THE COURT OF APPEAL, FIJI

[ON APPEAL FROM THE HIGH COURT]

Civil Appeal No. ABU 091 of 2020

(Lautoka Civil Action No. 008 of 2018)

BETWEEN	:	**MACIU VAKACEGUILOMALOMA NAIVALU**
		Appellant
AND	:	**SUPERIOR ROOFING (FIJI) PTE LIMITED**
		Respondent
Coram	:	**Almeida Guneratne, JA**
Counsel	:	**Ms. A. Valenitabua for the Appellant**
	:	**Ms. R. Charan for the Respondent**
Date of Hearing	:	**4th February, 2021**
Date of Ruling	:	**12th February, 2021**

RULING

[1] This is an application seeking leave to appeal out of time the decision of the High Court dated 23rd July, 2018.

[2] At the hearing both parties submitted that they would be relying on their respective written submissions.

The Impugned Order (decision) of the High Court

[3] The order against which the present application has been made is one where the Court had granted leave to the Respondent (Original Applicant) to issue committal proceedings against the Appellant (Original Respondent).

The factual content that stands established in the case

[4] On a reading of the respective written submissions and the affidavits filed the following facts stand established. They are: -

(a) that, the impugned order is of an interlocutory nature.
(b) that, the length of the delay (as admitted by the Appellant) is some 2 years and four months and therefore is substantial (vide: paragraph 2) of the Appellant's written submissions.
(c) that, the Appellant had offered no reason for the delay (admitted again by the Appellant at page 3 (unnumbered) of his written submissions (at paragraph 2 thereof)

The Application of that factual content to the instant case

[5] If I were to pause at this point those factual aspects on the Appellant's own admissions go against him although the Appellant has made an oblique attempt to offer some reasons for the delay (supra, at page 3 paragraph 2 of his written submissions) in which regard I could not see a basis to view the Appellant's case favourably even on the views expressed by the Supreme Court in Fiji Industries Ltd v National Workers, (AV 008/2016, 27th October, 2017 (as per His Lordship, Keith, J.)

[6] Indeed, the thinking of His Lordship, Kumar, JA (as His Lordship then was) writing for the Court of Appeal in categorical terms laid down that,

"Legal practitioners should be conversant with the law and rules in respect to any Application and/or Appeals filed in Court" (Paragraph 10 in I-Taukei LTB .v. Waqa ABU 0138 of 2016, 13th July, 2018.

The Resulting Position at this point

[7] Thus, consequentially what remained to address was as to whether there are merits and/or prospects of success in appeal if the present application is to be granted.

Consideration of the Supreme Court decision in NLTB .v. Khan (CBV 2 of 2013, 15th March, 2013

[8] I must say, neither of the parties have referred to that case in their written submissions, although other decision striking a common chord with it have been cited.

[9] Be that as it may, the criteria laid down in that case, in regard to consideration of an application for extension of time to appeal, are as follows:-

(i) the length of the delay.
(ii) the reasons for the delay.
(iii) the criteria of relative prejudice to the parties involved.
(iv) the merits of the proposed grounds of appeal and/or prospects of success should leave be granted.

The Schools of Judicial Thought that have emerged in consequence of the NLTB decision (supra)

[10] They are:-

(i) the Strict View – which is, should an applicant fail to get over the threshold bars of length and reasons for delay, then an application for

extension of time to appeal ought to be denied, for otherwise, "an Appellant who had been in lapse" and "an Appellant who has complied with the legislatively decreed rules" would be placed on par. I must confess that, I subscribe to that school of thought.

(ii) The liberal view – which is what is revealed in the NLTB Case (supra) that, should there be prospects of (reasonable) success or a strong arguable case, leave ought to granted.

(iii) The via media approach – which in what, His Lordship Justice Keith (supra) in my reading, has suggested, that "all the factors in the overall" must be taken into consideration (foreshadowed in the NLTB Case)

As a Single Judge of the Court of Appeal the task legislatively falling on me as envisaged in terms of Section 20 (1) of the Court of Appeal Act (Cap 12), particularly, Section 20 (1) (b) thereof

[11] That task, whatever my personal judicial views may be (which of course is the strict view which I have articulated at paragraph [10] above), I consider myself bound by the aforecited Supreme Court decisions.

Application of the thinking of the said Supreme Court decisions to the instant case

[12] I shall first take "the Prejudice Criterion."

[13] In that regard the Appellant in his written submission has submitted that, the Respondent Company has already enjoyed "the fruits of its success" namely "by receiving 30 percent of the $20,000 that was ordered against him and that the Appellant has already served his time in custody" (vide: paragraph (5) of his written submissions)

[14] That was not disputed by the Respondent.

[15] So, if one were to pause at this point, while the criteria of length of the delay and reasons for the delay stood against the Appellant, the prejudice factor stands in his favour.

[16] Consequently, if the Appellant's application was to be allowed, he was required to satisfy this Court that he has at least, a reasonable chance of success in appeal, which therefore brought me to consider the merits urged by him.

The Merits Urged

[17] In that regard all what the Appellant has urged is that:

> *".....we submit.....that the ground of appeal, inter alia, will probably succeed (and) further that the Appellant was employed under an employment contract and therefore the proper jurisdiction to determine his case was either the Employment Relations Tribunal or the Employment Relations Court and not the High Court...."*

[18] While rejecting that argument on a mere perusal of the powers of the High Court, I did however take note of the Appellant's argument that the High Court had not followed Order 52 Rule (2) (3) procedure of the High Court Rules when it granted leave to the Respondent for leave to issue committal proceedings against the Appellant that had led the Court to find the Appellant guilty of contempt resulting in a custodial sentence being entered against him. (vide: paragraph (3) of the Appellant's written submissions).

[19] I have perused the Applicant's (Appellant's) Affidavit in Support of his Summons dated 14th July, 2020. In that I could not find any material attached as would support that submission. The impugned decision of the High Court does not reveal anything either way.

[20] Apart from that, the High Court has observed that the "Court gave directions for the defendant for the filing of affidavit in reply but the defendant did not file an affidavit in

reply. (that is, to five affidavits filed by the Respondent in support of the committal proceedings).

In any event a Court Shall not act in vain

[21] Leaving aside all those considerations, in any event, there is the principle that a Court shall not act in vain.

[22] The Appellant has already paid the fine of $20,000.00 ordered and has served his time in custody.

[23] Consequently, even on the merits criterion I am inclined to the view that the Appellant has failed to satisfy this Court in the exercise of its discretion to grant the application he has sought.

Re: The Jurisdictional Issues raised by the Respondent to the Appellant's present application

[24] Although the said issues have been raised by the Respondent in its written submissions, I must confess that I took the path of dealing with the Appellant's lament on a substantive basis rather than disposing of it on a preliminary basis.

[25] Having done so, I think I must address that issue raised by the Respondent for purposes of record as well, *al beit,* even briefly.

[26] In that regard, the Respondent adverting to Section 12(2) (f) and Rule 26 (3) of the Court of Appeal Act in the light of judicial precedents interpreting the said provisions has submitted that the Appellant could not have maintained the present application.

[27] Having given my mind to the express legislative provisions contained therein, I had no option but to agree with the Respondent.

[28] Thus, the Appellant could not have maintained the present application in the first instance.

Determination

[29] For all those reasons, I proceed to make my orders as follows.

Orders of Court

1. The Application for extension of time for leave to appeal the order of the High Court dated 23rd July, 2018 is refused and/or dismissed.

2. Taking into consideration the facts I have noted at paragraph (13) of this Ruling I am inclined to make only a nominal order as to costs in a sum of $1,000/= to be paid by the Appellant to the Respondent within 21 days of notice of this Ruling.

.....

Almeida Guneratne

JUSTICE OF APPEAL