IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

MISC. NO: 22 of 2011
(High Court HBC 446 of 2005)

BETWEEN : **SURESH PRASAD**

Appellant

AND : **HOUSING AUTHORITY**

Respondent

Coram : **Calanchini P**

Counsel : **Appellant in person.**
Mr N Lajendra for the Respondent.

Date of Hearing : **24 January 2014**

Date of Decision : **26 March 2014**

DECISION

[1] This is an application under Rule 27 for an enlargement of the time specified in Rule 16 of the Court of Appeal Rules (the Rules) for filing and serving a notice of appeal. Such applications are sometimes referred to as applications for leave to file and serve a notice of appeal out of time. The Appellant is seeking to appeal an order of the High Court striking out his action for want of prosecution.

[2] The application was made by summons filed on 2 June 2011 by the Appellant acting in person. The application was supported by an affidavit sworn on 18 April 2011 by Suresh Prasad.

[3] The application was listed for mention before me on 25 July 2012. On that day directions were given for the filing of further affidavits. It would appear that the Respondent had attempted to locate a copy of the judgment at the Lautoka Registry of the Court and as a result was unable to file an answering affidavit prior to the next mention date which was fixed for 21 August 2013.

[4] The Respondent finally, on 11 September 2013, filed an answering affidavit sworn on 10 September 2013 by Peceli Baleikorocau. The Appellant did not file a reply affidavit. The parties were directed on 27 September 2013 to file written submissions. The Respondent filed written submissions on 27 November and the Appellant filed brief submissions on about 20 December 2013.

[5] When the parties appeared before me on 24 January 2014 they indicated that they did not intend to make further submissions orally and would rely on their already filed written submissions.

[6] The undisputed facts have been summarised by the Respondent in the written submissions filed on 27 November 2013 and to those of which are relevant reference will be made later in this decision. On 26 May 1993 the Appellant commenced proceedings by writ against the Respondent for wrongful dismissal claiming damages and an order for re-instatement.

[7] At this stage it is appropriate to point out that a claim for wrongful dismissal at common law is a claim for breach of contract and as such the only remedy available at common law is damages. Re-instatement is not a common law remedy for breach of contract of employment. Since a contract of employment is one for personal services, it falls within the category of contracts whose execution the court cannot supervise and will not ordinarily enforce by an order for specific performance (See Chitty on Contracts – 29th Edition at paras. 39-200 to 39-2002). Furthermore, in a dispute

arising under a contract of employment, a court will not intervene by way of injunction unless it is satisfied that the relationship of mutual trust and confidence subsists.

[8] The Appellant's action was dismissed for want of prosecution by the High Court on 22 October 2002. It is also appropriate to comment briefly on the effect of this Order. It may at times have been thought that there was a distinction between the use of the words *"dismissed for want of prosecution"* and *"struck out for want of prosecution."* The distinction being that the use of the former put an end to the proceedings even if the order had been made before any limitation period had expired. The latter left open the possibility of fresh proceedings being commenced if the limitation period had not expired. However in proceedings involving *"want of prosecution"* applications by defendants, the principal issues are delay and prejudice. The proceedings do not involve a finding on the merits and the order in whatever form does not of itself determine the claim (see **Hart –v- Hall & Pickles Ltd** [1969] 1 QB 405 CA). The expiry of the limitation period may have the effect of preventing fresh proceedings. As a result the two expressions are assumed to be used interchangeably with no particular significance to be attached to the use of either form. Needless to say, since nine years had elapsed between the date on which the proceedings were commenced and the date on which the order was made by the High Court, the limitation period had expired and as a result the Appellant's claim was by then statute barred.

[9] On 26 January 2011 the Appellant filed a Notice of Motion in the High Court seeking re-instatement of the action. It must be recalled that in order to have an action re-instated, it is first necessary to obtain an order setting aside the decision that terminated the action in the first place. The Appellant could only have his claim for damages for breach of contract re-instated if he was successful in an application to have the orders made by the High Court on 22 October 2002 set aside.

[10] However the orders sealed on 13 February 2003 make it abundantly clear that before making his orders on 22 October 2002 the learned High Court Judge had heard both parties in an inter partes hearing on the summons filed by the Respondent. Unfortunately the orders are lacking in essential information. Neither the date of the summons nor the date of its filing is stated. The affidavit which is required to

accompany and support the application is not referred to. However it can be said with some certainty that the application was not made ex parte nor was the hearing conducted in the absence of the Appellant. Under those circumstances I am unaware of any rule that would enable the Court to entertain an application for re-instatement of the action. In the circumstances of this case the High Court was *"functus officio."* If the limitation period had permitted, the Appellant might have been able to pursue his claim in the High Court by way of a fresh writ that commenced a new action for the same claim.

[11] The Master of the High Court delivered a written Ruling on 4 February 2011 following a hearing the day before. The Master outlined in helpful detail the background to the Appellant's proceedings. The Master correctly pointed out that the Appellant should have lodged a timely appeal against the orders of the High Court made on 22 October 2002 and that in 2011 he would need to make an application for an extension of time to file and serve a notice of appeal. This of course is the application presently before me.

[12] The Master's reference to the *"principles of re-instatement"* in paragraph 7(c) of his Ruling is somewhat confusing when considered in the context of the application before him. The position in this case is that the Appellant's only remedy following the striking out order made by the High Court was to appeal to this Court.

[13] In **Trade Air Engineering (West) Limited and Others –v- Taga and Others** (unreported ABU 62 of 2006 delivered 9 March 2007) the Court of Appeal observed at paragraphs 12 and 13:

> *"Although the judge rejected the Appellants' submissions he did give leave to them to apply for the action to be re-instated. [Counsel] was unable to refer us to any provision in the rules granting the court power to re-instate an action struck out in these circumstances. Generally a party's only remedy following the striking out of its action is to appeal. Exceptions to this general rule such as O13 R10, O14 R11, O24 R17 or O32 R6 have no application to Order 25.*

> *_ _ _ The rationale for granting leave to apply for re-instatement after the decision to dismiss the action had already been taken is not easy to discern."*

[14] Although the **Trade Air** proceedings (supra) arose under O25 R9 of the High Court Rules, the Court of Appeal considered that the only additional power given to the High Court to strike out for want of prosecution under that Rule (i.e. additional to the Court's inherent jurisdiction) was the power to strike out *"of its own motion."* Otherwise O25 R9 did not *"confer any additional or wider jurisdiction to strike out on grounds which differed from those already established by authority"* (supra at paragraph 16).

[15] As a result it was not necessary for the Master to make any reference to the *"principles of re-instatement."*

[16] As for the present application, the principles to be applied by a court in an application for an extension of time to appeal are well settled. Whether the application should be granted involves the exercise of a discretion. When called upon to exercise that discretion the matters that should be considered by a court were discussed by the Supreme Court in **NLTB –v- Ahmed Khan and Anor** (unreported CBV 2 of 2013; 15 March 2013). As a result of that decision, the court is required in this application to consider (a) the length of the delay, (b) the reason why the notice of appeal was not filed within time, (c) whether there is a ground of appeal that, in this case, not only merits consideration by the Court of Appeal but is a ground that will probably succeed and (d) whether the Respondent will be unfairly prejudiced if time is enlarged? The Court may also consider whether the appeal raises (1) issues of general importance (**NLTB –v- Lesavua and Subramani** - unreported Misc. action No.1 of 2004; 18 March 2004), (2) important questions of law (**Beci and Others –v- Kaukimoce and Others** – unreported Misc. action No.2 of 2009; 20 January 2010) and (3) issues that in the interest of justice should be considered by the Full Court (**Narayan –v- Narayan** – unreported Misc. action No.14 of 2009; 3 September 2010).

[17] The length of the delay is calculated from the date on which order of the High Court was "signed, entered or otherwise perfected" (being the requirement under Rule 16 prior to 13 December 2008) which was 13 February 2003 to the date on which the

application for the extension of time was filed. The application made by summon was filed on 2 June 2011. Since the order made by the High Court on 22 October 2002 was a final order the notice of appeal was required to be filed by 27 March 2003 being 42 days from 13 February 2003. The delay is over 8 years and is substantial and inordinate.

[18] The explanation for this excessive delay should ordinarily be forthcoming in the affidavit filed by the Appellant in support of his application. In his affidavit sworn on 18 April 2011 the Appellant would appear to be attempting to explain the delay when he deposed in clauses 4 to 6 that :

> *"4 That I raise this with my Solicitors then of which my Solicitors didn't adhere to it so I also took legal action against my Solicitor.*
>
> *5 My primary ground appeal is that the learned judged with respect failed to construe, analyse and/or make findings with respect to the documents dated 4th July 2003 which is unsatisfactory to my case. In addition the learned judgment failed to correctly apply section s 6 and/or the Act.*
>
> *6 The delay in the application for security for costs has been as a result of late instructions in the relation of the finalisation of the grounds of appeal."*

[19] The explanation which appears to be offered in paragraph 4 relates to the conduct of the Appellant's legal practitioners. The material in support of this explanation is incomplete to say the least. The correspondence which appears to be attached to the affidavit in support but which has not been formally exhibited, identified or verified, would suggest that the Appellant became aware of the High Court order dismissing his action for want to prosecution on 22 July 2003. There is also a letter dated 1 October 2010 attached to the affidavit and which again has not been formally exhibited, identified or verified. This letter is from the Chief Registrar and is addressed to the Appellant. The letter informed the Appellant that his complaint against his legal practitioner (solicitor) was unsuccessful. A copy of a judgment (presumably given by the Independent Legal Services Commission) was attached to the letter. However that judgment has not been exhibited or produced.

[20] Although paragraph 4 and the correspondence to which reference is made above may explain the delay between October 2002 and July 2003, there is no attempt to explain the delay between that date and the date on which the present application was filed. In the re-instatement application there was affidavit material to which the Master referred in his written Ruling that would indicate that the Appellant had decided to pursue his complaint against his solicitor first hoping that a favourable outcome would facilitate his re-instatement application. It is appropriate to remark that the Appellant had taken the wrong option. It is not clear whether the Appellant had sought legal advice before embarking on his chosen course of action. The principal objective for the Appellant, after he became aware of the orders made in October 2002, should have been to revive his claim. Any complaint about his solicitors could have been pursued at the same time or after he had exhausted his options to revive his claim. I have already indicated that an application to re-instate his action was not the correct next procedural step. His only remedy was to appeal.

[21] Paragraph 5 of the affidavit in support refers to a document dated 4 July 2003. There is no copy of this letter but it is referred to in the letter dated 22 July 2003 from the Deputy Registrar at Lautoka. As the court was "*functus*" at that stage there was no obligation upon the learned Judge to construe, analyse or make findings in respect of any application that may have been directly or indirectly seeking an order for re-instatement. The High Court's involvement with the action had come to an end when the learned High Court Judge dismissed the action for want of prosecution in October 2002. Whatever may have been the Appellant's intention for deposing to paragraph 5, it certainly does not offer any explanation for the delay that is under consideration in this application.

[22] Paragraph 6 refers to a delay in the application for security for costs and late instructions for the finalisation of the grounds of appeal. An application to the Registrar to fix an amount as security for costs to prosecute the appeal is only required after a notice of appeal has been filed within time or outside of time with the leave of the Court. It has no application to the present proceedings.

[23] As for the reference to late instructions for finalising the grounds of appeal and the reference to annexed revised grounds of appeal in paragraph 8 of the same affidavit,

all that needs to be said is that there is no such document attached to the affidavit nor has such a document been filed at any time since the affidavit was filed.

[24] The position is that there has been inordinate delay and virtually no explanation or at least no satisfactory explanation for that delay. Under those circumstances the exercise of the court's discretion will depend, to some extent, on the merits of the proposed appeal. As Thompson JA in **Tevita Fa –v- Tradewinds Marine Ltd and Another** (unreported ABU 40 of 1994; 18 November 1994) observed at page 3:

> *"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."*

[25] In view of the inordinate delay and the wholly unsatisfactory explanation for that delay, in my judgment the Appellant must do more than show that he has a reasonable chance of success; he must establish that there is a ground of appeal that has a high probability of succeeding. In assessing the probability of success of any one ground of appeal the court does not usually consider in detail the merits of any particular ground. A single judge exercising the jurisdiction of the Court under section 20 of the Court of Appeal Act does not adjudicate the appeal. In this application the Appellant has not exhibited or filed proposed grounds of appeal. As a result it is not possible to determine whether any ground has a high probability of succeeding.

[26] In support of its striking out application the Respondent had relied on an affidavit sworn on 26 September 2001 by Jagdish Prasad the then Secretary to the Housing Authority Board. In paragraph 3 the Respondent set out the factual basis for the application as follows:

> *"Over the last ten years, a number of Plaintiff's fellow employees, including the Plaintiff's supervisors employed either at the Defendant's office at Lautoka or Suva who might have had personal knowledge of matters relating to this case have either resigned or in some cases services have been terminated. There has been charge of at least three Chief Executives over the last ten years."*

[27] The Respondent claimed that because of the lapse of time it would be difficult to locate witnesses and difficult for those witnesses to recall events that occurred ten years earlier and that as a result the Respondent's case would be *"seriously"* prejudiced if the action proceeded to trial.

[28] However, apart from referring to the amount of time that had elapsed since the termination of employment, the affidavit does not refer to any fault on the part of the Appellant that may have been the cause of the delay. It must be recalled that there is a limitation period within which an action must be commenced although in this case the Appellant commenced his action promptly. It is not unusual in this jurisdiction for the trial of the action to come on for hearing some years, if not many years, after the cause of action arose. In my judgment the material in the affidavit, would not by itself be sufficient to strike out the Appellant's claim.

[29] It would appear that the learned judge in the Court below did not hand down written reasons for his decision, apparently choosing instead to make an ex tempore order after hearing Counsel for both parties. On perusing the file, it would appear that Pre-Trial Conference Minutes had been filed on about 17 March 1994. The action was listed for hearing before a Judge of the High Court at Lautoka on 10 November 1994. As Counsel for the Appellant was engaged in a criminal trial on that day, the Judge ordered the action be taken out of the list by consent and a new date to be fixed by the Deputy Registrar. The action was subsequently re-listed for hearing on 8 and 9 August 1995. On this occasion the action was taken out of the list at the request of the then legal practitioner acting for the Respondent due to commitments in the Court of Appeal on 8 August 1995. The Appellant's practitioner did not oppose the application and an order was made to that effect by consent.

[30] It would appear that from 8 August 1995 to 1 September 2000 the Appellant's practitioner made no effort to have the action listed for hearing although the proceedings had been listed for mention before the Deputy Registrar on a number of occasions during that period for the purposing of fixing a trial date.

[31] By summons dated 1 September 2000 the Appellant's Counsel applied for an order under Order 34 of the High Court Rules that the action be entered for trial. The file

indicates that between the 29 November 2000 and 18 May 2001 the application was listed for mention before the Judge on four occasions. On the second of those dates, being the 26 February 2001, the Appellant's practitioner requested by letter to the Court that the date be vacated due to a criminal trial commitment.

[32] On 30 July 2001 the Judge gave directions to the parties under Order 34. When the parties appeared in Chambers on 25 January 2002 the action was listed for hearing on 22 April 2002. However it would appear that that hearing date was vacated by the Court as there is a Notice of Adjourned Hearing dated 17 April 2002 informing the parties that the action was listed for mention only on 28 June 2002. On that day the action was listed for hearing on 22 October 2002.

[33] In the meantime the Respondent had filed and served a summons seeking an order that the action be struck out for want of prosecution. The summons was filed on 10 October 2001 and was returnable before Judge in Chambers on 9 November 2001. There is no indication in the file as to what happened in Chambers on that day. As it turned out, it was the Respondent's summons to strike out that was heard on 22 October 2002. There does not appear to have been any interlocutory orders made in respect of that summons and it is not clear whether the Appellant was even afforded an opportunity to file an answering affidavit.

[34] Whilst some aspects of the procedures followed by the Registry and the parties may have been due to factors beyond their control because of a shortage of Judges at Lautoka and the political upheaval in 2000, two matters stand out from the material that count against the Appellant. The first is that the Appellant whether because of his legal practitioner's inactivity or for some other reasons, made no effort to have the action listed for hearing between 8 August 1995 and 1 September 2000. There is simply no explanation in any material to explain that delay.

[35] At the hearing before me the Appellant produced a medical certificate dated 22 January 2014 from the Lautoka Hospital signed by Dr Akhtar Ali, the Surgical Registrar. The certificate stated that:

> *"Mr Suresh Prasad was admitted on 8 March 2006 under care of Medical Unit, Lautoka Hospital for weakness of right side of body and vomiting. He was diagnosed as left acute or chronic subdural hematoma.*
>
> *He was operated on 20/03/2006 by Dr V Taoi Consultant Surgeon and drained 65ml blood. He recovered satisfactorily.*
>
> *He was discharged after 10 days of post-operative care with Neurological recovery. Mr Suresh is camobid with diabetes mellitus."*

[36] Clearly, that material does not explain a five year delay in prosecuting his action between 1995 and 2000. The appeal against the striking out order is unlikely to succeed.

[37] The second matter that works against the Appellant is that there is simply no affidavit material that would give any indication that his action for damages for breach of contractcould proceed to trial with any reasonable chance of succeeding.

[38] As a result I have concluded that the Appellant's application for an enlargement of time, for all of the reasons discussed in this decision, should be refused and dismissed. The applicant is ordered to pay costs fixed summarily in the sum of $650.00 to the Respondent within 28 days.

HON. MR JUSTICE W. D. CALANCHINI
PRESIDENT, COURT OF APPEAL