THE COURT OF APPEAL, FIJI

[ON APPEAL FROM THE HIGH COURT]

Civil Appeal No. ABU 094 of 2020

(Suva HBC 104 of 2016)

BETWEEN	:	**GOLDEN MANUFACTURES LIMITED**
		Appellant
AND	:	**PALAS AUTO SERVICES LIMITED**
		Respondent
Coram	:	**Almeida Guneratne, JA**
Counsel	:	**Mr. E. Narayan on 29th January, 2021 for the Appellant (Applicant)**
	:	**Mr. N. Lal on 11th February, 2021 for the Appellant (Applicant)**
	:	**Mr. R. Singh for the Respondent**
Dates of Hearing	:	**29th January and 11th February, 2021**
Date of Ruling	:	**22nd February, 2021**

RULING

Prefatory Statement

[1] This is a matter that warranted consideration of the scope and application of Section 20 (1) (k) of the Court of Appeal Act in the different situations that may arise *vis a vis* Section 20 (1) (b) and how this Court should adopt an approach the same in the light of time tested principles.

Brief Account of the Background History

[2] By a summons dated 20th October, 2020 the Applicant had sought leave for enlargement of time to file and serve Notice of Appeal against the judgment dated 4th September, 2020 of the High Court at Suva.

[3] The Applicant's summons has been supported by the affidavit of Naushad Ali (Chief Financial Officer of the Applicant Company).

[4] The Respondent has opposed the said Application by the affidavit of Prakash Pala (Director of the Respondent Company).

[5] On 26th November, 2020, learned counsel for the Applicant submitted that he would not be filing an affidavit in reply. On that date both parties having agreed to tender written submissions concurrently by 17th December, 2020, I fixed the matter for hearing on 29th January, 2021.

[6] The Applicant complied with the date fixed for written submissions (having filed the same on 10th December) the Respondent not so complying but filing its submissions on 24th December, 2020.

[7] No objection being taken on behalf of the Applicant in that regard, both counsel moved the Court to make a determination on the written submissions so filed.

[8] Mr. Singh however having submitted that he would be raising a preliminary objection to the Applicant's application on the ground that, this Court's jurisdiction has been invoked under the wrong provisions of the law (a point taken in the Respondent's written submissions at paragraph 4 thereof) I made order to have the hearing of the matter resumed to enable the Applicant to respond to the said preliminary objection.

[9] Consequently, the hearing was resumed on 11th February, 2021.

The Applicant's summons and the Preliminary Objection

[10] The application under consideration is one to extend the time to file and serve Notice of Appeal against the impugned judgment of the High Court.

[11] No doubt this Court is vested with power to entertain such an application under Section 20 (1) (b) of the Court of Appeal Act (Cap 12 – the Act).

[12] But, to do so, the jurisdiction (power to decide) in the exercise of the Court's discretion, need to be properly invoked. In the instant case, the Applicant's summons dated 20th October, 2020 is based on Rule 17 (2) (3) of the Court of Appeal Rules.

Applicable Legal Principles

[13] I have no doubt that this Court's jurisdiction has been sought to be invoked on a misconceived premise (provision). In such a situation, I am unable to resort to a concept of "inherent jurisdiction of the Court."

[14] The legislature has expressly defined the scope and content of this Court's jurisdiction within the framework of Section 20 (1) of "the Act."

[15] However, while appearing to have conceded the defective nature of the summons, in a valiant effect to have that omission supplied sought to take refuge under Section 20 (1) (k) of "the Act", in what struck me as a contention to tie up that provision with the concept of "inherent jurisdiction of the Court."

Section 20 (1) (k) of the Act – cannot be given a broad interpretation

[16] That Section decrees thus:

> *"Section 20 (1) (k):*
>
> > *A judge of the Court may exercise (the power) generally, to hear any application, make any order or give any direction that is incidental to an appeal or intended appeal."*

[17] It does not require an exercise in semantics to say that there is "no appeal on foot" to give any direction "that is incidental to an appeal" because, unless an application is granted under Section 20 (1) (b) there "is no appeal on foot."

[18] I do however agree with Mr. Lal that it could be argued that there is an "intended appeal."

[19] However, the point is, even for this Court to have stretched the exercise of its discretion, the application under consideration being one for enlargement of time to appeal, the same needed to be made under the legislatively decreed provision under Section 20 (1) (b) and not under Rule 17 (2) (3).

[20] For the said reasons I am not prepared to place such a broad interpretation on Section 20 (1) (k) as being a "catch all" kind of provision.

[21] To do so, in my view, would render Section 20 (1) (b) redundant.

[22] For the propositions I have laid down at paragraphs [19] and [20] above I derived inspiration from the thinking of Justice Gates (as he then was, when he, writing for the High Court, expressed views in the case of Silimaibau and Anor .v. Minister of Sugar Industry [2004] HBC 155/01 L, 5 March, 2004 on the scope of Section 20 (1) (k).

Application to have the flawed summons amended

[23] Mr. Lal, still not prepared to "throw in the towel" (so to say), moved as a last resort to have the summons amended.

[24] Mr. Singh did not appear to have seriously objected to that move of Mr. Lal, probably contemplating an order for costs had the Court been inclined to allow the same.

[25] The aforesaid factors weighed with me, as to what approach I should adopt in the interests of justice.

[26] To begin with, the preliminary objection to the summons was entitled to be upheld which I uphold with the result that, the Applicant's summons stands rejected and/or dismissed.

[27] Having held so then I asked myself as to whether I was *functus* and there was nothing left in the exercise of my jurisdiction and discretion to move any further.

[28] Once that application to amend the summons had been made by Mr. Lal, what options were available to me? This was the question that I needed to answer, particularly in view of what I have recapped at paragraph [23] above.

[29] Indeed, I would have had to prevail on Mr. Lal to file a fresh summons to have "the proposed amended summons" to be gone into, subject to the normal procedural steps, affidavit in opposition followed by affidavit in reply, written submission (etc.)

[30] All that inevitably would have entailed protracted proceedings.

[31] In the event of the amended summons being allowed (no doubt, subject to an order for costs), that in turn would have needed a fresh application under Section 20 (1) (b) for enlargement of time for leave to appeal and appeal which would then have gone beyond the time factor in the present application and yet this Court would have been required to address as to whether there are merits (and/or prospects of success if leave was to be granted) , (vide: NLTB v. Khan

(infra), notwithstanding the length of the delay (which would count as being substantial) reasons for the delay (being the lapse on the part of lawyers in first invoking the jurisdiction of this Court under the wrong provisions, in which regard the Supreme Court in Fiji Industries Ltd v. National Union of Factory and Commercial Workers, CBV 008 of 2016 27 October, 2017 expressed the view that, mistakes of lawyers should not be visited upon party litigants.

[32] It is having regard to all those factors taken in the overall that I decided to act in terms of Section 20 (1) (k):

(a) in allowing the oral application of Mr. Lal to have the initial summons amended as if it is one under Section 20 (1) (b) of "the Act" but the application seeking enlargement of time to be considered on the merits.
(b) For that approach I found some support in the form of precedent as well in the case of Ambika Prasad v. Santa Wati and Bisun Deo [2001] FLR Vol. 1, 430.

There must be a speedy end to litigation

[33] That is the overriding principle that weighed with me in the approach I adopted.

[34] Consequently, I felt it was in pursuance of that principle and in the interest of justice that I looked at the High Court Judgment and then the grounds of appeal (filed of record) against it.

The High Court Judgment

[35] The learned High Court Judge in his judgment recounted the essential facts as follows:

"1. The Plaintiff purchased a "Jeep Grand Cherokee" motor vehicle from the defendant under a warranty for a period of three years. Two years, eight months later, the Plaintiff gave the vehicle to the Defendant to repair the engine. The Defendant advised that a new engine was installed and the vehicle was available for collection. The Plaintiff, in its statement of claim states that there were

outstanding defects in the Forward Collision Warning, (FCW) light and dashboard. The Plaintiff sold the vehicle, as its value had substantially declines, due to the "delayed re-delivery."

2. *The Plaintiff claims: (i) damages for loss of the use of the vehicle from the time it was given for repair until it was finally delivered; (ii) the cost of repairing the dashboard, in the sum of $12,038.00; (iii) damages for losses in a sum of $99,500.00, being the difference between the purchase and sale price; (iv) special damages incurred of $6625.00 in hiring a vehicle after the expiry of the LTA registration of the vehicle provided by the Defendant as a replacement, (replacement); (v) interest; and (vi) costs.*
3. *The Defendant, in its statement of defence states that after liaising with its supplier in New Zealand and completing tests, a new engine was approved under the warranty. The vehicle was ready collection. The vehicle was retained for further diagnostics and advice regarding the FCW light. The issue was resolved. The Defendant denies liability for the issue with the dashboard and any loss arising from the sale of the vehicle. The vehicle was without defect at the date of purchase and was used for over two years before the defect in the engine arose. The Defendant counterclaims for the continued use of the replacement by the Plaintiff, after the vehicle was ready for collection.*
4. *The Plaintiff in its reply states that the vehicle was not ready for collection in September, 2015."*

[36] Having done so and, having had regard to the agreed facts (at paragraphs 5 to 9 of the judgment (which I incorporate into my Ruling, without the need to repeat the same), His Lordship arrived at his conclusions as follows, which I reproduce verbatim for purposes of convenience.

> *"10. <u>In my judgment</u>, it is evident that the vehicle was merchantable and fit for the purpose intended at the time of purchase. The defect in the engine arose two years, eight months later.*

11. *The Plaintiff claims damages for loss of the use of the vehicle from September, 2014 to 10th December 2015. The statement of claims states particulars of such loss to be quantified and made available prior to trial. The Plaintiff did not adduce any evidence in support of loss. Accordingly, the claim is declined.*

12. *The Defendant provided a replacement when the vehicle was given for repair, it is contended that the replacement was of inferior quality and comfort.*

13. *In my view, the warranty does not state that the Defendant had to provide a replacement of a similar nature as the vehicle purchased, as accepted by PW1 in cross examination.*

14. *Next. The Plaintiff claims the cost of repair of the dashboard.*

15. *PW1 said, that when the Plaintiff collected the vehicle on 10 December, 2015, it was found that the dashboard was damaged as the vehicle was parked in the sun. The Plaintiff obtained a quotation from Asco Motors for over $12,000.00 to replace the dashboard.*

16. *PW1 was unaware if the Defendant was informed of the damage.*

17. *DW1 stated that it was not brought to the attention of the Defendant that the dashboard was damaged. The Defendant would have repaired it under the warranty.*

18. *I would not that PW1 said that the Defendant honoured the terms of the warranty and attended to every issue raised by Plaintiff.*

19. *In my judgment, the Plaintiff has not established that the damage to the dashboard was brought to the attention of the Defendant nor that the vehicle could have been sold for a higher price, if the dashboard was repaired, as contended by PW1. The claim is declined.*

20. *The Plaintiff claims a sum of $99,500.00, being the difference between the purchase price of $176,500.00 and the stated sale price of $77,000.00. it is contended that the value of the vehicle had "substantially declined on account of the delayed re-delivery of the vehicle" by the Defendant."*

21. *PW1said that the vehicle was sold in 2016, shortly after it was collected from the Defendant. He was unsure if a valuation of the vehicle was obtained and if*

the buyer "Pau Consultant" was a consultant of Plaintiff, as was put to him in cross examination. PW1 said that a vehicle would depreciate in four years.

22. *The evidence reveals that the Plaintiff did not collect the vehicle for four months, after the new engine was installed and for three months, once the FCW light was repaired on 15th September, 2015.*

23. *In my judgment, the Plaintiff has not established that the value of the vehicle had declines for the alleged reason. The claim is decline.*

24. *The final claim is for special damages incurred of $6625.0, in hiring a vehicle for the period "16th June 2015 to 21st August 2015."*

25. *On 25th June 2015, the Plaintiff's technician inspected the vehicle after a new engine was installed. He notice a red FCW light on the dashboard. On 6th July 2015, the Defendant informed the Plaintiff that following the inspection, the vehicle was not ready to be picked up and requested a rental vehicle, as the insurance and LTA fitness of the existing rental had expired on 3rd July 2015.*

26. *In my view, the Plaintiff was required to provide a replacement during the period the FCW light was repaired.*

27. *PW1 produced a purchase order issued by Avis Rent A Car to the Plaintiff for rental charges for the period 16th July 2015 to 21st August 2015 in a sum of $6625.00. He said that the Plaintiff has an invoice of payment. The invoice was not produced. I am satisfied from his objective evidence on the whole that this sum was incurred.*

28. *In **Narendra Kumar v Sairusi Drawe, Minister for Home Affairs and Auxiliary Army Services and the AG**, [1990]36 FLR 90 at page 95, Palmer J stated:*

> *Notwithstanding that not a single receipt has been produced in evidence I am satisfied from the Plaintiff's evidence that he paid those amounts.*

29. *In my judgment, the Plaintiff is entitled to recover the sum of $6625.00 from the Defendant.*

30. *The Defendant shall pay the Plaintiff a sum of $6625.00 together with interest (as pleaded) at 3 percent annum from 21st August 2015 to 19th November 2019 (date of hearing) in a sum of $845.00 totalling $7470.00.*

Counterclaim

31. *The Defendant counterclaims for the use of the replacement by the Plaintiff for the period 6th March 2015 to 3rd July 2015, in a sum of $29,500.00 at a rate of $250.00 per day for 118 days.*
32. *The Defendant provided the Plaintiff a replacement from October 2014 to 3rd July 2015.*
33. *On 10th March 2015, the Defendant requested the Plaintiff to return the replacement. On 20th March 2015, the Defendant informed the Plaintiff that it would charge $250 a day as rental for use of the replacement.*
34. *It transpired in the cross examination of PW1 that for four months, the Plaintiff neither inspected, collected nor attended to the signing of forms to register the new engine with the LTA, as owner of the vehicle, as requested by the Defendant by several emails.*
35. *In my judgment, the Defendant is entitled to recover from the Plaintiff, the rental charges of $29500.00 for the period 6th March 2015 to 3rd July 2015.*
36. *I set off the sum of $7470.00 recoverable by the Plaintiff from the Defendant against the aforesaid sum of $29500.00. In the result, the Plaintiff shall pay the Defendant the sum of $22030.00"*

[37] On those conclusions, I shall extract the cogent aspects in my quest to ascertain whether any aspect therein leaves room for an arguable case and/or prospects of success should the present application be allowed.

[38] I focus special attention in that quest on what His Lordship said at paragraphs 10, 13, 19, 23, 26, 29 and 35.

The Grounds of Appeal Urged

[39] There are as many as 9 specific grounds urged.

Assessment of the Judgment of the High Court as against the Grounds of Appeal Urged

[40] I did not think it was necessary to reproduce those grounds of appeal verbatim for the simple reason that although the applicant avers that "the learned erred in law and in fact", I could not see any error in law in the judgment.

[41] The alleged errors complained of stand reduced to matters of fact.

[42] Those findings, being based on evidence placed before the judge are findings the learned Judge had arrived at in his assessment of the same in regard to which I could not see any misapplication or misdirection and /or non-direction I could not find any inferences drawn on the application of any provision or principle of law which could have been construed as being perverse.

[43] Such being the case as I saw it, the matter falling within the area of assessment of facts, I did not see a basis to interfere with the manner the learned Judge had dealt with the same.

Determination and Conclusion

[44] Accordingly, on the rationale laid down in the quoted case of NLTB v Khan (CBV 002 of 2013), even if I were to ignore such criteria as length, reasons for the delay, prejudice (etc.), on the criterion of Merits contained in the grounds of appeal I did not see any prospects of success in Appeal if the Applicant's application was to be granted under Section 20 (1) (b) of "the Act."

Conclusion

[45] While I uphold the preliminary objection raised by the Respondent, even on the criterion of prospects of success should leave be granted for extension of time to appeal I hold that the Applicant's application was not entitled to succeed.

Orders of Court

1. On the basis of the aforesaid reasons the Applicant's application seeking extension of time to appeal the impugned judgment of the High Court is refused and/or dismissed.

2. The Applicant shall pay to the Respondent a sum of $2,500/= as costs within 21 days of notice of this Ruling.

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Almeida Guneratne

JUSTICE OF APPEAL