

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

CIVIL APPEAL NO. ABU 73 OF 2017
(High Court HBC 88 of 2012)

BETWEEN : SUVA CITY COUNCIL

Appellant

AND : SETAVANA SAUMATUA

Respondent

Coram : Chandra RJA

Counsel : Mr. D. Sharma for the Appellant
Mr. I. Fa for the Respondent

Date of Hearing : 18 October, 2017

Date of Ruling : 6 December, 2017

DECISION

- [1] This is an application by the Appellant seeking an extension of time for leave to appeal and stay of the substantive matter.

- [2] In its application the Appellant has sought the following orders:
1. An extension of time for leave to appeal the Interlocutory judgment of Justice Hamza delivered on 25th May 2016;
 2. An extension of time for leave to appeal the Interlocutory Judgment of Justice Hamza delivered on 24th November 2016.
 3. Enlargement of time to file and serve a notice of appeal within 7 days from the date on which the said Leave to appeal is granted.
 4. The substantive matter in this case be stayed and whilst this application for leave to Appeal: and Appeal are heard and determined.
 5. Costs in the cause.
- [3] The Application has been made pursuant to :
- (i) Order 3 Rule 4 of the High Court Rules 1988;
 - (ii) Section 12(2)(f) of the Court of Appeal Act, Cap. 12;
 - (iii) Section 20(1)(a);(b)(e) and (k) of the Court of Appeal (Amendment) Act 1998;
 - (iv) Rules 4,6,16, 26(3) 27 and 34 of the Court of Appeal Rules; and under inherent Jurisdiction of the Court.
- [4] The application has been supported by an affidavit deposed to be Bijay Chand the Acting Chief Executive Officer of the Appellant Council.
- [5] The Respondent has filed an affidavit in opposition dated 16th August 2017.
- [6] The Appellant has filed an affidavit 22nd August 2017 in response to the Respondent's affidavit of opposition.

Brief history of proceedings in the High Court

- [7] The Respondent filed a Writ of summons against the Appellant based on the alleged breach of his employment contract resulting in the unlawful termination of his services.

- [8] The Appellant's defence was that the termination was on a directive of the then Line Minister for Local Government, which had received a directive from the Permanent Secretary of the Prime Minister's Office, to terminate 12 employees, including the Respondent for reasons of illegal bloggings against the then Interim Government.
- [9] Appellant sought the protection of s.173(4) of the 2013 Constitution on the basis that it had acted on the directive of its Line Minister between the period from 5th December 2006 to October 2014.
- [10] The Appellant filed its Summons to strike out the Respondent's claim on the basis that the Court had no jurisdiction to hear the said action by virtue of Section 173(4)(d) of the Constitution.
- [11] The learned High Court Judge by his interlocutory ruling dated 25th May 2016 held that the Court had jurisdiction to hear the said action and struck out the Appellant's Summons.
- [12] The Appellant filed an application for leave to appeal the said decision to the same High Court and the Court dismissed the application by order dated 24th November 2016.
- [13] It is thereafter that the Appellant filed the present application seeking an extension of time for leave to appeal the interlocutory judgment of the High Court dated 25th May 2016 as well as extension for leave to appeal the judgment of the High Court dated 24th November 2016.

Consideration of the Present Application

- [14] At the outset it is observed that the Appellant has sought an extension of time for leave to appeal against two judgments of the High Court, which have been delivered on 25th May 2016 and 24th November 2016. The judgment of the 24th November 2016 is the judgment refusing leave to appeal which was sought by the Appellant against the interlocutory judgment of 25th May 2016.
- [15] In terms of section 12(2)(f) Leave to appeal to the Court of Appeal is required where a party is seeking to challenge an interlocutory judgment. In terms of Rule 26(3) of the Court of Appeal Rules, an application may be made either to the court below or to the Court of Appeal, it shall be made in the first instance to the court below. New India Assurance Company Ltd. v. Panach Investment Ltd (2017) FJCA 46; ABU0059.2016(12 May 2017); New India Assurance Co Ltd v. Sakiusa Soli and Others ABU 66/2015;22 September 2017.
- [16] Initially the Appellant had made his application to the High Court seeking leave to appeal to the Court of Appeal on 13 June 2016 which was within time, i.e. within two weeks from the date of the Ruling.
- [17] Thereafter the Appellant made the present application on 26th June 2017 to this Court which was after a period of six months from the date of the refusal(24th November 2016) to grant leave to appeal from the interlocutory judgment dated 25th May 2016.
- [18] The Appellant having first sought leave to appeal the interlocutory judgment of 25th May 2016, had pursuant to Rule 26(3) of the Court of Appeal Rules sought an extension of time to leave to appeal firstly from the lower court, which is the High Court and thereafter made the present application when that application was refused on the 24th of November 2016.

- [19] When such an application is refused by the High Court, an Appellant has to renew the application seeking leave to appeal to the Court of Appeal, by making the application to the Court of Appeal. Such an appeal is not against the refusal but a renewed application for leave against the initial interlocutory judgment, which in this case was the judgment of 25th May 2016.
- [20] The application seeking enlargement of time for leave to appeal has been made by the Appellant in terms of Section 20(1)(b) of the Court of Appeal Act (Cap.12) to this Court after almost 11 months from the date of the interlocutory judgment. However, in the meantime, the Appellant has first sought leave from the High Court in terms of section 26(3) of the Court of Appeal Rules which was refused by judgment of 24th November 2016.
- [21] In consideration of the grant of extension of time for leave to appeal, the Court of Appeal exercises its discretion. In exercising its discretion the factors to be considered have been laid down by the Supreme Court in **NLTB v Ahmed Khan and Anor** (unreported CBV 2 of 2013; 15 March 2013). They are:
- (a) the length of the delay;
 - (b) the reason for the delay;
 - (c) whether there is a ground of merit justifying the appellate court's consideration or, where there has been substantial delay, nonetheless is there a ground that will probably succeed;
 - (d) if time is enlarged, will the Respondent be unfairly prejudiced.

The delay and Reasons for the delay

- [22] If the time period is taken into account from the date of the interlocutory judgment of 25th May 2016, a period of almost 11 months have gone by in making the application to the Court of Appeal. It is a substantial delay. However, the period within which the

application was before the High Court upto the time of the refusal on 24th November 2016 can be excused as the application was pending before the High Court.

- [23] Even if the time is taken into consideration from the 24th of November 2016 the application has been filed on the 26th of June 2017 and there has been a delay of over six months. In the affidavit filed on behalf of the Appellant, it has been stated that steps were taken to add the Attorney General as a party which application was subsequently withdrawn in March 2017. As submitted by the Respondent, that was not an excusable reason if the Appellant had the intention of appealing the interlocutory judgment. In these circumstances, the reasons adduced for the delay cannot be considered to be satisfactory.

Merits of the Appeal

- [24] Even if there has been a delay it would be necessary to consider whether there is merit in the appeal of the Appellant. Justice Calanchini PCA in Gunac (South Pacific) Ltd v Formscuff (Fiji) Ltd [2014] FJCA 97; ABU45.2013 (13 June 2014) as paragraph [12] stated:

"In a case such as the present where the explanation for the delay is on the one hand unsatisfactory and on the other non-existent, the Appellant is required to show at the very least that he has a reasonable chance of success. In assessing the chances of success a single judge in an application such as the present will not consider in detail the merits of any particular ground., A single judge exercising the power of the Court of Appeal under section 20(1) of the Act does not decide the appeal. The task is to form an overview of the appeal on the basis of the limited material that is available in the absence of the appeal record and to assess the chances of success."

- [25] In the present case the explanation for the delay is unsatisfactory. However, it would be necessary to consider whether the Appellant has a reasonable chance of success. The Appellant has set out the following grounds of appeal in the proposed notice of appeal:

"(i) The learned Judge erred in fact and in law when he took the view that the directive made by the Permanent Secretary in the Prime

Minister's office was not caught by section 173(4)(d) of the Constitution.

(ii) The learned Judge erred in fact and in law when he made the finding that the Appellant had acted on the directive of the Permanent Secretary in the Prime Minister's Office in terminating the Respondent's employment and in doing so he did not consider the fact that the Appellant only acted on the advice and directive of its Line Minister, the Minister for Local Government after receiving the letter from the Minister of Local Government on 2nd February 2010.

(iii) The learned Judge erred in fact and in law when he made the finding that the decisions of the Special Administrator were not made under the Local Government Amendment Promulgation 2008 but under the Local Government Act Chapter 125 because the duties the Special Administrator was discharging were duties under the Local Government Act."

- [26] The basis of the Respondent's action in the High Court was the termination of her employment from the Appellant Council. The Appellant took up the position that the Court had no jurisdiction to hear and determine the action instituted by the Respondent. The Appellant's position was that s. 173(4)(d) of the 2013 Constitution was a bar to such an action.
- [27] It was the submission of the Appellant that the issue on appeal is a Constitutional issue and that it stands a substantial prospect of success.
- [28] It is observed that there were three phases in the termination of employment of the Respondent. Firstly, there was a directive to the Special Administrator of the Suva City Council by the Permanent Secretary to the Prime Minister to which the Special Administrator had responded and suggested a procedure to carry out the directive. Secondly, the line Minister had issued a directive to the Special Administrator to carry out the directive of the Permanent Secretary which was issued earlier. Thirdly, the Special Administrator acted in accordance with the directive of the line Minister which was the termination of employment of the Respondent.

[29] The learned High Court Judge in his interlocutory judgment held that the directive carried out by the Special Administrator was not covered by the provisions of s.173(4)(d) of the Constitution and refused the application of the Appellant to strike out the respondent's action and held that the Court had jurisdiction to hear and determine the action.

[30] The learned High Court Judge stated:

"[27] In the present case the Special Administrator of the Suva city Council, by letter dated 4 February 2010, terminated the employment of the Plaintiff. In the letter of termination it is stated as follows: "The Minister has directed me to inform you that it is important at this stage to adhere to the directive given by the Permanent Secretary Prime Minister's Office in his letter dated 8 January 2010 to you." It is evidence that the Special Administrator was carrying out a directive given NOT by the Minister concerned, but by the Permanent secretary of the Prime Minister's Office. The Minister concerned was merely communicating or informing this fact to the Special Administrator.

[28] Therefore, it is the view of this Court that the directive of the Permanent Secretary of the Prime Minister's Office, acting on behalf of the Prime Minister, would not be caught up under the provisions of Subsection 173(4)(d) of the Constitution, as a decision made or authorised or an action taken in terms of Subsection 9A(2) of the Local government (Amendment) Promulgation 2008."

[31] The learned High Court Judge cited the decision in State v Attorney-General & Minister for Justice, ex parte One Hundred Sands Ltd [2015] FJHC 286; HBJ 09.2015 (24 April 2015) where the High Court had interpreted the provisions of S.173(4)(d) of the Constitution in an application for Judicial Review. The High Court in that case had held that a decision taken after the period of 5 December 2006 and until the first sitting of the first Parliament under the Constitution (6 October 2014) was outside the ambit of 173(4)(d).

[32] The view expressed by the High Court in One Hundred Sands case on the interpretation of S.173(4)(d) was overruled by the Court of Appeal on appeal (Vide ABU 27 & 31 of 2015; 23 February 2017)

- [33] However, the learned High Court Judge in this case went on to state that the present case must be distinguished from the facts and circumstances of the One Hundred Sands case.
- [34] It is quite apparent therefore that the jurisdiction of the High Court would depend on the interpretation given to the effect of s.173(4)(d) of the Constitution on the decision of the Special Administrator in terminating the employment of the Respondent. A question relating to the application of a statute to a given set of facts, what should be the proper interpretation of such statutory provision, what would be the scope and effect of such provision are questions of law as set out at paragraph [27] in the judgment of the Court of Appeal in Prince Vyas Muni Lakshman v. Estate Management Services Limited Civil Appeal No.ABU 0014 of 2012 (27 February 2015).
- [35] In the above circumstances the grounds of appeal of the Appellant may stand the chance of reasonable success before the full Court of the Court of Appeal.

Prejudice to the Respondent

- [36] Since the communication of the Special Administrator of the Appellant Council terminating the employment of the Respondent was on 4 February 2010 a considerable time has elapsed, and the Respondent would be prejudiced. However, it would be necessary to see that justice is meted out to both parties in relation to the application of the relevant law. In arriving at an ultimate conclusion, though delays would be inevitable in such circumstances as in the present case, it is necessary to settle the application of the law in such issues, and that would outweigh the prejudice that would be caused to the Respondent.
- [37] In Yunimoli Sawmill Ltd v Sen [2013] FJCA 140; ABU28.2013 (20 December 2013), Justice Calanchini PCA stated in a situation where there was a considerable delay but there were merits in the appeal :

"[26] there are examples of leave to file an appeal out of time having been granted even though the delays have been considerable and the explanations unsatisfactory when (1) the grounds of appeal raised issues of general importance (NLTB v

Lesavua and Another Misc. No.1 of 2004; 18 March 2004), (2) the grounds of appeal raised important questions of law that merit the consideration of the Court of Appeal (*Atami Beci and Others v Kaukimoce and Others* Misc. No.2 of 2009; 20 January 2010) and (3) the grounds of appeal should be considered by the Court of Appeal in the interests of justice (*Narayan v Narayan* Misc. No.14 of 2009; 3 September 2010)."

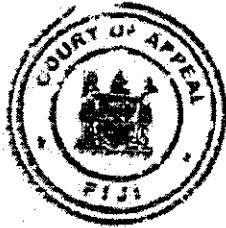
- [38] In the above circumstances leave is granted to file an appeal out of time on condition that the Applicant pay the costs of this application fixed at \$2500 to the Respondent within 21 days. Notice of appeal is to be filed and served within 28 days from date of this decision. Thereafter the appeal is to progress in accordance with the Court of Appeal Rules.


Stay of Proceedings

- [39] The Appellant has also sought a stay of the proceedings in the High Court pending the appeal to the High Court.
- [40] S.20(1)(f) of the Court of Appeal Act (Cap.12) confers a single Judge to stay an execution or make any interim orders to prevent prejudice to the claims of any party pending appeal.
- [41] The action of the Respondent before the High Court has not proceeded to trial yet. Proceeding with the action further in the High Court while the appeal of the Petition is pending would cause prejudice to the Appellant in the event he succeeds in his appeal and may even render his appeal nugatory.
- [42] Therefore the application of the Appellant seeking a stay of the proceedings is granted, until the conclusion of the appeal to the Court of Appeal.

Orders of Court:

1. *The Appellant is granted extension of time seeking leave to appeal;*
2. *The Appellant shall pay a sum of \$2500.00 to the Respondent within 21 days from the date of this decision;*
3. *The Appellant to file notice of appeal with the proposed grounds of appeal and served on the Respondent within 28 days of this order;*
4. *Proceedings in the High Court are to be stayed until the conclusion of the Appellant's appeal to the Court of Appeal.*





Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL