IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 72 of 2023
[In the High Court Case No. HBC 41 of 2011]

BETWEEN	:	**MANJULA DEVI**
		Appellant
AND	:	**GEETA WATI**
		01st Respondent
	:	**KESHMI DEVI SINGH**
		02nd Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. A. Pal for the Appellant** **Ms. P. Mataika for the Respondents**
Date of Hearing	:	**09 December 2024**
Date of Ruling	:	**13 December 2024**

RULING

[1] The appellant (02nd defendant) through its solicitors had filed summons on 15 August 2023 to file notice of appeal and grounds of appeal out of time, stay orders to stop the execution of orders in the High Court judgment and execution of the judgment of Labasa High Court dated 24 July 2015 and the Writ of Fieri Facias filed on 04 May 2023 by the 02nd respondent against the appellant pending determination of the appeal.

[2] On 01 December 2008, at about 8.15 p.m., Sinal Devi Singh and the 02nd respondent (then 02nd plaintiff) were travelling as passengers in a vehicle driven by the appellant (then 02nd defendant) along the Labasa- Coqeloa Road, when Rakeshwar Singh, the first defendant in the original action lost control of the vehicle near the Vunika Bridge. The vehicle ran off the road and landed upside down in the Vunika creek. In the aftermath, Sinal Devi Singh tragically died. The 02nd respondent suffered injuries. The 01st and 02nd respondents (then plaintiffs) alleged that the death and injuries were caused by the negligence of Rakeshwar Singh, the 01st defendant. The vehicle was owned by the appellant (then 02nd defendant). The 01st respondent is the mother of the deceased Sinal Devi Singh and the injured 02nd respondent. The 01st respondent sought compensation from Rakeshwar Singh, the appellant and Sun Insurance Co Ltd (then 03rd party) for the death of Sinal Devi Singh. The 02nd respondent sought damages for the injuries suffered by her. Default judgment was entered against the Rakeshwar Singh, the 01st defendant. Upon application by the appellant, notice was issued to Sun Insurance Co Ltd, the third party. The third party denied liability.

[3] The learned High Court judge in the impugned judgment held as follows.

> ***6. Orders***
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> ***A.*** *The first and second defendants shall pay the first plaintiff a sum of $9500 as damages.*
> ***B.*** *The first and second defendants shall pay the second plaintiff a sum of $ 36329.25 as damages made up as follows:*

a.	*General damages*	*30,000.00*
b.	*Interest on General damages*	*6300.00*
c.	*Special damages*	*150.00*
d.	*Interest on special damages*	*29.25*
	Total	*36329.25*

> ***C.*** *The second defendant shall pay the first and second plaintiffs a sum of $ 2500 as costs summarily assessed.*
> ***D.*** *The second defendant shall pay the Third Party a sum of $ 2500 as costs summarily assessed."*

Law on enlargement of time

[4] It is well settled now that this Court has an unfettered discretion in deciding whether or not

to grant the leave out of time[1]. However, the appellate courts always consider five non-exhaustive factors to ensure a principled approach to the exercise of the judicial discretion in an application for enlargement of time namely (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? and (v) if time is enlarged, will the respondent be unfairly prejudiced?[2] Nevertheless, these matters should be considered in the context of whether it would be just in all the circumstances to grant or refuse the application and the onus is on the appellant to show that in all the circumstances it would be just to grant the application[3]. In order to determine the justice of any particular case the court should have regard to the whole history of the matter, including the conduct of the parties[4]. In deciding whether justice demands that leave should be given, care must also be taken to ensure that the rights and interests of the respondent are considered equally with those of the applicant[5].

[5] Since the reason for the delay is an important factor to be taken into account, it is essential that the reason is properly explained - preferably on affidavit - so that the court is not having to speculate about why the time limit was not complied with. And when the court is considering the reason for the delay, the court should take into account whether the failure to observe the time limit was deliberate or not. It will be more difficult to justify the former, and the court may be readier to extend time if it was always intended to comply with the time limit but the non-compliance arose as a result of a mistake of some kind.[6]

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[1] **State v Minister forTourism and Transport** [2001] FJCA 39; ABU0032D.2001 (12 November 2001); **Latchmi v Moti** [1964] FijiLawRp. 8; [1964] 10 FLR 138 (7 August 1964)

[2] **Native Land Trust Board v Khan** [2013] FJSC 1; CBV0002.2013 (15 March 2013); **Fiji Revenue and Customs Services v New India Assurance Co. Ltd.** [2019] FJSC 34; CBV0020.2018 (15 November 2019); **Norwich and Peterborough Building Society v Steed** (1991) 2 ALL ER 880 C.A; **CM Van Stilleveldto B V v. E L Carriene Inc.** [1983] 1 ALL ER 699 of 704.

[3] **Habib Bank Ltd v Ali's Civil Engineering Ltd** [2015] FJCA 47; ABU7.2014 (20 March 2015)

[4] **Avery v Public Service Appeal Board** (No 2) (1973) 2 NZLR 86

[5] Per Marsack, J.A. in **Latchmi v Moti** (supra)

[6] **Fiji Industries Ltd v National Union of Factory and Commercial Workers** [2017] FJSC 30; CBV0008.2016 (27 October 2017)

[6] The length of the delay is determined by calculating the length of time between the last day on which the appellant was required to have filed and served its application for leave to appeal and the date on which it filed and served the application for the enlargement of time.[7] In this case the extension of time application to appeal has been filed on 15 August 2023 when the judgment was delivered on 24 July 2015 (and sealed on 31 December 2015) i.e. 08 years and 01 month after the judgment. Even if one counts from the date of serving the Final Order of the High Court on the appellant on 22 May 2018 (see the affidavit of Asesh Chand) still the appellant is late by 05 years and 02 months and 03 weeks. Thus, the length of the delay is extraordinarily substantial. 40 days have been considered 'a significant period of delay'[8]. Delay of 11 days[9] and 47 days[10] also have defeated applications for enlargement of time. Even 04 days delay requires a satisfactory explanation[11]. However, in some other instances, delay of 05 months and 02 years respectively had not prevented the enlargement of time although delay was long and reasons were unsatisfactory but there were merits in the appeal.[12]

[7] Rules of court must, prima facie, be obeyed and in order to justify a court in extending the time during which some step in procedure is required to be taken there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.[13]

[8] As for the reason for the delay the appellant claims in her affidavit dated 11 August 2023 that after the conclusion of the trial she kept visiting Mr.Sushil Sharma's (her trial lawyer) office to inquire about the decision of the High Court and sometime in 2016 she was told by Mr.Sharma that the case had been dismissed and asked her not to worry about anything.

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[7] **Habib Bank Ltd v Ali's Civil Engineering Ltd** (supra)
[8] **Sharma v Singh** [2004] FJCA 52; ABU0027.2003S (11 November 2004)
[9] **Avery v Public Service Appeal Board** (supra)
[10] **Latchmi v Moti** (supra)
[11] **Tavita Fa v Tradewinds Marine Ltd and another** ABU 0040 of 1994 (18 November 1994) unreported
[12] **Formscaff (Fiji) Ltd v Naidu** [2019] FJCA 137; ABU0017.2017 (27 June 2019) & **Reddy v. Devi** [2016] FJCA 17; ABU0026.2013 (26 February 2016)
[13] **Ratnam v Cumarasamy** [1964] 3 All E.R. 933

However, upon her inquiries she found that a Writ of Fieri Facias had been filed in the Magistrates court at Labasa on 04 May 2023 and a judgment had been entered against her in favour of the plaintiffs. Then her new solicitor Mr. Amrit Sen had obtained a copy of the judgment and had she been aware of the judgment she would have timely appealed it but Mr. Sushil Sharma unethically and unprofessionally had misled her.

[9] Her allegation against Mr. Sushil Sharma is extremely serious. If true, Mr. Sushil Sharma would have already had to answer a complaint by the appellant and again if true, potentially be liable for proceedings against him by the Legal Practitioners Unit and the Chief Registrar. However, the appellant does not appear to have made any complaint against Mr. Sushil Sharma to date. On the other hand, her new solicitor, Mr. Amrit Sen does also not appear to have contacted Mr. Sushil Sharma and placed the appellant's allegation before him and got an explanation from him as to the veracity or otherwise of it.

[10] The Court of Appeal set down the procedure to be followed by the appellate counsel when an allegation or criticism is levelled against a trial counsel by his or her client before the same is relied upon in an appeal[14], though it was in the context of a criminal appeal where grounds of appeal are based on such allegations or criticisms of trial counsel to support the appeal. The procedure is as follows.

> *(i) When allegations are made against former counsel, the new counsel should not settle or sign grounds of appeal unless he is satisfied that they are reasonable, have some real prospect of success and are such that he is prepared to argue before court. However, when they are properly made the new counsel must promote and protect fearlessly his client's best interests without regard even to fellow members of the legal profession.*
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> *(ii) The new counsel should not regard the allegations as 'reasonable' to draft grounds of appeal based on them unless, at the very least, he is in possession of a signed statement of facts and a unequivocal signed waiver of privilege from the client which should be obtained after advising him of the consequences of waiver. The client should also be advised that the allegations against his former counsel are unlikely to carry any weight with court unless they are supported by oral testimony.*

[14] **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019)

(iii) Such grounds criticizing the conduct of defense counsel at trial should not be advanced unless the new counsel feels that in the light of the information available to the former counsel, no reasonably competent counsel would sensibly have adopted the course taken by the former counsel.

(iv) The compliant or allegations should be set out with precision and clarity in the notice of appeal or application for leave to appeal or for extension of time (grounds of appeal may be perfected later) and it should be lodged accompanied by the waiver of privilege along with the client's signed statement and any request for former counsel to provide any material etc. in the registry without delay. It is proper for the new counsel to speak to the former counsel as a matter of courtesy before grounds are lodged to inform him of the allegations to be made against him.

(v) On behalf of the court, the registrar of the appellate court should then send to the former counsel the client's signed statement and waiver of privilege along with other relevant material inviting him to respond to the allegations made against him within a given time.

(vi) The former counsel should send his response to the registrar either within the time given or further time obtained from the registrar.

(vii) The registrar should send the response received to the new counsel who may reply to it. Then the grounds of appeal, waiver and responses would be placed before the single judge.

(viii) Where there is a factual dispute between the client and former counsel both of them may be required to give evidence and be subjected to cross-examination in court to resolve the issue of fact.

[11] There is no reason why the same principles should not apply *mutatis mutandis* to civil appeals or applications before the Court of Appeal or the Supreme Court. Where fresh solicitors or fresh counsel are instructed, it will be necessary for those solicitors or counsel to go to the solicitors and/or counsel who have previously acted to ensure that the facts are correct, unless there are in exceptional circumstances good and compelling reasons not to do so. It is the fundamental duty of advocates and solicitors to make applications to this court after the exercise of due diligence. In cases where allegations of incompetence, unethical or unprofessional conduct, any other misconduct and conduct unbecoming of a lawyer of trial advocates or solicitors is raised, the exercise of due diligence requires, having made enquiries of trial lawyers who are said to have acted improperly, taking other steps to obtain objective and independent evidence before submitting the same to the appellate court as grounds of appeal or grounds upon which leave to appeal or extension of time is sought.

Counsel and solicitors would be failing in their duty to this court if they did not make enquiries which would provide an objective and independent basis, other than complaints made by their client, as to what had happened.

[12] There is a debate as to whether the lapse on the part of lawyers must visit a party litigant[15] or whether a party litigants should not be punished for the lapse on the part of their lawyers[16]. Perhaps, the approach taken by Lord Green, M.R. at p.919 in **Gatti v Shoosmith** [1939] 3 All ER 916 on the failure to lodge a timely appeal due to a mistake by a solicitor seems more practical and sensible compared to any hard and fast rule.

> *'the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the court in exercising its discretion. I say 'may be', because it is not to be thought that it will necessarily be exercised in every set of facts…… What I venture to think is the proper rule which this court must follow is: that there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case. There may be facts in a case which would make it unjust to allow the appellant to succeed upon that argument.'*

[13] However, according to the appellant it was not a mere error on the part of Mr. Sushil Sharma but a deliberate lie. Therefore, I am not inclined to hold that the extraordinary delay was due to such an *'unethical and unprofessional'* conduct on the part of Mr. Sushil Sharma without any material to substantiate the same except the bare allegation of the appellant, particularly in the light of absence of any evidence that Mr. Amrit Sen has at least verified those serious allegations with Mr. Sushil Sharma and obtained his response. Leave aside the allegation by the appellant against Mr. Sushil Sharma, even if one counts from the date of serving the Final Order of the High Court on the appellant on 22 May 2018 still the appellant had waited till 25 August 2023 (05 years and 02 months and 03 weeks) to apply for extension of time. This delay is totally unexplained and this service of Final Order has not been even disclosed by the appellant in her affidavit casting serious doubt on the credibility of her explanations. Having considered the circumstances above enumerated, I am not persuaded by the

[15] See Dr. Almeida Guneratne's comments as single Judge in **Fiji Industries Ltd v National Union of Factory and Commercial Workers**

[16] **Hussain v Prasad** [2022] FJSC 7; CBV 15 of 2020 (03 March 2022)

explanation or the reasons for the delay. I am also of the view that the explanation does not meet the necessary threshold to satisfy the requirement for reasons for the delay.

[14] Even where the length and the reasons for the delay are adequately explained to the satisfaction of Court, if an appellant is unable to satisfy Court as to his or her chances of success in appeal if extension is to be granted, then the application must be rejected; even if an appellant fails to satisfy court as to the length and reasons for the delay, nevertheless a Court shall allow an extension of time if it is satisfied that, an appellant has a reasonable chance of success should an application were to be granted unless the reason for the delay in either case is owing to a mistake or misconception as to the correct applicable legal position on the part of lawyers[17]. The Supreme Court commenting on these three position of Dr. Almeida Guneratne, J.A. said[18] that the effect of propositions (i) and (ii) subject to proposition (iii) is to make the merits of the appeal the paramount, indeed the decisive, consideration and that goes too far because there may be cases where the merits of the appeal may not be that good, but where the overall interests of justice mean that the litigant should not be denied the opportunity of having his appeal heard. By the same token, there may be cases where the merits of the appeal are strong, but the prejudice caused to the other party if the appeal was allowed to proceed would be so substantial that it would be an affront to justice for the delay to be excused. The Supreme Court added that the bottom line is that each case should be considered on its facts, with none of the factors which the court is required to take into account trumping any of the others. Each factor is to be given such weight as the court thinks appropriate in the particular case. In the final analysis, the court is engaged on a balancing exercise, reconciling as best it can a number of competing interests. Those interests include the need to ensure that time limits are observed, the desirability of litigants having their appeals heard even if procedural requirements may not have been complied with, the undesirability of appeals being allowed to proceed which have little or no chance of success, and the prospect of litigants who were successful in the lower court having to face a

[17] Per Dr. Almeida Guneratne, J.A. in **Ghim Li Fashion (Fiji) Ltd v Ba Town Council** [2014] FJCA 192; Misc. Action 03.2012 (5 December 2014) & **Gregory Clark v Zip Fiji** [2014] FJCA 189; ABU0003.2014 (5 December 2014)

[18] **Fiji Industries Ltd v National Union of Factory and Commercial Workers** [2017] FJSC 30; CBV0008.2016 (27 October 2017)

challenge to the decision much later than they could reasonably have expected. As for the proposition (iii), the Supreme Court said mistakes made by lawyers is not an exceptional category for this purpose and the fact that the mistake was made by lawyers is just one matter to be taken into account in the whole scheme of things, but it can in no way be decisive.

[15] However, Dr. Almeida Guneratne, P took a different view later and said[19] that if the length and reasons for the delay, (criteria (a) and (b) laid down in ***Khan's case***) are explained to the satisfaction of Court, then the matter should be left to the full Court to determine the appeal on the merits because, while a party who files an appeal within time is vested with an unqualified statutory right, party who seeks enlargement of time to appeal requires the exercise of the court's discretion to earn that right. That right is earned when the aforesaid criteria (a) and (b) are satisfied. If the threshold criteria as envisaged in (a) and (b) above are not met by an applicant for enlargement of time to appeal, then such an application should be rejected and/or dismissed without the need to consider criteria (c) and (d) laid down in **Khan's case** in as much as the above reasons would not be applicable. A distinction must be drawn between a party who explains the delay to the satisfaction of Court to be treated on a par with a timely appeal and a party who fails to explain the reasons for the failure to file a timely appeal.

[16] However, because Dr. Almeida Guneratne, P has not taken into account the views of the full court judgment of the Supreme Court in ***Fiji Industries Ltd v National Union of Factory and Commercial Workers*** in his second ruling in ***Pacific Energy (South-West Pacific) Pte Ltd v Chaudhary*** and also because I am bound by the Supreme Court decision, I am inclined to follow the Supreme Court decision in accordance with section 98(6) of the Constitution of Fiji incorporating the doctrine of *stare decisis*.

[19] **Pacific Energy (South-West Pacific) Pte Ltd v Chaudhary** [2022] FJCA 190; ABU0020.2022 (30 December 2022)

[17] However, I am still required to consider the prospect of his appeal before the Full Court, for interest of justice demands that I take a holistic approach[20] by considering all the factors set out in ***Native Land Trust Board v Khan*** (supra) in addition to any other relevant factors before exercising my discretion either to grant enlargement of time or not.

[18] The first ground of appeal is based on the denial by the appellant that the 01st defendant, Rakeshwar Singh (driver) was not her employee or agent but she simply gave her vehicle to him for his 'personal use'. The trial judge had carefully examined this issue at paragraphs (j) to (q) in the light of available evidence from the appellant herself and rejected the appellant's position and determined that she had authorised the 01st defendant, who was his son's friend to use her vehicle for personal use (who therefore was not on a frolic of his own as alleged by the appellant before this court) and therefore she was vicariously liable for the 01st defendant's negligence. Having examined the judgment, I have no reason to disagree with the trial judge and there is little prospect for this ground of appeal to succeed.

[19] The second ground of appeal is raised on the basis that the action was time-barred. This was not pleaded by the appellant in the High Court. She had raised it for the first time in the affidavit filed in this court in support of the application for extension of time and proposed notice of appeal. So, understandably, the trial judge did not go into that issue. The action was filed on 1 December 2011 and the accident took place on 01 December 2008. Thus, the action was filed exactly 03 years from the accident and not prescribed. This ground has no prospect of success.

[20] Just as Keith J in the Supreme Court said in ***Fiji Industries Ltd v National Union of Factory and Commercial Workers*** there may be cases where the merits of the appeal may not be that good, but where the overall interests of justice mean that the litigant should not be denied the opportunity of having his appeal heard. In my view, this appeal is not one of

[20] **Hussein v Prasad** [2022] FJSC 7; CBV 15 of 2020 (3 March 2022)

those cases and therefore the overall interests of justice does not warrant that the appellant be given extension of time to appeal the High Court judgment.

[21] When it comes the prejudice to the respondents, I think that the prejudice that will be caused to them (already the case has been delayed by more 13 years) by the systematic delay is enormous.

[22] In all the circumstances above discussed, taking an all-inclusive view of the relevant law and the material before me, I am not inclined to grant the appellant enlargement of time to file the notice of appeal out of time or to grant stay orders as prayed for.

Orders of court:

(1) Enlargement of time to appeal against the impugned High Court judgment on 24 July 2015 is refused.

(2) Stay orders as prayed for in the summons dated 25 August2023 are refused.

(3) Appellant is directed to pay $2000.00 as cost of this application to the respondents (in equal shares) within 21 days of this Ruling.

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL