JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 35/2016

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**DALTON McLEAN**	**APPLICANT**
AND	**STEVE CESPEDES**	**RESPONDENT**

Mrs Christine Campbell-Swaby and Miss Debbie Salmon instructed by Salmon & Swaby Law Firm for the applicant

Mrs Raquel Dunbar instructed by Dunbar & Company for the respondent

Dalton McLean present

9 and 13 May 2016

ORAL JUDGMENT

PHILLIPS JA

[1] This is an application by Mr Dalton McLean (the applicant) against Mr Steve Cespedes (the respondent), (Mr Mark Champagnie, the 2nd defendant in the court below, having died subsequent to the delivery of the Supreme Court judgment), for an order that the time for filing the notice and grounds of appeal be enlarged, that the notice and grounds of appeal be served within seven days of the date of the order, and that the time be extended for the filing of skeleton arguments and the record of appeal, with costs of the application being costs in the appeal.

[2] The orders in the application were being sought on the basis of several grounds which include, *inter alia*:-

1) That the applicant has a good and arguable chance of succeeding on appeal.
2) That it is just and fair for the court to grant an order for the extension of time since the failure to file an appeal within the time allotted was not deliberate but occurred through inadvertence and was not done with intent to abuse the powers of the court.
3) There was no undue prejudice to the respondent if extension was granted.
4) There were several bases on which the learned trial judge erred in her findings of fact and arriving in her judgment in respect of the person at fault, that is, whose negligence caused the accident.

[3] The applicant swore to an affidavit in support of the application on 19 February 2016 wherein he indicated that he was an information technology teacher and he had filed claim HCV 04114 of 2007 to obtain damages for injury he had sustained in a motor vehicle collision which occurred on 26 September 2006 in the vicinity of Marcus Garvey Drive, Kingston. The matter, he deponed, had been tried on 21, 22 May and 1 June 2015. Judgment was delivered on 2 June 2015 in favour of the respondent and Mr Champagnie.

[4] The applicant explained that subsequent to the receipt of the judgment he was in a state of emotional shock and disbelief as he had believed in the strength of his case. He became despondent, withdrawn and extremely distressed. He had not immediately pursued obtaining advice on the success of an appeal. He was of the view that he had been treated unfairly at the trial as he had been "made to answer questions in open court" from opposing counsel in the absence of his own counsel.

[5] He deponed that he eventually obtained new counsel as the counsel who had represented him in the court below did not think that she had the requisite experience to deal with the matter on appeal. The applicant, through his attorneys, endeavoured to obtain the written reasons in respect of the judgment of the court which took some time. Prosecution of the appeal was still further delayed as he was experiencing financial difficulties. He testified that once he was able to cross that hurdle, the application for extension of time to file an appeal was made to Rattray J in the court below as the time for filing an appeal had passed. The learned judge, he said, refused the application indicating that it was to be heard in the Court of Appeal.

[6] The applicant deponed that the delay to proceed with the application in this court was not deliberate; that he had a reasonably good prospect of succeeding on appeal; and that the respondent would not be prejudiced if the court were to grant an order extending the time to file and serve the notice and grounds of appeal. He exhibited the draft formal order of Rattray J and a duly filed affidavit of urgency setting out yet again, *inter alia*, that the delay in filing the notice and grounds of appeal was

not deliberate and further that he was unaware that he could have appealed the decision of Dunbar-Green J on the day the oral judgment had been delivered.

[7] The respondent filed an affidavit in response. It was sworn to by his attorney-at-law, Mrs Raquel Dunbar. She specifically denied that the applicant had been treated unfairly at the trial. She denied that the applicant "had been made to answer questions relating to the triable issues" by her, in the absence of his attorney. The question, she deposed, that had been asked of him, was with regard to the identity and location of his attorney-at-law in order for the court to assess how to proceed with the trial, and where his attorney was when the court had resumed after an adjournment. Mrs Dunbar deposed, with regard to the latter, that the applicant had presented information to the court including advising that his attorney had fallen in the Supreme Court library (where she had gone to prepare closing submissions in the case) and also that she had been rushed to a doctor for medical attention. The court, she deponed, adjourned on 22 May 2015 to continue on 1 June 2015 to facilitate the applicant's counsel.

[8] Contrary to what the applicant had claimed, it was Mrs Dunbar's contention that the court had been "extremely generous to the applicant" permitting several adjournments to accommodate him. Mrs Dunbar further deponed that the applicant did not have a good case. She referred to and relied on the findings of the learned trial judge that it was the applicant's manoeuvre on the roadway that resulted in the damages and injuries he had sustained. She further deponed that he had failed to agree or make any order for the payment of costs. She stated further that in order to succeed on appeal, the applicant would have to show that the learned trial judge had

erred in law and had erred in the understanding of the facts as presented. It was Mrs Dunbar's further contention that the applicant had not proved that the learned trial judge had made any such error. Additionally, the respondent would be severely prejudiced as this action had been hanging over his head for approximately nine years and shortly after the accident, his brother (Mark Champagnie), the driver of the motor truck involved the accident with the applicant's motor car and his only witness to the accident had died, and the continuation of the claim served as an unfortunate reminder of the painful loss of his brother, and he was therefore desirous of the matter being brought to an end.

Judgment of Dunbar-Green J

[9] As indicated, judgment was delivered on 2 June 2015. The learned trial judge in the opening paragraphs of her judgment referred to the hesitant start of the case with an adjournment having been granted to the applicant's attorney as requested. The learned trial judge referred to the claim of the applicant against the respondent, the owner of the Isuzu motor truck, and Mark Champagnie, the driver of the same.

[10] The particulars of negligence claimed against the respondent and Mr Champagnie, by the applicant, were that Mr Champagnie, had been driving at an excessive speed, failed to keep a proper look out, drove without any sufficient consideration for other road users and failed to have any sufficient regard for the safely of the applicant, who was the driver of the Toyota Starlet motor car licenced EA 1292. The applicant also claimed that Mr Champagnie had lost control of the motor truck causing it to collide into the rear of the applicant's stationary motor car. The learned

trial judge set out the fact that the applicant relied on the doctrine of *res ipsa loquitur* and she referred to his particulars of injuries claimed including whiplash, and the special damages incurred, which included visits to medical doctors and damage to his motor vehicle. The medical and assessors reports were tendered into evidence by consent.

[11] The learned trial judge referred to the defence. She stated that the respondent asserted that the doctrine of *res ipsa loquitur* was inapplicable to the instant case and set out the particulars of negligence claimed by the respondent as contributory negligence of the applicant. These included driving at an excessive speed in the circumstances, attempting to and/or negotiating a right turn across the path of the respondent's motor truck when it was manifestly unsafe to do so, attempting to cut across the path of the motor truck when it was unsafe to do so thereby causing the collision, and failing to keep any or any proper look out whilst obstructing the path of the respondent's motor truck.

[12] The learned trial judge referred to the respective cases of the parties and referred to the witness statements which she had permitted to stand as the evidence in chief. The evidence gleaned from the parties respective cases was that the applicant was driving his Toyota Starlet motor car along Marcus Garvey Drive from the direction of Kingston in the left lane. Mr Champagnie was driving the Isuzu motor truck in the same direction in the right lane. The applicant's case was that the motor truck was a little ahead of him and when he reached beside the motor truck it "sped up". He however passed the motor truck and when at a distance of about three car lengths ahead, he indicated and switched to the right lane "with the intent of entering a median

to turn into Industrial Terrace". In his estimation one car length was approximately 14 feet. The applicant's case was that he came to a stop beside a flat bed truck "which was occupying the median". While waiting there he heard a bang and his motor car turned 120 degrees and "slid backwards under the flatbed truck". The vehicle was therefore wedged under the truck with the front facing the direction from which he had been coming before the collision. It was his further contention that there were no vehicles travelling either in front or behind Mr Champagnie's motor truck. Both drivers he said went to the police station. They gave their reports. The applicant indicated that he had been experiencing severe intermittent pain subsequent to the accident, with a residual inability to sit or stand for long periods.

[13] The learned trial judge set out the respondent's case. She referred to the witness statement of Mr Champagnie which confirmed that he had been driving the respondent's motor truck in the right lane on Marcus Garvey Drive heading in the direction of Spanish Town in the parish of Saint Catherine. The judge noted that Mr Champagnie had stated that as he approached the intersection of Marcus Garvey Drive and Industrial Terrace about 6 feet from the median, the applicant had cut across from the left lane without giving any indication with an intention to turn into Industrial Terrace. The motor car, he said was unable to turn fully into the intersection as the flatbed truck was in a slanted position waiting to complete the turn. Mr Champagnie claimed that he had been travelling about 35 miles per hour and that the truck was heavily laden with 30 bags of cornmeal. He said that he had slammed on his brakes and the truck had swerved to the left but it had not come to a complete stop. The right side

of the truck front bumper had hit the right rear of the car causing it to spin and hit into the flat bed truck waiting in the break in the median. The respondent's truck came to stop in the left lane about 6-7 feet ahead of the intersection. The truck had sustained some minor damage to the right reflector light and the right front section above the bumper. The car, he said, had been damaged also to the left rear section of the vehicle. The learned trial judge said that in cross-examination Mr Champagnie had testified that he had slowed after the applicant had passed him. He said that he had seen the motor car clearly as it passed him but that the rear of the motor car had been protruding out into the right lane. The collision occurred about 2-3 seconds thereafter. Mr Champagnie indicated that the road was wet as it had been raining, which caused the truck to slide when he applied the brakes.

[14] The learned judge identified the issues as follows:

1) Had Mr Champanie owed a duty of care to the applicant? Was there a breach? Was the harm foreseeable?
2) Was the applicant the author of his own misfortune with regard to the injuries sustained by him?
3) The quantum of damages if any to be awarded to the applicant.

[15] The learned judge made several findings of facts. She accepted that there was a collision between two motor vehicles, a Toyota Starlet motor car and an Isuzu motor truck being driven by the applicant and Mr Champagnie respectively. She also accepted that the vehicles were travelling in the same direction; Mr Champagnie in the right lane

and the applicant in the left lane on Marcus Garvey Drive. She found that the applicant passed Mr Champagnie and switched lanes and then attempted to make a right turn but did not complete the same due to the presence of the 20 foot flatbed truck in the space in the median. The learned judge referred to **Glenford Anderson v George Welch** [2012] JMCA Civ 43 for the proposition that in order to succeed in a claim for negligence the claimant must prove that the defendant owed a duty of care which had been breached, and which had resulted in damages. The learned judge referred to section 51 of the Road Traffic Act with regard to the duty owed by car users to other users of the road. She set out the duty as she understood it in paragraph 33 of her judgment which reads:

> "All road users have a duty to manoeuvre their vehicle in a manner which does not endanger other users of the road. In circumstances where crossing the path of another vehicle is being executed, the driver carrying out the manoeuvre must do so in a manner which does not endanger anyone and only when it can be done safely. This includes having a clear view of the roadway ahead, checking the speed of the vehicle which is being crossed and ensuring that after crossing any other manoeuvre can be completed safely."

[16] The learned judge opined that if the applicant's testimony was accurate that Mr Champagnie's truck had sped up while the applicant was attempting to pass, then the applicant had the option to slow down and permit the truck to proceed before moving into the right lane. The learned judge also opined that in any event if the truck had done so, with no other traffic on the roadway, that by itself would not have been negligent. She accepted that Mr Champagnie's truck was travelling at 35 miles per hour and so was not travelling at an excessive speed. She found that the applicant's motor

car being three car lengths ahead of the motor truck was not a sufficient distance for him to have attempted the manoeuvre that he had endeavoured to do.

[17] The learned trial judge found that the applicant's motor car was protruding into the road. That it had been raining. That the truck was heavily laden and that it was because of the wet road and the load that the truck was carrying that Mr Champagnie had been unable to brake safely to avoid the collision. She also found that Mr Champagnie had swerved in an attempt to avoid the collision which he had been forced to do because of the applicant's manoeuvre. In her opinion, the fact that there was not a full-on collision, and also the extent of the applicant's injuries, all pointed to the fact that Mr Champagnie had not been driving fast. She found specifically at paragraph 43 that:

> "I am satisfied that it was unsafe and negligent for the [applicant] to have crossed lanes into the path of a truck (which on his evidence had been increasing its speed) then come to a stop shortly after, without ensuring that a part of his vehicle was not protruding onto the major roadway in the path of the truck, and expect that the heavy laden truck which was travelling on a wet road would have been able to come to a safe and sudden stop to avert a collision."

[18] She further relied on the dictum of Wolfe JA (as he then was) in **James Mitchell et al v Leviene McKenzie et al** SCCA No 104/1991, delivered 21 October 1992, and concluded at paragraph 48:

> "There is nothing on the evidence that the second defendant breached the reciprocal duty required by the **Road Traffic Act** or his duty of care at common law. Neither was his evidence discredited in any material respect."

[19] She referred to certain inconsistencies in Mr Champagnie's evidence but did not find them material particularly as to whether Mr Champagnie's truck had swerved before or after the collision and also with regard to the position of the damage to the applicant's motor car. In respect of the latter, the learned trial judge explained that as the motor car had been hit, spun around and become wedged in the flatbed truck damage would have occurred to both sides of the car.

[20] In the end, the learned trial judge found that Mr Champagnie's evidence was not contrived. It was credible and she accepted it. She made specific reference to the fact that the road was wet, that the truck was heavily laden, that he had pressed his brakes and that the truck had slid and impacted the applicant's motor car. She finally concluded at paragraph 57:

> "[Mr Champagnie's] evidence was more reliable and credible than the [applicant's]. I therefore find, on a balance of probabilities, that the [applicant] has not proved that"[Mr Champagnie] had failed to exercise due care and was liable for the collision."

[21] In the light of the above findings, the parties made full submissions on the success of the application for an extension of time to appeal.

The applicant's submission

[22] Counsel submitted that permission to appeal was not required as the judgment was final and referred to rule 1.11(1) of Court of Appeal Rules (CAR). She accepted the time for filing the appeal, namely within 42 days of service of the judgment, had long passed.

[23] Counsel stated that the applicant was required to address four relevant factors in order to succeed on the application namely: the length of the delay, the reasons for the same, the prejudice to the other party and the merits of the appeal. Counsel referred to the applicant's affidavit and indicated that he explained the delay in filing the application for permission to appeal out of time. She referred to his mental state and the fact that he had filed an application on 20 November 2015 in the Supreme Court which Rattray J had refused on the basis that he lacked jurisdiction in spite of section 1.11(2) of CAR which she submitted gave him the power to do so. Counsel submitted that although the delay was fairly substantial it was not inordinate and would not have caused undue prejudice to the respondent.

[24] Counsel then submitted on the merits of the appeal, and said that the learned trial judge had erred in that she had failed to recognise the duty of care owed by Mr Champagnie to the applicant, bearing in mind that the applicant's vehicle was in a stationary position waiting to cross the median, in an attempt to make a right turn when his motor vehicle was hit in the rear by Mr Champagnie's motor truck. The trial judge, she submitted, failed to give sufficient regard to the testimony of the applicant, as when the applicant was attempting to complete his manoeuvre the road was clear. The learned judge, she submitted, believed that Mr Champagnie had been driving at 35 miles per hour and had failed to acknowledge or recognise that that was before the applicant's motor car had passed the truck which had sped up.

[25] Counsel distinguished the facts in **James Mitchell et al v Leviene McKenzie et al** to say that in that case, the court found that the applicant had crossed the path of

the bus at a time when it was unsafe to do so, which she argued was not the situation with the case at bar. Counsel submitted that the learned judge had accepted that it had been a "rainy day" when it was in fact a "hot sunny day". Counsel further submitted that the learned trial judge had erred when she instructed the applicant's counsel to leave the room to locate another attorney previously representing the applicant "forcing the attorney to abandon her client whilst in the witness stand and permitting questions to be put to him in the absence of his attorney". Additionally, she argued the learned trial judge failed to advise the applicant that he was not obliged to answer questions in the absence of his counsel.

[26] Counsel complained that the learned trial judge did not take into consideration the inexperience and unpreparedness of counsel for the applicant. Counsel relied on the principle emanating from **Fabian Valentine Bowes v Paulette Yvonne Bowes** [2012] JMSC Civil 27 that time limits in the rules ought to be obeyed, but that the delay on the part of the applicant must be looked at in the round in the context of the entire history of the matter and the litigation. Counsel finally argued that the applicant would suffer the far greater prejudice if the application was refused, as the respondent would only experience delay in obtaining his costs although she conceded that it had taken a long time for the matter to be completed. But on the other hand, the door of access to the court would be closed ultimately denying justice in the case to the applicant, if the application for extension of time was refused.

The respondent's submissions

[27] Counsel accepted the relevant factors required to be proved in an application for extension of time which had been referred to in the applicant's submissions and as are set out in **Leyman Strachan v The Gleaner Company Limited and Another** [2005] UKPC 33. Counsel argued that the court in exercising its discretion whether to grant the application must consider the overriding objective, and she reminded the court that in the instant case the respondent had had the matter hanging over his head for nine years and so there was real prejudice to him. The applicant, she submitted had failed to provide any material on which the court could exercise its discretion to grant an extension of time, as although stating that his appeal had a good chance of success, he had not supported that mere assertion with any details. The case had been determined mainly on factual evidence and she referred to the evidence in support of the respondent's case. She confirmed that the facts in **James Mitchell et al v Leviene McKenzie et al** on which the learned trial judge relied, were relevant and she referred to the dictum of Wolfe J as being applicable to the case at bar.

[28] Counsel submitted that the allegations that any aspect of the case had been conducted in the absence of the applicant's counsel were entirely false, and referred to her affidavit which has been set out earlier where she deponed what had occurred. She argued that the submissions of the applicant's attorney with regard to the reasons for delay in pursuing this application are spurious and commented that it had been nearly a year since the delivery of the judgment. Moreover, the action continues to affect the

respondent adversely when it is resurrected, since it is a painful experience for him to recall the accident as his brother died shortly thereafter.

Discussion and analysis

[29] There is no doubt that the court has power to extend time for the notice and grounds of appeal to be filed even if the time has passed. Rule 1.7(2)(b) of CAR reads as follows:

> "Except where these Rules provide otherwise, the court may ...
>
> (b) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed;"

[30] The decision of Dunbar Green J was delivered on 2 June 2015. Pursuant to rule 1.11(1)(c) of CAR within 42 days after service of the judgment of the court the notice of appeal ought to have been filed. That was not done. An application was made in November 2015 to extend time to file the notice and grounds of appeal before Rattray J, allegedly pursuant to section 1.11(2) of CAR, which was refused. The learned trial judge indicated that the application ought to have been made at the Court of Appeal. We are not sure that that is the correct interpretation of that section of the rule. But, be that as it may, the application was filed on 19 February 2016 and is now before the court for our deliberation and determination. The application was filed approximately seven months late.

[31] In dealing with the facts outlined, the length of delay and the reason for the same is an important consideration. Seven months is a fairly substantial period of time although in certain circumstances it may not be considered inordinate. The applicant has endeavoured to explain why the application to extend time was filed so many months out of time. He says he was shocked, emotionally upset, distressed and financially embarrassed. He was eventually able to secure attorneys who were prepared to act on his behalf to prosecute his appeal. The explanation may not be a "good one" but it is an explanation nonetheless, and in keeping with the dictum of Smith JA in **Peter Haddad v Donald Silvera** SCCA No 31/2003, delivered 31 July 2007, on behalf of the court, there must at least be an explanation given for the delay, even if the reason is not a good and or sufficient one. Smith JA stated at pages 8 and 11 that there must be some material upon which the court can exercise its discretion to extend time to file an appeal.

[32] There is also no doubt that there will be prejudice suffered by the respondent as he has indicated that he is desirous of the matter coming to an end, the accident having taken place nearly 10 years ago. He would wish his costs to be paid and to obtain closure in this long outstanding litigation relating to what he describes as an unfortunate accident. There is no doubt also that on the face of it, the applicant will suffer prejudice as he is trying to access the court to set aside a judgment against him and to obtain judgment in his favour with consequential damages compensating him for damage to his motor car, personal injuries suffered, and to remove the order to pay costs, which would no longer be open to him if the application for extension of time is

refused. However, as counsel for the respondent stated, if there is no merit in the appeal, then this court ought not to exercise its discretion to extend the time to file the appeal even if the delay is not inordinate and there is prejudice being experienced by either party.

[33] With regard to the merit of the case, the words of Viscount Simon in **Watt v Thomas** [1947] 1 All ER 582, at pages 583-584, are instructive:

> "… an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached on that evidence should stand, but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide, but if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

[34] It is incumbent on the applicant therefore, in circumstances where there are no verbatim notes and the learned trial judge has had the opportunity of seeing and hearing the witnesses giving evidence to prove that the learned judge was demonstrably wrong. In this case this is how we see it. The learned trial judge, based

on her findings, has demonstrated clearly the following facts. The applicant was travelling in the left lane alongside Mr Champagnie who was driving a motor truck in the right lane on Marcus Garvey Drive heading in the same direction. The applicant endeavoured to switch lanes, to move in front of the motor truck, and to position himself to turn right in the median. That in itself would be a manoeuvre fraught with difficulties, potential danger and proved to be unsafe, as there was already a flatbed truck in the break in the median attempting to turn right into Industrial Terrace. The applicant's motor car obstructed the right lane where Mr Champagnie was travelling. It was a rainy day. There was no evidence that it was a sunny day. Mr Champagnie's motor truck was heavily laden, and although he attempted to swerve it was not possible in the space and time available to do so. The collision occurred. It seems to us that in these circumstances, and on that evidence it was open to the learned trial judge to make the findings that she did. It is also unlikely that this court could ever find that she was demonstrably and palpably wrong.

[35] Section 51(2) of the Road Traffic Act States:

> "Notwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident, and the breach by a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection."

[36] There is no doubt that in the circumstances of this case there was a duty of care owed by the applicant to other road users namely Mr Champagnie whilst undertaking the manoeuvre to enter Industrial Terrace. The learned trial judge accepted that the

applicant was either three car lengths or 6 feet ahead of the truck. But in either case, there would have been a question as to why the applicant did not go behind the truck and wait for it to pass. Then he would have been better able to assess the situation, bearing in mind that the flatbed motor truck was already in the median waiting to turn right. The learned judge, having accepted that it was raining and that the truck was heavily laden, acknowledged that it would be difficult to swerve and stop all of which was in the evidence and which she was entitled to accept. This is why she concluded that Mr Champagnie had not breached any reciprocal duty required by the Road Traffic Act or his duty of care at common law. She found that the inconsistencies such as they were, did not seem to be material and her conclusion in that regard cannot be faulted. It would seem therefore that the applicant was the author of his own damage and injuries.

[37] Finally there are two points which seemed to have concerned counsel for the applicant, firstly, the commencement and continuation of the trial and secondly, the conduct of the trial in the absence of the applicant's counsel. With regard to the first concern, the learned judge, in paragraphs 1 and 2 of her judgment and with the assistance of the respondent's counsel, it seems to us and we accept, that the matter commenced at approximately midday on 21 May 2015, and continued to 22 May 2015 with time being given to counsel representing the applicant to obtain certain documents to be admitted into evidence. That having been done the matter was adjourned at the end of the respondent's case on 22 May 2015 for closing submissions to be undertaken. When court resumed later on 22 May 2015 it was then that the applicant's counsel did

not appear, and the applicant was asked questions in open court as to her location. The court was then informed that she had fallen and had had to seek urgent medical attention. The matter was then adjourned to 1 June 2015 for continuation with closing submissions which were done and the matter was completed. There does not seem to be any merit in the claim that counsel was absent during the trial of the matter causing prejudice to the applicant, so much so that he did not have a fair trial.

[38] With regard to the second concern expressed by the applicant's counsel, the allegation that the applicant was in the witness box under cross-examination when he was questioned in the absence of his counsel does not appear to be accurate and so this allegation cannot succeed. There was no evidence to support such an allegation, and Ms Dunbar has indicated in her affidavit what occurred and we accept her version of events. The applicant's statement in any event that the questions were posed to him in open court is consistent with what has been deposed by Ms Dunbar and without any evidence to the contrary, one could not assume that such a fundamental breach of the fair trial procedure had taken place. There is certainly no mention of that in the reasons for judgment of the learned trial judge, and had it occurred one would have expected that the applicant would have set out the same in great detail in his evidence in support of the application. In our opinion, based on the above there does not seem to be any basis for the applicant's concern in this regard.

Conclusion

[39] In light of all the above the application to extend time to file the notice and grounds of appeal is refused. We do not think that the applicant has satisfied the court

that there was no evidence for the learned judge to have found as she did, or that she had misconceived the evidence, or applied the wrong law to the facts found. The appellant has failed to show that there is any chance of success on appeal. He has failed to demonstrate that there is any basis that this court could find that the judge was demonstrably wrong. There is no arguable appeal. The application is therefore refused with costs to the respondent to be taxed if not agreed.