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

CIVIL APPEAL NO. ABU 8 of 2019
High Court Action No. of HBC 113 of 2011

BETWEEN	:	**ABDUL AFIZ MOTORS LIMITED**
		Appellant
AND	:	**RESHMI LATA LAL**
		Respondent
Coram	:	**Dayaratne, JA**
Counsel	:	**Mr A J Singh for the Appellant** **Mr A K Singh for the Respondent**
Date of Hearing	:	**14 November, 2019**
Date of Ruling	:	**29 November, 2019**

RULING

[1] The Appellant has made two applications to this court. The first is an application seeking enlargement of time to appeal and the other is an application for a stay of execution of the judgment of the High Court dated 20 November 2018. The applications are made in terms of Section 20(1)(b) and Section 20(1)(e) of the Court of Appeal Act (revised 2013) respectively. The High Court on 27 June 2019 refused the stay application on the basis that there was no appeal on foot.

I will deal with these two applications separately.

Application for enlargement of time to appeal

[2] In order to consider this application, it would be useful to set out the chronology of events. The judgment of the High Court was delivered on 20 November 2018. Therefore the appellant had time till 31 December 2018 to file his Notice of Appeal. The notice was filed in court on 28 December 2018, which was within time. However, the service on the Respondent was made only on 18 January 2019, which was 18 days after the appealable period lapsed. The matter had been listed in the Court of Appeal on 25 January 2019 but since the appeal was deemed abandoned for failure to serve notice on the Respondent within the required time period, the Appellant was required to obtain enlargement of time.

[3] On 28 January 2019, an affidavit had been sworn on behalf of the Appellant seeking enlargement of time and on 30 January 2019 summons together with the said Affidavit had been filed in court. The said summons together with the affidavit had been served on the Respondent on 13 February 2019 after issuance by court. The summons had been listed for 15 March 2019, and court had granted 21 days for the Respondent to file Affidavit in opposition and the Appellant to respond within 14 days. However, the Respondent had failed to file the affidavit in opposition within that period (by 5 April 2019) and the affidavit has been filed only on 28 May 2019. The parties were to file submissions within 28 days and that period expired on 3 May 2019. The Appellant has filed submissions on 29 April 2019 but the Respondent filed submissions only on 25 September 2019.

[4] It is important to note that the Court of Appeal Rules (the Rules) required that Notice of Appeal (Notice) "shall in addition to being filed in the Court of Appeal be served upon the Chief Registrar and upon all parties to the proceedings in the Court below who are directly affected". What happened in this case was that the Appellant filed the notice in the registry within the 42 day period but failed to serve notice on the Respondent, within that time. The service of notice on the Respondent was 18 days after the end of the 42 day period. Thus the default of the Appellant is with regard to the second part of the requirement.

[5] The matters that a court should consider in an application of this nature has been succinctly dealt with by Calanchini P in the case of **Gulf Seafood (Fiji) Ltd v iTaukEi Land Trust Board** [2017] FJCA 185; ABU 94.2016 (20 December 2017). He states that;

> *"The principles upon which an enlargement of time may be granted are well known. They were considered by the Supreme Court in **NLTB (now iTLTB) v Ahmed Khan and another** (CBV 2 of 2013; 15 March 2013). In order to ensure that the discretion is exercised in a principled manner the court considers (a) the length of the delay, (b) the reasons for the delay, (c) whether there is a general 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 and (d) if time is enlarged, will the respondent be unfairly prejudiced. The discretion should be exercised in a manner that will re-inforce the importance of compliance with the rules of Court and the need to bring finality to litigation (see Mc Caig v Abhi Manu CBV 2 of 2012; 24 April 2013)"*

[6] I will now consider the above matters in relation to the facts of this case. The length of the delay as stated earlier is only in respect of the service and is 18 days (although I am mindful that such failure renders the notice invalid). The explanation offered by the Appellant for the said delay is that the office of the Respondent's solicitor was closed since the solicitor had gone overseas. The Appellant states that the rubber stamp of the solicitor did not name an agent and the office in Nausori did not display any notice as to when the office would open. It was submitted that service on the Respondent personally too was not possible since the Respondent worked in the accounts section of the judicial Department and it was not possible to meet her during day time. The learned counsel who appeared for the Respondent (whose law firm was the solicitor on record) admitted at the hearing of this matter that he

was overseas during the relevant period and that his office was closed until 15 January 2019.

[7] It is clear that the Appellant cannot be faulted entirely for the failure to serve notice on the Respondent. It was not fair for the solicitor for the Respondent to keep his office closed for a considerable period of time without naming an agent. Although the learned counsel for the Respondent stated that there was an agent and that the name of the agent in Suva was mentioned in the rubber stamp used by him. However, the learned counsel for the Appellant said that such a name was not mentioned during the High Court proceedings and therefore, the Appellant was unaware of any agent. I have perused the documents filed by the Respondent in these proceedings. I find that in one of the documents (the affidavit opposing the stay application) the rubber stamp that has been placed by the solicitors for the Respondent "A.K.Singh Law" does not contain the name of an agent whilst in two other documents (the submissions of the Respondent and affidavit opposing the enlargement of time to appeal), the name of a town agent is given at the bottom of the rubber stamp but it appears to be typed.

[8] Although one may hasten to fault the Appellant for the failure to serve the notice personally on the Respondent in the absence of the solicitor, that would not be fair since the practice, as adverted to by learned counsel is for the Appellant to serve notice on the solicitor and not the party itself. In any event, the Appellant has explained as to why it was difficult to personally serve notice on the Respondent.

[9] Admittedly, the Respondent's solicitor's office was closed and there is doubt as to whether an agent had been named. It was submitted by learned counsel for the Appellant that the task of serving notice had been entrusted to a process server and that all attempts to serve notice on the solicitor and the Respondent were frustrated as a result of the reasons stated above. I wish to note here that the solicitor of the Respondent had been irresponsible in not making any alternative arrangements if the office was to be closed.

[10] The Respondent has cited the case of **Ports Authority of Fiji v C & T Marketing Ltd.** [2001] FJCA 1, ABU 0004.2001 (22 February 2001) where court stressed on the need to strictly adhere to the rules in order to ensure a more efficient appellate process. Court went on to observe that *"To allow the Appellant to file appeal for failure to follow the*

statutory steps and to allow the Appellant, either inadvertently or deliberately, to delay the appellate process for months or years, would clearly violate the purpose of the Rules". I am in complete agreement with the sentiments expressed in the said case and several others where the importance of following the Rules have been emphasized. However, I am mindful that there cannot be a rigid and inflexible yardstick to determine as to what would be 'undue delay'. That no doubt will depend on the facts and circumstances of each case.

[11] Considering the facts discussed above, I am inclined to agree with the Appellant that the blame for the failure to serve notice on time cannot be laid entirely on the Appellant. The notice has been served within three days of the solicitor's return to the country (the solicitor says he returned on 15 January 2019 and notice was served on him on 18 January 2019). This application for enlargement of time had been made on 13 February 2019. I also take in to consideration the fact that the delay infact was only in relation to the service of notice, although I am mindful, as stated earlier, that failure to serve would render the notice invalid. Therefore, I am unable to agree that there has been an undue delay and I am convinced that the Appellant has given acceptable reasons for the delay.

[12] The Appellant was sued by the Respondent in the High Court to recover a sum of $180,475. This sum was claimed on account of alleged payments made by her to the Respondent to effect repairs to her motor vehicle, cost of further repairs as a result of the Appellant's failure to carry out repairs properly and for special damages on account of loss of income as a result of not having the use of the said motor vehicle. The Appellant counter claimed a sum of $4120 being unsettled repair bills.

[13] In his judgment dated 20 November 2018, the learned High Court judge had refused to grant relief except for the claim for special damages for loss of income and that too for a shorter period than what the Respondent had claimed. The Appellant's cross claim was not allowed. Costs of $5000 has been awarded to the Respondent.

[14] The High Court judge in his judgment has awarded the Appellant a sum of $36,000 on the basis that the Respondent had been deprived of the use of the vehicle and thus lost her earnings from a timber transportation contract for a period of six months from November 2010 to April 2011. The position of the Appellant is that the vehicle was repaired and handed over to the Respondent in October 2010 and that it was used by the Respondent for

a short period consequent to the issue of a roadworthy certificate by the relevant authority. Thereafter, in the month of November 2010 certain corrective measures had to be made to the vehicle by the Appellant and the Respondent was to take possession of the vehicle in the latter part of that month. However, she had not turned up to accept the vehicle and it had been taken over by the Bank (which was the bill of sale holder) since she had defaulted in the payments due to the Bank. Later, the Bank had sold the vehicle to a third party.

[15] The Appellant points out that even prior to the vehicle being handed over to the Appellant for repairs, it had been seized by the Bank and the vehicle had been stripped of its major components and was not in a motorable condition.

[16] Therefore, the Appellant argues that the Respondent had ceased to earn any income from the vehicle long before it was handed over for repairs. Neither was there a possibility of her earning an income after the repairs since she failed to take possession of the vehicle in November 2010. The Appellant maintains that the learned judge was therefore wrong in awarding damages for loss of income for the period November 2010 to April 2011.

[17] The Appellants have set out its grounds of appeal in the Notice of Appeal. All 10 grounds of appeal taken cumulatively revolves around the issue that the learned judge erred in granting special damages (for loss of earnings) in respect of a period that she was in no way capable of earning an income from the said vehicle.

[18] It must be noted that this court is not expected at this stage to consider the grounds of appeal in detail or venture to determine the appeal. Nevertheless it is necessary to consider as to whether the grounds merit a full hearing before the full court. My brief analysis of the matters adverted to by the Appellant indicates that 'there is a ground of merit justifying the appellate court's consideration'.

[19] I am also satisfied that the Respondent will not be unfairly prejudiced by the granting of an enlargement of time. Therefore, I grant the Appellant enlargement of time to appeal.

The application for a stay

[20] In a stay application, the matters to be taken in to account by court has been laid down by His Lordship the then Chief Justice Anthony Gates in **Native Land Trust Board v Lal** [2002] FJSC1, as follows;

> *"(a) Whether if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative)*
> *(b) Whether the successful party will be injuriously affected by the stay*
> *(c) The bona fides of the applicants as to the prosecution of the appeal*
> *(d) The effect on third parties*
> *(e) The novelty and importance of questions involved*
> *(f) The public interest in the proceeding*
> *(g) The overall balance of convenience"*

[21] I will now consider the above factors in relation to the facts of this case. The Appellant's position is that the learned High Court judge had erred in awarding special damages to the Respondent and moves that the said judgment be set aside. As stated earlier, the notice of appeal contains the grounds of appeal.

[22] If a stay is not granted and the Appellant is to give effect to the judgment, payment will have to be made to the Respondent. If the appeal is heard and a judgment is obtained in favour of the Appellant, it will be of no use to the Appellant since the money has already been parted with.

[23] Further, consequent to the stay application being supported before the President, an interim stay has already been granted upon the Appellant depositing in court, the full sum awarded by the High Court. Thus, damages awarded are presently lying in court and in the event the Appellant fails in its appeal, the Respondent will be entitled to the money along with interest. Thus the Respondent will not be injuriously affected by the stay.

[24] The bona fides of the Appellant in prosecuting the appeal cannot be in doubt since they have demonstrated diligence inspite of the initial lapse, in respect of which I have concluded that satisfactory reasons have been given. On the other hand I note that there has been considerable delay on the part of the Respondent in filing affidavit in opposition as

well as submissions. Considering the nature of the case, there cannot be any effect on a third party as a result of granting a stay. Although there is no basis to directly satisfy the factors set out in (e) and (f) above, in my view there is a question of law that merits determination by the full Court.

[25] Herein before (in dealing with the application for enlargement of time), I have discussed the merits of the appeal. In addition, I wish to observe that the Respondent failed to prove two of her causes of action and the third was allowed only in part. In the case of **New World Ltd v Vanua Levu Hardware (Fiji) Ltd** [2015] FJCA 172. ABU 76.2015 (17 December 2015), Calanchini P states as follows:

> *"The Respondent's principle objection to the granting of a stay pending appeal was that the appeal had no merit whatsoever. This court is required to consider the bona fides of the appellant in the prosecution of the appeal and whether the appeal involves a novel question of some importance.* ***However, at the same time the authorities suggest that the merits of the appeal will rarely be considered in any detail, it is usually enough if an appellant has an arguable case.*** *If the appeal is obviously without merit and has been filed merely to delay enforcement of the judgment, then the application should be refused".* (emphasis added)

[26] Considering all matters as discussed above, I believe that the Appellant has an arguable case and that the balance of convenience is tilted towards the Appellant. Therefore, I am of the view that this is a fit case where a stay should be granted.

[27] Accordingly, I grant the Appellant enlargement of time to appeal and a stay of execution of the judgment dated 20 November 2018 of the High Court.

[28] The parties will bear their costs.

Hon. Mr Justice V. Dayaratne
JUSTICE OF APPEAL