IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 110 of 2020
(Suva High Court Civil Action No: HBC 132 of 2019)

BETWEEN : **HOTEL RESORT INVESTIMENT HOLDINGS**

Appellant

AND : **BANK OF SOUTH PACIFIC (BSP)**

Respondent

Coram : **Almeida Guneratne, AP**

Counsel : **Mr J. Suveinakama for the Appellant**
Ms L. Prasad for the Respondent

Date of Hearing : **26th August, 2021**
Written submissions of Appellant : **30th August, 2021**
Written submissions of Respondent: **6th September, 2021**
Date of Ruling : **5th October, 2021**

RULING

Essential Relevant Background facts for a determination of the Application

[1] This is an application to appeal out of time the ruling of the High Court dated 2nd September, 2020. By that ruling, the Court refused to set aside its earlier ruling made on 21st February, 2020.

[2] That earlier ruling of 21st February, 2020 was when the High Court had fixed for hearing the matter of the Appellant's application to entertain and determine its application to re-instate an appeal against *"the Master's"* decision which the High Court had deemed to have been abandoned for non-compliance with Order 59 Rule 12 of the High Court Act/Rules.

[3] On the said date (viz: 21st February, 2020) the Appellant being absent and unrepresented, the learned High Court Judge struck out the summons of the Appellant for re-instatment.

[4] Thereafter, the Appellant filed summons on 28th February, 2020 to set aside the said striking out order.

[5] By its order dated 2nd September, 2020 the High Court refused to set aside the said ruling made by it on 21st February, 2020.

Applicable criteria in an application for extension of time to appeal

[6] These criteria are well entrenched in the Fijian jurisprudence, the leading case being **NLTB –v- Ahmed Khan** (CBV 2 of 2013, 15 March, 2013).

[7] The Supreme Court in that case laid down the following criteria viz:

(a) The length of the delay;
(b) The reasons for the delay;
(c) Prospects of success;
(d) Prejudice to parties.

[8] The Appellant has relied on several precedents in support of its application.

[9] I shall proceed to look at the reasoning of the learned High Court Judge in the light of the precedents cited and the submissions made on behalf of the parties.

The Ruling of the High Court

[10] In the context of the essential relevant background for a determination of the present application as re-capped above in paragraph [1] to [5] above I discerned the features of the learned High Court Judge's reasons as follows.

Jurisdiction to exercise discretion

[11] Adverting to Order 32 Rule 5(4) of the High Court Rules and the Supreme Court Practice provisions (1991) (vide: page 3 of the Ruling). His Lordship recognized the fact that the said Rules and the Supreme Court Practice provisions provide for the exercise of discretion on the Court to re-instate an action that was dismissed for want of appearance.

Factors to be considered in exercising that discretion

[12] Having so recognized the jurisdiction to exercise discretion in considering an application of the present nature, His Lordship then looked to the factors to be considered in exercising that jurisdiction.

(1) The delay and reasons given for the non-appearance

[13] The delay being just 7 days (between 21 February, 2020 and 28 February, 2020) the Court saw no issue in the said delay.

(2) Were the reasons for non-appearance given by the applicant adequate for the Court to set aside its order (that is, the order of 21 February 2020)?

[14] His Lordship discerned the reasons adduced by the Appellant's Solicitor as follows and made his observations in relation to them thus:

(i) In relation to what the Solicitor had written in the Court appearance minute viz: "*file submissions ASAP*", the learned Judge noted that, the Court had never made such an order.

(ii) As against the arguments that the Solicitor had noted down the date of hearing wrongly, the Court reflected on the fact that, it was after consulting both Counsel that the hearing date was fixed. Apart from that, the lawyer himself had made a note that on "*21.02.2020, (he had been) advised by Praneel of High Court*" which had been clarified as the next date of hearing.

(iii) Another reason advanced by the Appellant's lawyer for his non-appearance on the date fixed for hearing (21.02.2020) is that he was forced to attend a workshop organized by the Fiji Law Society. The learned Judge in that regard had reasoned thus:

> *"[12] This workshop could not have been organized by the Fiji Law Society in a week or two. When the court nominated the hearing date Mr Valenitabua could have known that he had to attend the workshop and should have informed court that he would not be free to attend court on 21st February 2020.*
>
> *[13] He has also averred in his affidavit that due to an accident he was admitted to Oceania Hospital and was there for four days and in support of that he tendered a medical certificate.*
>
> *[14] However, he had no difficulty in bringing to the notice of the court or at least to the registry about his difficulties or to send another lawyer to court on the day of the hearing, not to conduct the hearing but to inform court that Mr. Valenitabua's difficulty in attending court."*

[15] For the aforesaid reasons, the learned Judge rejected the reasons urged for the non-appearance by the lawyer on 21/02/2020.

[16] It is to be noted that this is not a case of "*a misunderstanding*" by a lawyer (in regard to which Appellant's Counsel relied on the decision in **Gatti vs Shoosmith** [1939] 3All ER 916.

[17] Again the present case did not turn out to be one occasioned by a difficulty on which the trial came on (vide: **Latchmi v Moti** [1964] 10 FLR 138)

The Prejudice criterion

[18] In his response to this criterion, the learned Judge held thus:-

> *"[17] The learned Master of the High Court removed the caveat and it is common ground that the property mortgaged by the Hotel Equipment Limited has already been sold by a mortgagee sale. The interest of the defendant in the property is that it had entered into a sale and purchase agreement with the Hotel Equipment Limited to purchase this property. Since the property has already been disposed of by the respondent no prejudice would be caused to the appellant if the order of this court striking out the application for leave to appeal out of time is not reinstated.*
>
> *[18] The learned counsel for the appellant submitted that there was no legal representation for the appellant before the Learned Master.*
>
> *[19] Order 5 rule 6 of the High Court rules 1988 provides:*
>
> > *(1) Subject to paragraph (2) and to Order 80, rule 2, any person (whether or not he sues as a trustee or personal representative or in any other representative capacity) may begin and carry on*

proceedings in the High Court by a barrister and solicitor or in person;

(2) Except as expressly provided by or under any enactment, a body corporate may not begin or carry on any such proceedings otherwise than by a barrister and solicitor.

[20 In this matter the appellant was not represented by a solicitor or barrister. One of the directors of the company filed all the affidavits and other documents in court. The learned counsel for the appellant faulted the court for the mistakes of his own client. The court is not expected to give legal advice the litigants. They must know what the procedure to be followed in instituting proceedings before a court of law. It is a universally accepted principle of law that ignorance of law is not an excuse (ignorantia juris non excusat). If a party follows a wrong procedure they will have to bear the consequences of their own mistake.

[21] The learned counsel for the appellant submitted on the law of Equity of Redemption and cited various authorities in support of his submission. Equity gives right to pay off loan and terminate mortgage by the successful repaying of the mortgage debt. It is the mortgagor who is entitled to claim such a right. In this matter the mortgagor is not a party to these proceedings. The mortgagor company, Hotel Equipment Limited, has already been wound up. Therefore, the law of Equity of Redemption has no application to the facts of this matter."

Interim Reflections on the Ruling of the High Court

[19] I have reproduced the reasoning of the High Court verbatim for the reason that I could not see much to add to it except to say that:-

(a) the criterion of "*prospects of success*" (vide: **NLTB v Khan** (supra) in the context of the Appellant's lament on the issue of the Caveat was not an issue in as much as the question for determination by the High Court fell squarely within the provisions of

Order 32 Rule 5(4) of the High Court Act, although the learned Judge having referred to this correct provisions perhaps by inadvertence later referred to Order 35 Rule 5(4) (at paragraph [8] of the Ruling).

Determination

[20] Thus, the criterion of "*prospects of success*" on the merits of the initial substantive case (that is, "*the caveat issue*") was not the matter that was before the High Court.

[21] But rather, whether the Appellant's Counsel had shown reasons for the non-appearance on 21/02/2020. The learned Judge rejected those reasons in the exercise of his discretion.

[22] It is an inveterate principle of law that, an appellate Court will and should not interfere with the exercise of discretion by the "lower Court" unless there is a serious misdirection, non-direction or misinterpretation of legal provisions and/or the impacting facts.

[23] I could not find any of those aspects in the Ruling of the High Court on both the exercise of discretion in terms of Order 32 Rule 5(4) and on the application of "*the criterion of prejudice*." I have no doubt that, given the reasons his Lordship took into consideration which I have re-capped above, certainly prejudice would have resulted to the Respondent in turning back the clock.

Respondent's Prayer for Indemnity Costs

[24] However, going on the thinking reflected in **Attorney-General v Draunidalo** [2009] FJCA 54 (cited on behalf of the Respondent itself) I am not inclined to award indemnity costs on the basis that the Appellant's conduct was *"reprehensible to a significant degree"* particularly in view of the fact that the *"length of d*elay" in seeking extension of time to appeal the Ruling of 21st February, 2020 was a mere seven (7) days.

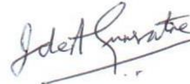
Conclusion

[25] For the aforesaid reasons, I am not inclined to grant the application of the Appellant and proceed to make my Order as follows.

Orders:

1) The application of the Appellant is refused and accordingly dismissed;

2) The Applicant (Appellant) shall pay to the Respondent a sum of $2,500.00 as costs of this application.



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Almeida Guneratne

ACTING PRESIDENT, COURT OF APPEAL