EDDIE McCAIG v ABHI MANU (CBV0002 of 2012S)

SUPREME COURT — CIVIL JURISDICTION

GATES P

27 July, 27 August 2012

[2012] FJCA 18

Practice and procedure — time limit extensions — delay of two days — miscalculation by solicitor — jurisdiction — principles to be applied — reason for delay — lack of candour — length of delay — whether ground of merit — prejudice to respondent — Court of Appeal Act ss 7(3), 20(1) — High Court Rules O 2 r 1 — Legal Practitioners Decree — Supreme Court Act ss 11, 11(b), O 41, r 5(2); — Supreme Court Rules rr 6, 20(4), O 41 r 5(2)

The applicant sought enlargement of time within which to bring a petition for special leave. The petition for special leave was lodged with the Registry two days after the expiry of the 42 day time limit for lodgement. The petition was filed without any separate application for enlargement.

Held –

(1) Because the present case is civil, it can derive support for the jurisdiction to permit relaxation of the rule by virtue of r 46 of the Supreme Court Rules and O 2 r 1 of the High Court Rules. When exercising civil jurisdiction, the appellant courts have tended to be less lenient than when they are considering the position of an accused who lodges a late appeal. In civil appeals the Court has to be more even-handed and consider equally the rights and interests of the respondent with those of the applicant.

Latchmi & Anor v Moti and Others [1964] 10 FLR 138, cited.

(2) The non-compliance is a mere two days, however the relief cannot be granted to enlarge time unless "some very good, exceptional reason" exists. The explanation for the delay lacked candour, and is unsatisfactory.

(3) A letter of intent in the matter of appeal will not suffice to initiate an appeal, but such letters remove some of the prejudice caused to the respondent by late appeals. The respondent has been prejudiced by the lack of timely appeal by the petitioner. His own ability to bring a petition has been prejudiced also. Considering the protracted nature of the litigation and its effect on the respondent in his very difficult circumstances, justice lies with not granting indulgence to the applicant following his solicitor's non-compliance with the rules for lodging his petition.

Grant of extension of time declined.

Cases referred to

Air Pacific Ltd v Saumi [2002] FCJA; *CM Van Stillevoldt BV v EL Carriers Inc* [1983] 1 WLR 207; *Gatti v Shoosmith* [1939] 3 All ER 916; *Josua Raitamata v State* CAV0002.07 25th February 2008; *Kamlesh Kumar v The State* CAV0001.09, 21st August 2012; *Kevorkian v Burney* [1937] 4 All ER 97; *Norwich & Peterborough Building Society v Steed* [1991] 2 All ER 880; *Palata Investments Ltd v Burt & Sinfield Ltd* [1985] 2 All ER 517; *Permanent Secretary for Health and Anor v Arvind Kumar & Others* [2011] FJSC 5 CBV0006.08, 11th March 2011; *Regina v Donald Burley* [1994] Times LR 565; *Shankar v Naidu* CBV0002.02S 24th October 2003; *Wood v Manchester Corporation* Yearly Practice of the Supreme Court 1939p 1283, Digest Practice 806, cited.

Ropate Green with J. Pickering instructed by *Office of the Attorney-General, Suva* for the Applicant.

C.B. Young instructed by *Messrs Young & Associates, Lautoka* for the Respondent.

[1] **Gates P.** The applicant seeks enlargement of time within which to bring a petition for special leave. The petition for special leave was lodged on 4th May 2012. The decision of the Court of Appeal had been delivered on 21st March 2012. Time for lodging expired on 2nd May 2012. It is agreed between the parties that the petition was lodged with the Registry 2 days after the 42 days time limit for lodgment [Rule 6 Supreme Court Rules 1998].

[2] When the petition was lodged, no separate application for enlargement was filed for that issue to be dealt with separately as an interlocutory matter. Though the court may be lenient to facilitate access to the court for litigants who are indigent, inarticulate, or unrepresented, a similar indulgence to cure handicap could not be permitted to others better equipped to present their cases.

[3] In this case a motion and affidavit should have been filed at the outset exhibiting the proposed petition for special leave. The petition, once late, could not properly be lodged. It must not be thought that an application for the grant of indulgence to enlarge time within which an appeal can be brought to the final court of appeal can simply be merged with argument on the hearing of the petition for Special Leave. If that were the case there would be no point in having any rules to regulate the Supreme Court's procedure. The obtaining of the grant of enlargement is not a mere administrative step.

[4] The entitulment of these appeal papers mentioned 'High Court Judicial Review NoHBJ 13 of 2004.' I cannot find any such case in these proceedings. Care must be taken with appeal documents. It perhaps indicates a rushed application.

Jurisdiction

[5] Hitherto powers to enlarge time for the lodging of petitions have been found to exist in r 20(4) of the Supreme Court Rules. However such powers are usually granted through Acts of Parliament or Decrees, not Rules. Appellate courts for the most part are confined to functions within a restricted jurisdiction. Section 20(1) of the Court of Appeal Act Cap 12 (as amended) for instance grants powers to a single judge of the court in civil appeals:

> (b) 'to extend the time within which a notice of appeal or an application for leave to appeal may be given or within which any other matter or thing may be done.'

[6] No such statutory power is given to the Supreme Court. This may be because of the even greater restriction placed on gaining access to the court than to the Court of Appeal. Only the cases that can meet the filter threshold of section 7(3) may be considered for such initial leave. The civil appeal criteria are:

> ' (3) In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant special leave to appeal unless the case raises
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> *(a)* a far-reaching question of law;
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> *(b)* a matter of great general or public importance;
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> *(c)* a matter that is otherwise of substantial general interest to the administration of civil justice.'

[7] The power to enlarge time was discussed this month before the Full Court of the Supreme Court. The case in question was one from the criminal jurisdiction. I set out paras [2] and [3] of *Kamlesh Kumar v The State* CAV0001.09, 21st August 2012.

> '[2] Rule 20(4) of the Supreme Court Rules refers to the grant of an extension of time 'for good and sufficient cause shown'. This indulgence appears to be confined however to non-compliance with conditions of appeal or petition post lodging, and not to enlargement of time applications. Rule 46 has been thought to provide the necessary jurisdiction for the Supreme Court to permit enlargement of time: *Josua Raitamata v State* CAV0002.07 25th February 2008 at para. 7. Rule 46 provides that the High Court Rules and Court of Appeal Rules and forms prescribed apply with necessary modifications to the practice and procedure of the Supreme Court. Section 26 of the Court of Appeal Act grants the statutory power for that court to enlarge time. Though the High Court Rules do not apply to the Criminal Jurisdiction the court considered that the High Court's power to enlarge time where time prescriptions apply provided the basis for a general power for the Supreme Court to extend time: *Josua Raitamata* [supra at para 8].
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> [3] The Supreme Court is the final court of appeal, and the procedure, save where leave has been granted beforehand by the Court of Appeal, is by way of special leave to be sought upon petition. The decision to grant special leave to hear an appeal, whether timely or not, lies with the court. At this final level special leave could allow a late appeal in cases meeting the leave criteria of section 7(2) of the Supreme Court Act or where in a rare case there is irremediable injustice otherwise compelling the intervention of the Supreme Court: see *The State v Eliki Mototabua* CAV0005.09 9th May 2012; *Fernandopulle v Premachandra de Silva and Others* [1996] 1 Sri: LR 70.'

[8] Because the instant case is civil, it can derive support for the jurisdiction to permit relaxation of the rules by virtue of r 46 SC Rules and Order 2 r.1 of the High Court Rules.

[9] But it must be remembered that whilst in a compelling case, the court may more easily be convinced of a need for intervention in a criminal case with less regard for the prejudice caused to the State as Respondent, the position is different in a civil case. In such cases when exercising civil jurisdiction, the appellate courts have tended to be less lenient, than when considering the position of an Accused person who lodges a late appeal. In civil appeals the court has to be more even-handed and consider equally the rights and interests of the Respondent with those of the applicant: *Latchmi & Anor v Moti and Others* [1964] 10 FLR 138 at 145G per Marsack JA.

[10] This application being interlocutory can be heard by a single judge of the Supreme Court [section 11 Supreme Court Act], and any decision made can be varied, discharged or reversed by the Full Court [section 11(b)].

Principles to be applied

[11] In applications of this kind appellate courts consider five factors to ensure a principled approach to the exercise of a judicial discretion. Those factors are:

(i) The reason for the failure to file within time.
(ii) The length of the delay.
(iii) Whether there is a ground of merit justifying the appellate court's consideration.
(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
(v) If time is enlarged, will the Respondent be unfairly prejudiced?

Reason for the failure

[12] Mr Green for the applicant in oral argument said the reason for the 2 days lateness was 'miscalculation'. On 29th June 2012 the motion seeking enlargement with the affidavit of Ajay Singh was filed. The deponent describes himself as a civil servant, without professional address being listed. In the body of the affidavit he states he is the Litigation Officer in the office of the Solicitor-General. In paragraph 3 of the affidavit the deponent says 'counsel for the applicant/petitioner had drafted and prepared a Petition for Special Leave to appeal and Leave to appeal out of time…' He does not name the counsel, whom he knew had drafted the appeal papers or the person who had informed him of this information. Such information should have been provided in order to comply with the rules for the drafting of affidavits in interlocutory proceedings: Order 41 r.5(2). It is not a question of embarrassment, but rather the pre-requisite of accurate evidence to provide the necessary platform in order to succeed in the application.

[13] Further down in the affidavit he deposes:

> '7. That I am advised and verily believe that the mistake by counsel was inadvertent and was not intentional as he had miscalculated the last date to seek Special Leave.'

[14] Again the informant for this belief is not named, nor the mistake explained. There is a lack of candour in the explanation. How can a qualified barrister 'miscalculate' the 42 days? Or was the petition simply lodged late because of counsel's overlooking of the date when lodgment had to be done? From time to time applications are brought in such circumstances. Counsel appearing usually readily and frankly admits it was his oversight and lapse. The court thinks none the less of Senior Counsel for such an error. But the court expects candour and should not be misled in an affidavit, for such a course may influence the exercise of the discretion; see too Rules for Professional Conduct and Practice (Schedule to the Legal Practitioners Decree 2009) Chapter 3 – Relationship with the Court para 3.1.

[15] In *Gatti v Shoosmith* [1939] 3 All ER 916. Sir Wilfred Greene MR [at p.919G] said:

> ' On consideration of the whole matter, in my opinion under the rule as it now stands, the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the court in exercising its discretion. I say 'may be,' because it is not to be thought that it will necessarily be exercised in every set of facts.'

[16] It is of course an unfettered discretion *Gatti* [p.918A]. In Wood v Manchester Corporation: Yearly Practice of the Supreme Court 1939 p.1283, Digest Practice 806, 3693 the court had allowed an extension where a solicitor had failed to seek his client's instructions on appeal after the client's union was not prepared to take her case beyond the Divisional Court.

[17] The Master of the Rolls, with the court, accepted that the misunderstanding of counsel as to the applicable rule was plausible and understandable: *Palata Investments Ltd v Burt & Sinfield Ltd* [1985] 2 All ER 517 at 521f where the fact that counsel's advice was wrong could only be checked and ascertained when the new edition of the Supreme Court practice had arrived at the solicitor's office. In addition the solicitors had written to the other side beforehand putting them on notice that they were proceeding with an appeal. The discretion was exercised in favour of the applicant: [*Gatti* p 920].

[18] In *Kevorkian v Burney* [1937] 4 All ER 97 leave was given because the appellant had been in America. In *Gatti* it was given, since there had been, as here, a very short delay, and notice had already been given to the Respondent's solicitors. In *Latchmi's* case there was no question of a misunderstanding and it was said (at para 146f):

> ' No explanation has been given as to why no steps were taken earlier by the unsuccessful party to have a judgment of which they complained, reviewed in a higher court.'

[19] Of course in the instant matter, when aggrieved by the Court of Appeal's decision the main complaints of the applicant would have been obvious. They are contained in grounds 5(ii) and 5(iii) of the Petition. Ground 5(i) may be less likely to persuade the court that the leave criteria could be met. No doubt it would have been urged on the court that these complaints went beyond mere quantum and that the award was to be addressed as being so disproportionate with other awards as to require the intervention of the final appellate court as a matter of public policy. Argument would have to be addressed to convince the court that the threshold criteria have been met and that this petition is not in essence about quantum.

[20] In *Latchmi* [at p146f] Marsack JA in agreeing with Briggs JA expressed his reasons for refusing enlargement as follows:

> 'In the present case an appeal was, as counsel concedes, in contemplation though not actually decided upon when the judgment was given on the 19th March 1963. The matter was then allowed to rest until after service of the judgment on the 11th December, 1963. *No explanation has been given as to why no steps were taken earlier* by the unsuccessful party to have a judgment, of which they complained, reviewed in a higher court.
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> The error made by appellants' solicitors when a copy of judgment was served on the 11th December 1963, was of an entirely different character from that referred to in the judgment in Gatti v Shoosmith. There was no question of a misunderstanding – held to be forgivable in *Gatti's* case – of the rule to the extent of thinking time for appealing ran from the date of service and not the date of entry of judgment. Rule 21 is clear on the point. But even after service the applicant had ten or eleven days before the commencement of the Christmas vacation in which to lodge notice of appeal.
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> Although at the hearing of the application counsel stated that the delay had been due to a misunderstanding in his office, the affidavit filed by the applicants' solicitor in support of the application for leave does not say that the solicitor mistakenly believed that the time for appealing ran from the date of service and not of entry of the judgment. Even if he had been under this impression, his notice of appeal was not filed within thirty days of that date. Thirty days from the 11th December would have expired on the 10th January and his original notice of appeal was not filed until the 13th January. That, as has been stated, was rejected as being out of time.' **(emphasis added)**

[21] Both in *Gatti* and in *Air Pacific Ltd v Saumi* [2002] FJCA 4 at 2 the would be petitioners, though late, notified the Respondents of their intention to appeal. In *Gatti's* case the Respondents were notified within the appeal period.

Length of delay

[22] The delay here was very short, a mere 2 days. In *CM Van Stillevoldt BV v EL Carriers Inc* [1983] 1 WLR 207 it was 2 weeks, and the discretion was exercised in favour of the appellant. In *Palata* it was 3 days, and Ackner CJ said at p 521b:

> …. "we expressed the opinion that, in cases where the delay was very short and there was an acceptable excuse for the delay, as a general rule the appellant should not be

deprived of his right of appeal and so no question of the merits of the appeal will arise. We wish to emphasise that the discretion which fell to be exercised is unfettered, and should be exercised flexibly with regard to the facts of the particular case."

[23] Ackner LJ noted there was no question of any prejudice arising to the plaintiffs therefore and no need to go into the question of whether there was a good arguable case on appeal.

Whether ground of merit justifying consideration

[24] The grounds raised here are meritorious and a good arguable case could be put up. This is not the same question however as the leave criteria of section 7(3), which must also be considered and weighed. Enlargement factor (iv) does not need to be considered since there has been no substantial delay.

Prejudice to the Respondent

[25] The judgments delivered in this case, included in the Respondent's bundle of authorities, are as follows:

"1. Lautoka High Court Judgment of Justice Finnigan dated 10 June 2005
2. Court of Appeal Judgment dated 24 March 2006
3. Lautoka High Court Supplementary Judgment of Justice Finnigan dated 12 May 2006
4. Court of Appeal Judgment dated 20 April 2007
5. Supreme Court Judgment dated 22 July 2008
6. Court of Appeal Judgment dated 7 November 2008
7. Lautoka High Court Judgment of Justice Inoke dated 16 February 2011
8. Court of Appeal Judgment dated 21 March 2012"

[26] These judgments indicate the lengthy and protracted nature of the proceedings in which the parties have been engaged. The spinal injury to the Respondent occurred on 7th September 2001. Action was instituted in 2002. This case would find a place in the April 2013 sittings of the Supreme Court. The matter is on its second visit to the Supreme Court after 4 visits to the Court of Appeal. The consequences of the injury to the Respondent have left him with a life which could be described as extremely restricted, personally embarrassing, and truly pathetic. The litigation process, continuing anxiety as it does, has not so far alleviated any of that suffering.

[27] In addition to the continuing hardship by the late lodgment, there is the prejudice that has been caused to his own appellate position. The Respondent deposes that he would have lodged a petition himself on the issues of damages for loss of income, nursing care and special housing which the Court of Appeal had not allowed. If the State were not to appeal, then the Respondent would not have elected to incur further cost and elected not to pursue an appeal on these issues. Since there is no such procedure as a cross-petition, the Respondent would have to apply for enlargement of time within which to bring a petition of his own: *Permanent Secretary for Health and Anor v Arvind Kumar & Others* [2011] FJSC 5 CBV0006.08, 11th March 2011.

[28] Allied to prejudice is the need for finality of litigation. In *Norwich & Peterborough Building Society v Steed* [1991] 2 All ER 880 at 885 Lord Donaldson MR said:

" However, I wish to comment on one passage in the skeleton argument for the applicant. This reads as follows:

> 'The [applicant] submits that there is a good excuse for the whole of the delay and that it is not necessary to look at the merits: see The Supreme Court Practice 1991 (including 1st supplement) at para 59/4/4, *Palata Investments Ltd v Burt & Sinfield Ltd* ([1985] 2 All ER 517, [1985] 1 WLR 942) and *Nestle v NatWest Bank* ((1990) Times, 23 March).'
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> This submission is not correct. Once the time for appealing has elapsed, the respondent who was successful in the court below is entitled to regard the judgment in his favour as being final. If he is to be deprived of this entitlement, it can only be on the basis of a discretionary balancing exercise, however blameless may be the delay on the part of the would –be appellant."

[29] In *Shankar v Naidu* CBV0002.02S 24th October 2003 this court enlarged time inter alia since there was a 'want of any practical prejudice to the Respondent.' In *Stillevoldt* at p.213A Griffiths LJ said:

> "Finally, there is no question in this case of the defendants being in any way prejudiced if the time is extended save for this fact of course, that they will now have to face the appeal rather than the plaintiffs having the door slammed in their faces at this stage."

[30] But his lordship concluded (p.213E):

> 'Of course the fact that the defendants do not suffer prejudice is not a determinative matter, but it is undoubtedly a very important factor to weigh in the balance; and as the defendants in this case will suffer no true prejudice by the extension of the time limit,'

[31] Bearing in mind that enlargement is a more difficult relief to obtain in civil proceedings than in criminal, the English Court of Appeal in *Regina v Donald Burley* [1994] Times LR 565 [Lord Taylor CJ, French and Longmore JJ] made the following observation:

> ' Their Lordships wished to make it perfectly clear that it was no answer to a failure to observe time limit for solicitors to say *mea culpa*, it is entirely our fault, do not let it redound to the disadvantage of the client.'
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> .....
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> The rules were there not simply for perverse reasons but to enable the court to manage its business in a proper manner. If cases were allowed to come in late that meant that other cases, which had been filed in time, would be held back.
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> Accordingly, the court had to insist that the time limits were obeyed unless there was some very good, exceptional reason for their not being obeyed.'

Conclusion

[32] The non-compliance is a mere 2 days. However the relief cannot be granted to enlarge time unless there exists 'some very good, exceptional reason.' A combination of factors in the applicant's favour can amount to an exceptional reason.

[33] The explanation for the failure to comply in his case regrettably lacked candour. Counsel should have deposed in an affidavit freely admitting his or her mistake. But even frankness may not be met with indulgence: see *Burley* supra, where leave was still refused. The explanation here remains unsatisfactory.

[34] A letter of intent in the matter of appeal will not suffice to initiate an appeal. But the cases demonstrate, such letters remove some of the prejudice caused to the Respondent by late appeals: see observations on why the Respondent requires notice in Permanent Secretary for Health v Kumar [supra at para 5].

[35] The Respondent has been prejudiced by the lack of timely appeal by the Petitioner. His own ability to bring a petition has been prejudiced also. His unwillingness to approach the court unilaterally is understandable. Finality in protracted litigation gains greater prominence the longer the litigation is ongoing. Every case and application turns on its own special facts and circumstances. In this matter the protracted nature of the litigation and its effect on the Respondent in his very difficult circumstances, together with the other matters I have just recited, draw me to the conclusion that justice lies with not granting indulgence to the applicant following his solicitors' non-compliance with the rules for lodging his petition.

[36] In the result, I decline to grant an extension of time. There will be costs to the Respondent summarily assessed at $1,500.

Application dismissed.