16<sup>th</sup> August 2023 and the Learned Master refused the Defendant's application to strike out.

- [3] On 25<sup>th</sup> September 2023 the Learned Master ordered the Plaintiff to complete the disclosures by 4pm on 2<sup>nd</sup> October 2023. She further ordered that PTC be completed and minutes to be filed by 12 noon on 24<sup>th</sup> October 2023. In the alternative the Learned Master ordered that if signed minutes were not filed by the given time and date, a **PTC will be held in Court on 26<sup>th</sup> October 2023 at 11am** and that **any party failing to attend may result in the pleading being struck out**. When the matter was called next on 26<sup>th</sup> October 2023 a lawyer appeared on instructions for the Plaintiffs lawyer and sought adjournment. The Learned Master was informed that the documents were not circulated and the instructed Lawyer was not in a position to participate in the PTC and sought adjournment. The Learned Master then in reliance with her orders of 25<sup>th</sup> September struck out the matter for want of prosecution under Order 24 Rule 16 (1) (b) on not being able to convene PTC.

### C. The Relevant Laws

- [4] The relevant Rules relating to the application (**leave to appeal and extension of time**) are contained in **Order 59** of the High Court Rules 1988. The other relevant Rule is **Order 3 Rule 4** of the High Court Rules. It gives the court discretion and provides for extension of time.
- [5] Over a period of time our Courts have developed a number of case laws on extension of time and leave to appeal out of time. In *Herbert Construction Company (Fiji) Ltd v Fiji National Provident Fund [2010] FJCA 3; Miscellaneous Case 20 of 2009 (3 February 2010)* the Fiji Court of Appeal stated that:

*"[12.] It is well settled law that once the rules are not followed it is the discretion of the court to grant leave to appeal out of time and that the onus rests upon the appellant to satisfy the court that in all circumstances the justice of the case requires that he be given an opportunity to appeal out of time against the judgment he wishes to appeal.*

*[13.] In Ist Deo Maharaj v. Burns Philip (South Sea) Company Ltd, Civil Appeal No. ABU0051 of 1994S citing the judgment of Norwich and Peterborough Building Society v. Steed (1991) 2 All ER 880 CA it was said:-*

*"The court has unfettered discretion in the grant or refusal of leave. The factors which are normally taken into account in deciding whether to grant an extension of time are:*

*(a) the length of the delay;*

*(b) the reasons for the delay;*

*(c) the chances of succeeding if time for appealing is extended; and*

(d) the degree of prejudice to the Respondent if the application is granted."

[14.] *In Avery v Public Services Appeal Board (No.2) (1973) 2 NZLR 86* it was said:

*"Everything is left to the discretion of the court on wide basis that leave may be granted in such cases as justice of the case may require. In order to determine the justice of any particular case the court should I think have regard to the whole history of the matter, including the conduct of the parties.""*

#### D. Discussion

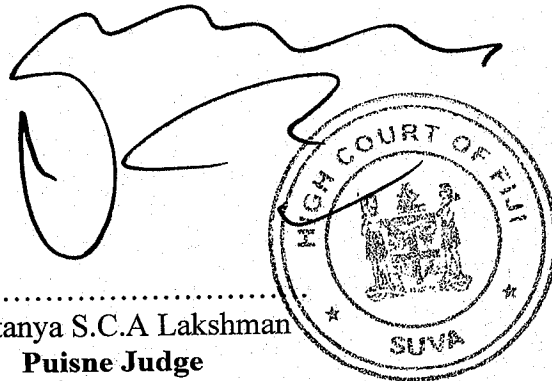
- [6] I would now go over each of the factors. Firstly, I would look at the **reasons for failure to file within time and the length of time (delay)**. The reasons for the delay and the length of delay have not been addressed by the Plaintiff. Nothing is contained in the Affidavit of the Plaintiff that has accompanied the summons seeking leave and extension of time to appeal. The response filed by the Plaintiff also did not address the said issues. The decision of the Learned Master was delivered on 26<sup>th</sup> October 2023. The leave to appeal application should have been filed and served by 9<sup>th</sup> November 2023. The application was filed on 12<sup>th</sup> December 2023. According to the Defendants it was served on or around 5<sup>th</sup> January 2024. The delay in filing the leave application is almost 2 months. The Plaintiff has failed to address the reasons for the delay and the length of time in its application to Court.
- [7] The other factor is the merits of the appeal. The Plaintiffs proposed grounds of appeal are annexed as "A" in his affidavit in support. I have carefully perused it. I need not rehash it here. As to the 1<sup>st</sup> proposed ground of appeal I note that the Learned Master gave the party's ample time to comply with her orders and the requirements of the Court. She had required the parties to attend to PTC and finalise and file the PTC. The Learned Master had during the course of the proceedings granted numerous adjournment for compliance.
- [8] As to the 2<sup>nd</sup> and 3<sup>rd</sup> proposed ground of appeal the Lawyer for the Plaintiff knew very well that in the absence of the PTC being completed and filed, the parties were required to attend on the given day and complete the PTC in Court. By sending in another lawyer without complete instructions the instructing Lawyer was unhelpful. Adjournments are at the discretion of the Court. It does not accrue per se. The Learned Master stood down the matter for the Lawyer to get proper instruction for the PTC. The Plaintiffs Lawyers were not prepared or ready for the PTC. The Learned Master gave the parties ample opportunity and adjournments to comply with the orders. The Master had warned the parties that she will strike out their pleadings for non-compliance. The warnings were not taken seriously by the Plaintiff. As to the 4<sup>th</sup> proposed ground of appeal I find that the Master applied the correct Rules and used her discretion reasonably and after giving the parties adequate opportunity to comply.
- [9] The 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> proposed grounds of appeal respectively show the Plaintiff attributing the delay for its action on the Defendants. The Defendants Lawyer was in Court ready for the PTC. The Plaintiffs lawyer was not. The documents show that

Defendants took steps to comply with the Court orders. A PTC requires more than one party to be completed. By failing to turn up in Court after completing the PTC on their own, the Plaintiffs left the Master with no other option but to exercise her discretion. She had given clear directions and had warned the parties of the consequences of their failures. The Plaintiffs took it lightly and are complaining after failing to adhere to the Courts directions.

- [10] The threshold for merits for the application contained in the proposed grounds of appeal are not adequate to grant extension of time and also to grant leave to appeal. In my view if time is enlarged there will be prejudice to the Defendants. No reasons for the delay in seeking extension has been expounded by the Plaintiff. In addition the proposed grounds of appeal does not have merit.
- [11] The summons seeking extension of time and leave to appeal are dismissed. Cost is summarily assessed in favour of the Defendants in the sum of \$500.00 to be paid by the Plaintiff within 21 days.

E. **Court Orders**

- (a) The Plaintiffs summons seeking extension of time and leave to appeal are dismissed.
- (b) Cost is summarily assessed in favour of the Defendants in the sum of \$500.00 to be paid by the Plaintiff within 21 days.



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Chaitanya S.C.A Lakshman

**Puisne Judge**

3<sup>rd</sup> July 2024