

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

**Civil Action No. HBA 05 of 2017**

**BETWEEN:**                      **MOHAMMED SAHIM**

**APPLICANT/APPELLANT**

**AND**                                      **SANJAY SINGH VERMA**

**RESPONDENT**

**Before:**                                      Hon. Acting Chief Justice Kamal Kumar

**Counsels:**                                      Mr A. Chand for the Applicant/Appellant

Respondent in Person

**Date of Judgment:**                      27 May 2020

**RULING**

**(Application for Leave to Appeal Out of Time and Appeal)**

## **1.0 Introduction**

- 1.1 On 3 March 2017, Applicant/Appellant filed Application for Leave to Appeal Out of Time Learned Magistrates decision delivered on 1 September 2016, in SCT Appeal No. 4 of 2016, whereby the Appeal was dismissed with right to appeal within 30 days (“**the Application**”).
- 1.2 On 13 March 2017, the Application was called before Justice Hamza when execution of Learned Magistrates Judgment was stayed until 30 March 2017, which was extended to 20 April 2017, and Applicant was directed to file Supplementary Affidavit.
- 1.3 On 13 April 2017, Applicant filed Supplementary Affidavit.
- 1.4 On 20 April 2017, parties were directed to file Affidavits, interim stay was extended to 10 May 2017, and this matter was adjourned to 10 May 2017, for hearing.
- 1.5 On 26 April 2017, Respondent filed Affidavit in Reply.
- 1.6 On 10 May 2017, Respondent was directed to serve Affidavit in Reply on Applicants Solicitors on the same day with Applicant to file Response within two weeks when the Application was adjourned to 24 May 2017, and interim stay was extended to that date.
- 1.7 On 22 May 2017, Applicant filed Affidavit in Response.
- 1.8 On 24 May 2017, the Application was adjourned to 1 August 2017, for hearing before Justice Hamza with interim stay extended to 1 August 2017.
- 1.9 The Application was next called in this Court on 11 August 2017, when parties were directed to file submissions and the Application was adjourned to 12 September 2017, for hearing.

## **2.0 Application for Leave to Appeal Out of Time**

2.1 It is well established that in order to do justice the court needs to consider following factors in dealing with application to extend time fixed by Rule of Court or Order of the Court:-

- (i) Length of delay.
- (ii) Reason for delay.
- (iii) Chance of Appeal Succeeding.
- (iv) Prejudice to the Respondent.

**CM Van Stilleveldto B V v. E L Carriene Inc.** [1983] 1 ALL ER 699 of 704;  
**Norwich and Peterborough Building Society v. Steed** [1992] 2 ALL ER 830 at 83; **Ist Deo Maharaj v. BP (South Sea) Co. Ltd.** Civil Appeal No. ABU0051 of 1994S – FCA; **Nand v. Famous Pacific Shopping (NZ) Limited (2010)** FJHC 619; Civil Appeal No. 6 of 2009.

2.2 It must be understood that when Court is empowered to exercise a discretion, it should do so judicially and in the interest of justice.

2.3 The factors provided by Courts when dealing with certain Applications are to guide Court to reach a decision which is fair and just under the circumstances of each case and to ensure the decisions are consistent on such Applications based on similar set of facts.

2.4 In exercising the discretion, the Court should consider the factors highlighted by Superior Courts in addition to any other factors they think necessary before reaching a decision which they consider will serve interest of justice in a particular case.

2.5 Interest of Justice demands that the Courts take a holistic approach by considering all the factors mentioned at paragraph 2.1 in addition to any other relevant factors before reaching a decision rather than dismissing the application after considering only one or two factors.

### **Length of Delay**

2.6 In **Revici v. Prentice Hall Incorporated & Ors** [1969] 1 ALL ER 772 – Lord Dennings M R rejecting the Appellant’s submission that time does not matter as long as costs are paid stated as follows:

**“Nowadays we regard time very differently from what they did in the nineteenth century. We insist on rules as at time being observed..... So, here although time is not quite so very long, it is quite long enough.”**

In **Revici’s** case time for appeal had expired by one month.

2.7 Judgment in Magistrate Court was delivered on 1 November 2016.

2.8 Learned Magistrate granted Applicant 30 days to appeal the decision.

2.9 Application for enlargement of time to appeal was filed on 3 March 2017, which is after expiry of five (5) months from date appeal should have been filed.

2.10 There is no doubt that delay is inordinate.

### **Reasons for Delay**

2.11 Lord Davies in **Revici’s** case stated that:-

**“... rules are there to be observed; and if there is non-compliance (other than a minimal kind), that is something which has to be explained away. Prima Facie if no excuse is offered, no indulgence should be granted” (at 747 para F).**

2.12 Application was refused in **Revici’s** case as no explanation for delay was given.

- 2.13 In **1st Deo Maharaj** – the Court of Appeal adopted with approval the following quote from **Gallo v. Dawson** [1990] 64 ALJR 458 at 459.

**“Case needs to be exceptional before a Court would enlarge by many months the time for lodging an appeal simply because the applicant had refrained from appealing until he/she had researched the issues involved. In *Hughes v. National Trustees Executors & Agency Co. of Australasia Ltd* [1978] VR 257, McInerney J pointed out (at 263) that one object of fixing times under court rules is “to achieve a timetable for the conduct of litigation in order to achieve finality of judicial determinations.” When the time for appealing has expired, the litigation is at an end; the successful party is entitled to the benefit of the judgment in his or her favour. At that stage, the successful party has a “vested right to retain the judgment”. It would make a mockery of O 70, r 3 if, months after the time for appealing has expired, the unsuccessful party could obtain an extension of time on the ground that he or she had delayed appealing because that person wanted to research the issues involved. Lack of knowledge is a misfortune, not a privilege.”**

- 2.14 In **Tevita Fa v Tradewinds Marine Ltd. & Anor.** – Civil Appeal No. ABU0040 of 1994 (FCA) – His Lordship Justice Thomson (as then he was) in dismissing Appellant’s application for extension to appeal made four days after the expiration of time to appeal stated:-

**“The application for leave to appeal was filed only 4 days after the end of the period of six weeks. That is a very short period but time-limits are set with the intention that they should be observed and even lateness of only a four days requires a satisfactory explanation before an extension of time can properly be granted. In this case, as stated above, the applicant has given no explanation at all. That he may have been confused is merely an inference that Mr. Patel has asked me to draw from his statement of present belief that time began to run only from 8 August 1994.”**

2.15 In **Tevita Fa's** case, it was submitted by Appellants' Counsel that there had been a misunderstanding on the solicitor's part as when time started running for Appeal.

2.16 The following explanation for delay has been held to be unsatisfactory and not a basis for granting extension by the Fiji Court of Appeal:-

- Oversight by instructing solicitor due to Appellant's commitment in Australia even when the Appellant's solicitor was engaged in a Supreme Court (now High Court) criminal trial at relevant time for filing appeal. **Jawant Singh v. Peter Francis** (Action No. 57 of 1973 FCA (cyclostyled judgment) – Marsack JA (referred to in 1st Deo's case at page 3).
- Misunderstanding as to when time for appeal started running. [**Tevita Fa's case**]
- A misunderstanding of the effect of Court of Appeals judgment concerning the Special Damages. **Attorney General of Fiji & Anor v. Paul Praveen Sharma** – Civil Appeal No. ABU0041/93S – FCA.
- Applicant's solicitor mistakenly thought they had 30 days in which to appeal from the date on which judgment was served (Applicant's solicitors to be blamed – not applicant). [**Latchmi's case**]

2.17 The reason for delay is stated at paragraphs 15 to 17 of Applicant's Affidavit in Support filed on 3 March 2017, in following terms:-

- “15. That the Learned Magistrate refused to listen to me and then just ordered for me to abide with the Small Claims Ruling and dismissed my Appeal.
16. That I then instructed my solicitor to file appeal in the High Court **who continued to drag in filing and then I was out of time in filing of the Appeal and Stay.**

17. That now I have engaged a new solicitor who will file the Appeal and grounds after obtaining the leave from this honourable court.”

2.18 This Court has time and again stated that inaction or delay of part of parties Solicitor is not a good excuse.

2.19 This Court holds that reason for delay is not satisfactory.

### **Chance of Appeal Succeeding**

2.20 His Lordship Justice Richmond in **Avery v. No. 2 Public Service Appeal Board & Ors** [1973] 2 NZLR 86 stated as follows:-

**“Once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all the circumstances the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal.”**

2.21 In **Tevita Fa’s** case his Lordship Justice Thomson stated as follows:-

**“However, as important as the need for a satisfactory explanation of the lateness is the need for the applicant to show that he has a reasonable chance of success if time is extended and the appeal proceeds.”**

2.22 The proposed ground of appeal are that:

- (i) Learned Magistrate erred in taking into account that the Referee exercised his jurisdiction;
- (ii) Learned Magistrate failed to take into account the fact that the Referee acted in an unfair matter which prejudicially affected Referee’s order.

2.23 Section 33(1) of Small Claims Tribunal Act 1991 provide as follows:-

“33(1) Any party to proceedings before a tribunal may appeal against an order made by the tribunal under section 15(6) or section 331(2) on the grounds that:-

- (a) the proceedings were conducted by the Referee in a manner which was unfair to the appellant and prejudicially affected the result of the proceedings; or
- (b) the tribunal exceeded its jurisdiction.”

2.24 It is appropriate that this Court look at grounds stated in s33(1)(b) first.

2.25 Respondents claim in Small Claims Tribunal (“**SCT**”) arose out of Agreement entered between the parties on 19 September 2014.

2.26 Applicant in Appeal to Magistrates Court raised the issue of jurisdiction on the ground that Respondent had filed another claim in SCT and decision of Referee in that matter was subject to appeal.

2.27 This Court takes note of the following:-

- (i) On 19 November 2014, parties entered into an Agreement (**Page 6, 7 of SCT Copy Record**) pursuant to which Respondent as Lender lent Applicant as borrower of a sum of \$2,250.00 (**Loan Agreement**);
- (ii) The Loan Agreement also provided that:-
  - (a) Lender (**Respondent**) will charge a fee of \$350.00 per month until debt of \$2,250.00 is fully paid (**Clause 8**).
  - (b) A sum of \$4,500.00 was advanced on 11 August 2014 (**Clause 10**).
  - (c) Total debt stood at \$6,750.00.
- (iii) On 15 May 2015, Respondent as Vendor and Applicant as Purchaser entered into Agreement for sale and purchase of Vendors two trucks (**“Sale Agreement”**) (**Pages 9 to 13 of SCT Copy Record**)
- (iv) Clause 3 of the Sale Agreement provide as follows:-



**“That the Vendor had previously borrowed the sum of \$7,500.00 from the Purchaser and both parties agree that this contract will supersede any previous contract for borrowing.”**

(v) At paragraph 3 and 4 of SCT Ruling the Referee states as follows:-

“3. The Tribunal then clearly explained the definition and meaning of the word both in English and as well as in Hindustani, citing examples such as dates of an Agreement and the subject matter which was also shared by and in accord with the views held by Kunal Singh a practicing Solicitor, who was present as a witness.

4. The Respondent then stated that he now understood its meaning but added that he had paid the claimant a sum of \$5,000.00 for an earlier Claim, which was currently on appeal and that the matter before the Tribunal was a false Claim.”

(vi) Referee in his Ruling does not say as what meaning he gave to Applicant for the word “supersede” in clause 3 of Sale Agreement.

2.28 Applicant during SCT hearing gave evidence that Respondent had already paid Respondent \$5,000.00 in an earlier SCT Claim which was subject to Appeal.

2.29 The word “supersede” in clause 3 in simple and layman’s terms means that Sale Agreement has taken over any earlier Agreement that was entered between the parties where the Applicant borrowed \$7,500.00 from the Respondent.

2.30 Referee should have permitted the Applicant to fully clarify as to under which Agreement the Respondent claimed \$5,000.00 in earlier SCT claim.

2.31 Referee should have also called for the earlier claim file to verify the claim rather than shutting Applicant out from verifying earlier claim.

2.32 If upon verification of earlier claim it would have been found out that earlier claim was under Loan Agreement which was superseded by the Sale Agreement then Respondent’s claim subject to this proceeding would have exceeded

Referee's jurisdiction on the ground that Respondent is claiming in excess of \$5,000.00 by filing two separate claims.

- 2.33 Even though the Referee looked at clause 3 of the Sale Agreement he failed to take into consideration or mention as to why the words Vendor and Purchaser were amended in handwriting without any parties initialling the amendment.
- 2.34 As to grounds stated in section 33(1)(a) of SCT Act this Court finds that the Referee acted in an unfair manner by failing to hear Applicant fully on the earlier claim in which he allegedly paid Respondent \$5,000.00 or verify the earlier claim himself to see if Respondent's earlier claim was pursuant to Loan Agreement or any other Agreement which was superseded by Sale Agreement.
- 2.35 This Court is of the view that because of the Referee acting in an unfair manner, it prejudicially affected the results of the proceedings.
- 2.36 This Court is also of the view that Learned Magistrate failed to consider the grounds of Appeal before him in detail.
- 2.37 This Court holds that Applicant's ground of appeal appears to be meritorious and has chance of success.

### **Prejudice to the Respondent**

- 2.38 In **Avery's** case his Lordship Justice Richmond at page 92 further stated:-

**“The rules do not provide that the Court may grant leave if satisfied that no material prejudice has been caused by the failure to appeal in time. Everything is left to the discretion of the Court on the wide basis that leave may be granted in such cases as the 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, the nature of the litigation and the need of the**

**applicant on the one hand for leave to be granted together with the effect which the granting of leave would have on other persons involved.”**

2.39 His Lordship Justice Marsack JA in **Latchmi’s** case stated:-

**“In deciding whether justice demands that leave should be given, care must, in my view, be taken to ensure that the rights and interests of the Respondent are considered equally with those of the Appellant.”**

2.40 It is not doubted that a successful litigant is entitled to fruits of litigation without undue delay.

2.41 Respondent has not stated in his Affidavit in Reply if he will be prejudiced in any way if this Court grants Leave to appeal.

### **3.0 Conclusion**

3.1 Whilst this Court finds that delay is inordinate reason for delay is unsatisfactory and Respondent is entitled to fruits of litigation, merits of the appeal, chance of appeal succeeding and interest of justice demand that Leave be granted.

### **4.0 Appeal**

4.1 In order to avoid unnecessary delay and that is stated at paragraphs 2.26 and 2.35 of this Ruling, this Court is of the view that Applicant’s appeal be allowed and matter be returned to SCT for determination of the claim by another Referee.

### **5.0 Costs**


5.1 Since, the Application for Leave to Appeal out of Time was filed by Applicant due to him/or his Solicitors inaction in not filing Appeal within time prescribed by the Learned Magistrate it is only fair that Applicant pay the costs.

## 6.0 Orders

6.1 I make following Orders:-

- (i) Applicant is granted Leave to Appeal Learned Magistrate's decision delivered on 1 September 2016;
- (ii) Appeal is allowed;
- (iii) Referee's Order made on 7 December 2015, in SCT Claim No. 450 of 2015, is set-aside;
- (iv) SCT Claim No. 450 of 2015 be re-heard by another Referee;
- (v) Applicant, Mohammed Sahim do pay Respondent, Sanjay Singh Verma's costs assessed in the sum of \$800.00 within twenty-one (21) days from date of this Ruling.



  
**K. Kumar**  
**Acting Chief Justice**

At Suva  
27 May 2020

**AMRIT CHAND LAWYERS for the Appellant**  
**PRENAPREETIKALAWYERS for the Respondent**