IN THE SUPREME COURT OF FIJI
[CIVIL APPELLATE JURISDICTION]

Civil Petition No: CBV 0012/2021
[On Appeal from the Court of Appeal Civil Appeal No: ABU 0091/2017]

BETWEEN: **THE NEW INDIA ASSURANCE COMPANY LIMITED**
Petitioner

AND: **KALABO INVESTMENTS LIMITED**
Respondent

Coram: The Hon. Mr. Justice Anthony Gates, Judge of the Supreme Court
The Hon. Mr. Justice Brian Keith, Judge of the Supreme Court
The Hon. Mr. Justice Priyasath Dep, Judge of the Supreme Court

Counsels: Mr R.R. Gordon for the Petitioner
Mr C.B Young for the Respondent

Date of Hearing: **21st April, 2022**

Date of Ruling: **29th April, 2022**

RULING

[On interlocutory Summons to strike out petition]

Gates J

[1] This application has a narrow focus. It concerns the date from which time begins to run after a decision for lodging an appeal petition. But in this case there was an unusual circumstance.

Following the end of the lockdown the Hon Chief Justice issued directions, amongst other matters, as to which day was to be the re-commencement date for the purpose of computation of time. For from the start of the restrictions imposed nationally in the lockdown, business was much restricted and the courts were closed.

[2] On 3rd November 2021 the Respondent filed a summons to strike out the petitioner's petition for leave to appeal. The summons alleged the petition was a nullity because it was filed out of time. The Respondent sought costs. The summons was lodged with the supporting affidavit of Mereseini Belinda Vanua, a solicitor partner in Young and Associates, Solicitors for the Respondent, the affidavit being sworn on 1st November 2021. The matter came on before Kumar CJ who referred the summons to the Full Court during the current sessions of this Court.

[3] The Petitioner's Solicitors lodged their petition and affidavit at the court registry on 29th October 2021. The stamped documents were then served on the Respondent's Solicitor's Suva agents.

[4] The judgment of the Court of Appeal had been handed down on 30th April 2021. In normal circumstances the petition and affidavit would have had to have been lodged and served within 42 days of that decision to comply with Rule 5(a) and (b) of the Supreme Court Rules 2016.

[5] However, at the time of the delivery of the decision of the Court of Appeal, Fiji was suffering from the Covid 19 outbreak and a lockdown was imposed from 19th April 2021 [for Lautoka and Nadi] and from 26th April 2021 [for Suva-Nausori]. There were 5 directions issued by the Chief Justice. They were issued on 19th of April 2021, 26th April 2021, 13th July 2021, 16th August 2021 and a final one on 23rd September 2021.

[6] On computation of time, the 1st direction stated:

> *"F. <u>Computation of Time</u>*
> *The lockdown period for parts of Lautoka, Nadi, Lami, Suva, Nasinu and Nausori areas, shall not be reckoned in the computation of time prescribed*

by Supreme Court, Court of Appeal or High Court Rules, Family Court Rules, Employment Relations Regulations for Tribunals and Courts or as directed by any Judicial Officer, Chief Registrar, Deputy Registrars, Registrar and Assistant Registrar for amending delivery or filing of any Documents, Affidavits, Submissions or Pleadings or doing of any act."

[7] The 5th Direction dated 23rd September 2021 was received by Legal Practitioners on 24th September 2021 by email. This is the direction where its interpretation is disputed in this summons. It dealt with computation in this way:

"D. Filing of Documents – Computation of Time

Since, the lockdown of cities/towns was fully lifted on 17 September 2021, the previous direction on computation of time has ceased to take effect. In other words, time prescribed by Supreme Court Rules, Court of Appeal, High Court Rules and SCT Rules are to be computed from 18 September 2021."
(emphasis added).

[8] The nub of the procedural dispute is whether 17th September 2021 is the intended start date or whether 18th September 2021, for computation of time after the lockdown was uplifted. If the correct interpretation is the 17th then the petition has been lodged late, out of time by 1 day. If 18th is the commencement date, then the petition was lodged within time.

[9] Rule 5 governs the time for lodging a petition. It states:

"Time for lodging Petition and service

5. A Petition and affidavit in support must –

(a) be lodged at the Court registry within 42 days of the date of the decision from which leave to appeal is sought;
(b) be served upon the Registrar and all parties to the proceeding who are directly affected by the Petition and such service to be effected within the same 42 day period fixed for the lodgment of the Petition at the Court registry in paragraph (a) above; and
(c) an affidavit or affidavits of service establishing compliance with paragraph (b) above must be lodged at the Court registry within 10 days of such service."

[10] The third requirement in the process of lodging the petition is complete when the affidavit of service is lodged at the Supreme Court registry pursuant to Rule 5 (c). This establishes to the court that the petition and affidavit verifying have been lodged within time, and that the respondent has been served with a copy of each also within time. Rule 5 (c) has already been complied with in this case.

[11] The petitioner filed an affidavit in opposition to the summons, that of Makelesi Tumalevu a Solicitor in the office of the Petitioner's Solicitors. She exhibited the 5th Direction issued on 23rd September 2021, and stated her office had received an email copy of the same on 24th September 2021. She related how her office had sought advice from the Supreme Court registry on the documents for lodgment. She sought clarification as to the last day for lodging and specifically whether 29th October 2021 was correctly the last day.

[12] The COVID-19 pandemic restrictions, and the consequent court re-arrangements that had to be made disrupted court business and legal practice. Mr Gordon explained that he had taken heed of the exhortation at the end of the Hon Chief Justice's directions "*to contact us if you need any assistance or clarification."* But at the end of the day, the interpretation put on the directions is a matter of law and could not be governed by registry practice. It was the court's obligation therefore to interpret the legal meaning. The email exchanges with the registry illustrated what had happened and related the solicitor for the Petitioner's attempt to keep within the Rules for lodgment. Mr Young correctly submitted "*it is strict law that a mistake or misunderstanding as to the meaning of a rule does not cure a failure to comply. Good faith and reliance are irrelevant."*

[13] Rule 5 is not phrased as 42 clear days. The day of the decision therefore is to be excluded – section 51(a) Interpretation Act; *Howey and Co. Pty Ltd v Creative Projects International Pty Ltd* [1973] NSWLR 898. Mr Young submitted that the computation of time was to start on 17th September 2021, which was the first day, a business day, after the lockdown was lifted. The court registry was also open for the filing of documents. If that were so, the 42 days would end on 28th October 2021.

[14] Mr Young argued that once the lockdown was lifted, as it was at 4am on the 17th September 2021, the earlier directions on computation of time ceased to have effect. This would mean the 17th September was a day to be included in the computation. It was a day to be counted as any other, since no lockdown applied to it. It was also urged that the phrase "in other words" was intended to explain the preceding first sentence. This meant that time was to start on 17th September 2021.

[15] The Chief Justice's directions of 23 September 2022 para. D read as follows:

"D. Filing of Documents – Computation of Time

Since, the lockdown of cities/towns was fully lifted on 17 September 2021, the previous directions on computation of time has ceased to take effect. In other words, time prescribed by Supreme Court Rules, Court of Appeal Rules, High Court Rules and SCT Rules are to be computed from 18 September 2021."

[16] Mr Gordon referred to a definition of "in other words" as expressing the same idea but in a different set of words for explanation or an interpretation of the idea mentioned first. There was really no dispute on the use of *"in other words"* an oft used phrase in common usage.

[17] The only mention of a re-commencement date in para D is in the final line, and that is *"from the 18 September 2021."* The lockdown was lifted on 17 September 2021, a decision and instruction within the hands of another Department and official. Directions issued by the Head of the Judiciary were to advise all users of the registries and courts how normalcy was, and when, to be restored. That Direction was stated in the final sentence, at its simplest, that computation was to start from 18th September 2021.

Other issues raised

[18] Mr Young sought to establish that the petition, if out of time, was a nullity. Application could have been made to have time enlarged, and if granted, the petition would be enlivened and after other necessary procedures, could proceed to a hearing.

[19] An action started in the name of a company without its authority is a nullity, but this defect could be cured if the liquidator had adopted the proceedings: *Danish Mercantile Co. Ltd v Beaumont* [1951] CH. 680. Whatever the appropriate word for the petition, if out of time, it can be said the appeal is not afoot. It is not necessary to say anything further on this, in view of the finding that the petition was lodged within time.

[20] Mr Young may have suggested that once the lockdown was lifted the Chief Justice could only put off the re-commencement date for the computation of time by exercising his Rule making powers and by amending the Supreme Court Rules. He also ruled out a Practice Direction. I cannot agree with that suggestion. The Chief Justice acted in an emergency when directing the closure of the courts because of the pandemic. Section 18 of the High Court Act granted extensive jurisdiction to the High Court of Fiji, including *"all other jurisdiction necessary for the administration of justice in Fiji"* Practice Directions have for long been issued in England by the Lord Chief Justice without written authority but as part of his jurisdiction as Head of the judiciary. They carry great authority but are not part of legislation. Rule making powers were granted to the Chief Justice by Acts of Parliament in Fiji which lends authority for the power to issue Directions [see section 293 CPA and sections 25, 26, 28 High Court Act].

[21] Mr Gordon submitted that we should deem the Court of Appeal judgment that was delivered on 30th April 2021 as having been delivered on the 17th September 2021. I consider that this is not necessary. The date of delivery should remain the same, 30th April 2021. Since that date was within the lockdown, time does not begin to run from that date. This only happens on 18th September 2021, the Chief Justice authorising the re-opening of the registries and authorising the reversion to the normal computation of time under the Supreme Court Rules.

[22] Lastly, the summons was correctly brought pursuant to Rule 5(a) and (b), Rule 31 and Court of Appeal Rule 26. This is not a case where Rule 17 is applicable for non-compliance with conditions, and for which non-compliance a certificate from the Registrar is required [Form

7-Schedule 1]. At this stage, if out of time, the petition is not afoot, so Rule 17 is not applicable.

[23] The court has been much assisted by the quality of the written and oral submissions from both Counsel.

[24] I find the petition was lodged within time, and therefore the summons to strike out must be dismissed with costs.

Keith J

[25] I agree entirely with the judgment of Gates J, and I add a few words of my own only because of the exceptional quality of the arguments addressed to us.

[26] The short answer to the argument advanced on behalf of the Respondent lies in the structure of para D in the Chief Justice's directions of 23 September 2021. The second sentence was intended to explain what the first sentence meant. That is the only possible consequence of the use of the words "In other words" with which the second sentence begins. So whatever the first sentence said – and I agree that there is room for the view that it meant that the time for taking any of the procedural steps required by the various sets of rules was reinstated when the lockdown was completely lifted, ie on 17 September 2021 – you look to the second sentence to see what the Chief Justice was trying to get across in the first sentence. Since the second sentence says that the provisions about the computation of time in the various sets of rules were to be reinstated from 18 September 2021, that was when the time for lodging the petition began to run.

[27] Mr Gordon argued – should it be necessary to do so (which in the light of the above, it was not) – that the judgment of the Court of Appeal should be regarded as having been handed down on 17 September 2021, not on 30 April 2021. Since the effect of section 51(a) of the Interpretation Act required the day on which the relevant event occurred to be excluded from the computation of the number of days which a litigant has to take a particular procedural

step, the time for lodging the petition should be treated as having started on 18 September 2021. I do not agree. The Chief Justice's previous directions related to the suspension of the rules laying down the time for taking the procedural steps required by the various sets of rules. They did not relate to the date on which a judgment should be deemed to have been handed down.

[28] Finally, had the petition been served out of time, I would not have been persuaded to treat it as a nullity. If it was a nullity, it would have to be lodged in the Registry again. We have never required a petition which is lodged out of time to be lodged again. We have only required an application for an extension of time to be made. If Mr Young's argument was correct, our practice over many years would have been wrong. I see no basis for saying that.

Dep J

[29] I have read in draft the Ruling of Gates J and I agree with his reasoning and conclusions.

Orders:

1). The summons to strike out is dismissed;

2). Costs for the respondent to the summons [the petitioner] of $2000.00.

Hon. Mr Justice Anthony Gates
Judge of the Supreme Court

SUPREME COURT FIJI

Hon. Mr Justice Brian Keith
Judge of the Supreme Court

Hon. Mr Justice Priyasath Dep
Judge of the Supreme Court