

**IN THE SUPREME COURT OF TONGA
APPELLATE JURISDICTION
NUKU'ALOFA REGISTRY**

AM 17 of 2017

- [3] On 18 May 2015 an article was published in the Kele'a concerning the activities of the respondent and his business. The respondent considered the article was defamatory of his character and he filed proceedings for damages against the applicants in the Magistrate's Court under CV 93/15.
- [4] After a defended hearing Magistrate Ma'u issued a ruling on 20 May 2016 finding in favour of the respondent and awarding him damages of \$10,000 and costs (the decision).
- [5] The applicants assert that they gave instructions to their lawyer, Mr. 'Ofa Pouono, to file an appeal but he did not do so. I shall come back to this matter. For present purposes it is enough to note that no appeal was ever filed.
- [6] In December 2016 the Kele'a closed down its operations. In February 2017 Mr. Siaosi Pohiva, who knew nothing of the decision, took over the newspaper. He has incorporated a company for that purpose. He acquired the assets of the newspaper (but did not pay anything for them) which I understand included a motor vehicle and computers.
- [7] In July 2017 the respondent took steps to enforce the decision by distress warrant. The Bailiff's attempted to levy distress against the assets in the possession of Mr. Pohiva which he has resisted.
- [8] On 7 August 2017 Mr. Pouono wrote to the Magistrate's Court seeking a stay of the distress warrant. The ground he advanced

related only to the costs awarded to the respondent of which Mr. Pouono said his office had received no notice. His letter contained no reference to any intention to appeal the decision.

[9] On 16 August 2017 Mr. Vatikani also wrote to the Magistrate's Court asking for a stay on the same ground advanced by Mr. Pouono. Again, there was no mention of any intention to appeal the decision.

[10] The application for stay was opposed by the respondent and in a notice of opposition filed with the Magistrate's Court on 28 July 2017 Mr. Edwards noted that no appeal from the decision had ever been filed.

[11] The Magistrate's Court did not grant a stay.

[12] On 24 October 2017 Mr. Pohiva filed this application seeking an extension of time to appeal.

The relevant principles

[13] The catalyst for this application was the action taken by the Bailiffs to levy distress against the Kele'a. Neither Mr. Pohiva nor his company were parties to the action in the Magistrate's Court and they have no standing to challenge the decision. However, as Mr. Pohiva advanced his arguments on behalf of the applicants as well as himself I will consider their merits.

[14] An appeal from a judgment of the Magistrate's Court to the Supreme Court must be filed within 28 days after the date of the Magistrate's decision (section 75(1) of the Act). The proviso to section 75(1) provides:

Provided that the 28 days within which the notice of appeal shall be given, may be extended with leave of the Supreme Court.

[15] The proviso confers on the Court an unfettered discretion whether to grant or refuse an extension of time but the discretion must be exercised judicially. The ultimate question is whether on the facts of the case justice requires that an extension of time be granted. The factors that the Court will usually take into consideration are the following:

- (a) the reason for the delay in filing an appeal;
- (b) the length of the delay;
- (c) whether there is an arguable case on appeal; and
- (d) the degree of prejudice to the other party in allowing the extension.

[16] These factors are not conjunctive and it is up to the Court to determine what weight to give to them on the facts of the case that is before it.

[17] In relation to the question of whether there is an arguable case the applicant is not required to show that he has a good or even a reasonable chance of success but he must show that there is some ground to advance on appeal that is at least arguable.

Discussion

The reason for the delay in filing an appeal

- [18] The applicants' case is that Mr. Pouono failed to file their appeal. Mr. Edwards makes the point that in other actions the applicants have made similar allegations against their lawyers and thereby obtained indulgences from the Court. The Courts have taken a very benevolent approach in such cases notwithstanding the principle that a client must accept the consequences of Counsel's advice and conduct of proceedings (see for instance *Pohiva ors v Edwards* (Unreported Court of Appeal, AC 10 of 2012, 31 March 2015) at [11]).
- [19] In cases like this an assertion that a party's lawyer has failed to take a proper procedural step is easily made and difficult to counter. It is an allegation that must be carefully scrutinised. In attempting to do justice to a party who claims to have been let down by his lawyer the Court may well inflict injustice on the other party and does nothing to advance lawyers' standards in the Kingdom. If Mr. Pouono did, contrary to my findings below, fail to follow instructions then the applicants may hold him accountable in an action for their loss.
- [20] But the applicants have failed to satisfy me that Mr. Pouono did not follow instructions to file an appeal for the following reasons. First, there are material differences in the evidence of Mr. Vatikani and Mr. Pouono as to who was responsible to file the appeal. Mr. Vatikani

said that he gave the file to Mr. Pouono on 9 June 2016 before travelling to China on 10 June 2016 and that he only became aware that the appeal was not filed on 3 August 2017 when the Bailiffs tried to execute the distress warrant. In his affidavit, Mr. Pouono purports to accept the blame for not filing an appeal yet he also says that he prepared the appeal and gave it to Mr. Vatikani to file and serve on Mr. Edwards. He then goes on to say 'Later, 'Ofa Vatikani came and returned me the file saying that he was travelling to China. I did not bother to check whether the appeal was filed or not'. Notably, Mr. Pouono does not say that Mr. Vatikani told him that he had not filed the appeal and that Mr. Pouono should do so.

[21] Secondly, there is no evidence of any contact between the applicants and Mr. Pouono from early June 2016 until August 2017 which one would expect if, as the applicants contend, they had believed that an appeal had been filed. The applicants are familiar with Court proceedings and have in the past said that their lawyers have let them down. With their experience and knowledge I do not consider it at all likely that they would have made no inquiries about the appeal for over 14 months.

[22] Thirdly, when the distress warrant issued both Mr. Pouono and Mr. Vatikani sought a stay but neither of them raised as a ground that it had been the applicants' intention to appeal. Had the applicants instructed Mr. Pouono to file an appeal I cannot conceive but that it would have been the first and principal ground advanced in support of an application for stay.

The length of the delay

- [23] The length of the delay has been unacceptable. The period from the issue of the decision to the filing of this application was 17 months. Even if one was to accept Mr. Vatikani's evidence that he first learned that no appeal had been filed on 3 August 2017 it was not until 24 October 2017 that this application was filed. That is itself an unacceptable delay. This period is much greater than the 28 days within which an appeal must be filed in the ordinary course.

Whether there is an arguable case on appeal

- [24] Mr. Pohiva frankly acknowledged that he is unable to say what grounds of appeal will be advanced if an extension of time to appeal is granted. He advises me that he has been unable to get the case file from Mr. Pouono to consider what grounds of appeal exist. I do not accept his explanation. A search could have been made of the Court file which has everything on it which Mr. Pohiva and the applicants would require to prepare an appeal. Furthermore, Mr. Vatikani said in his affidavit that he prepared everything required on his part to file an appeal. If that was so he must have known on what basis the appeal was going to be advanced and indeed he goes on his affidavit to list reasons why he was unhappy with the decision.
- [25] But even leaving those matters aside, I have considered the merits of the case. I have studied closely the pleadings, the article, the evidence in the Magistrate's Court and the Magistrate's reasons. The

Magistrate's conclusions were clearly open to him on the evidence. Specifically, he was right to reject the defences that were advanced. The defences of truth, honest opinion and qualified privilege could never have been upheld in light of the Magistrate's findings that the article consisted in large part of lies and that its author, Mr. Vatikani, was motivated by malice.

- [26] The applicants have fallen well short of satisfying me that they can advance even an arguable case on appeal.

Prejudice to the respondent

- [27] Although not determinative of this application there is prejudice to the respondent if an extension of time was to be granted. He has incurred costs to enforce the decision and further costs to oppose the application for stay in the Magistrate's Court. Those costs will be wasted. There is nothing before me to suggest that the applicants have any ability to pay the costs as a condition of granting an extension of time.

- [28] Another factor is that the respondent brought his action to remedy harm done to his reputation. After such a lengthy delay, none of which was caused by him, it would be quite wrong that the respondent's reputation be again put in issue by the applicants. This litigation should be brought to an end (*Muckenheim v Employment Insurance Commission* 2008 FCA 249).

Weighing the factors

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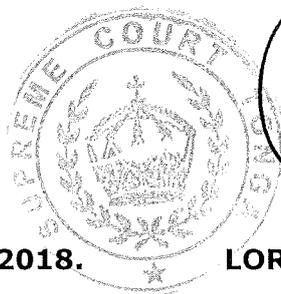
AM 17 of 2017

[29] The applicants have failed to provide a reasonable explanation for the delay in filing an appeal or satisfy me that they have an arguable case on appeal. The period of delay in applying for an extension of time is unacceptable and the respondent will suffer prejudice should an extension of time be granted. The interests of justice plainly require that this application to be dismissed.

Result

[30] The application for an extension of time to appeal is dismissed.

[31] The respondent is entitled to his costs to be fixed by the Registrar if not agreed.



A handwritten signature in black ink, appearing to read 'O.G. Paulsen', is written over the seal.

O.G. Paulsen

NUKU'ALOFA: 9 FEBRUARY 2018.

LORD CHIEF JUSTICE