

IN THE FIJI COURT OF APPEAL

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CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0041/93S  
(High Court Civil Action No. 728 of 1984)

BETWEEN:

ATTORNEY-GENERAL OF FIJI  
DOCTOR HUBERT ELLIOT

APPELLANTS/APPLICANTS

and

PAUL PRAVEEN SHARMA  
(f/n Daya Nand Sharma)

RESPONDENT

*Mr D. Singh* Counsel for the Appellants/Applicants  
*Mr T. Gates* Counsel for the Respondent

Date and Place of Hearing: 11 May 1995, Suva  
Delivery of Judgment: 17 May 1995

DECISION

This is an application for leave to appeal out of time and if leave is granted then for a stay order in respect of the balance amount owing by the Appellants/Applicants to the Respondent, pending determination of the appeal.

On 1 August 1982 the Respondent suffered a broken leg while playing soccer and was taken to the Colonial War Memorial Hospital in Suva for medical attention. For the present purposes it is sufficient to note that as a result of gross and continuing negligence on the part of the medical staff the Respondent suffered prolonged pain and suffering and finally having been taken to a hospital in Sydney, his leg had to be amputated. He claimed damages and interest thereon from the Appellants. The Appellants admitted liability and consent judgment was entered against them in the High Court in Civil Action No. 728 of 1984. Evidence was heard as to quantum of damages and interest thereon. On 27 August 1993 the High Court awarded the Respondent a total of \$383,259 in Australian currency, i.e. \$454,300 Fijian less \$71,041 Fijian already paid.

The Appellants appealed to the Fiji Court of Appeal against quantum.

On 12 August 1994 this Court allowed the appeal in part and held that the Respondent was entitled to a total of \$190,883 in Australian dollars. The Court noted that a substantial part of the sum had already been paid. Subsequently a dispute arose between the parties as to whether the sum of \$71,041 should be discounted from the final figure

of \$A190,883. The Appellants claimed that it should be discounted. They sought clarification from this Court on 8 December 1994 well after time for appealing against the judgment of this Court had expired. The clarification was given on 23 February 1995. This Court is in no doubt that the sum of \$A190,883 awarded by it is in addition to the sum of \$71,041 Fijian already paid by the Appellants.

The present application to appeal out of time was filed on 17 March 1995. It is supported by an affidavit sworn by Mr Daniel Singh, Counsel for the Appellants. Mr Singh seeks to explain the delay and refers to the correspondence he had with the Registrar of this Court. Paragraph 5 of his affidavit deposes - 'That I was under the honest belief that \$F71,041.00 already paid out was part of the total figure of \$A190,883.'

In the written submissions filed by the Appellants' Counsel it is contended at p.4 - 'The points of law involved in the appeal are of great public importance.' The proposed grounds of appeal attached to the notice of motion filed on 17 March 1995 are as follows:

*"1. THE Court erred in the finding and using an excessive and inappropriate multiplier of 15 for the working life of the respondent.*

*2. THE Court erred in finding and using an excessive and inappropriate multiplier of 18 for the purpose of assessing the future cost of purchasing artificial limbs.*

3. THE Court erred in awarding a high interest award of \$A2,700.00 in respect of the special damages.

4. THE Court erred in awarding excessively high general damages of \$A156,600.00

5. THE Court erred in awarding excessively high interest on general damages of \$A18,150.00

6. THE Court erred in awarding an excessively high total amount of damages and interest of \$A190,883."

As the matter in dispute exceeds \$20,000 the Appellant had a right of appeal to the Supreme Court by virtue of Article 117(1)(b) of the Fiji Constitution 1990 (see also S.8(1)(b) of the Supreme Court Decree 1991). If the Appellants were aggrieved with the multiplier used by the Court or with the rate of interest it awarded, then they had 42 days within which to lodge their Notice of Appeal. In our view none of the proposed grounds raise any questions of great importance in law. We must bear in mind that the Supreme Court which is the highest judicial forum in the country does not deal with trivialities. It was, in our view, set up to primarily make final and binding pronouncements on important disputed questions of law or on questions of great general public importance arising out of legal disputes.

We are mindful that the Appellants are not seeking leave to appeal as distinct from leave to appeal out of time although Section 8(1)(c) which sets out the criteria for leave to appeal is mentioned in the proposed Notice of Appeal. Therefore, it is not incumbent on the Appellants to satisfy the criteria namely that the question involved in the proposed appeal "is one that by reason of its great general or public importance or otherwise ought to be submitted." Nevertheless once an Appellant has failed to file an appeal within the

prescribed time it carries the burden, inter alia, of showing that the question involved in the proposed appeal is of some importance requiring serious consideration by the Supreme Court.

Proceeding on the basis that the Appellants have a right to appeal to the Supreme Court they ought to have complied with Rule 4(3) of the Rules of the Supreme Court 1992 which reads -

*"Every notice of appeal shall be filed in the Supreme Court within forty two days from the date of the decision of the Court."*

The time for appealing expired on 23 September 1994. Therefore, there has been a delay of over 5 months in making the present application. Even after receiving the clarification the Appellants waited until 17 March 1995 to file the present application.

There is merit in paragraph 5 of the written submissions of Counsel for the Respondent. It reads as follows:

*'5. Reason for the Failure. This is the crux of the application. The appellant's counsel at paragraphs 5 and 6 of his affidavit refers to an honest mistake, a misunderstanding of the effect of the Court of Appeal's judgment concerning the Special Damages. He wrote to the Registrar seeking clarification from the Court. However he did so only on 8th December 1994, just over 2 months (9 weeks) after the appeal period had expired. His re-application to the court should have been initiated well before that date, and could have been commenced whilst the court was still sitting immediately after judgment was delivered on 12th August 1994. In effect if there was confusion in the mind of the appellant as to the meaning of the judgment, it took almost 17 weeks, from 12th August to 8th December 1994, for him to take appropriate action. This was unreasonable delay rather than a slip or mistake, and still the appeal was not filed till 17th March 1995. It was said in the criminal appeal of The Queen v Brown (1963) SASR 190 at 191:*

*"The practice is that, if any reasonable explanation is forthcoming, and if the delay is, relatively, slight, say for a few days or even a week or two, the Court will readily extend the time, provided that there is a question which justifies serious consideration."*

Lord Taylor, Lord Chief Justice of England when delivering judgment in Regina v Burley ('The Times' of 9 November 1994) stated -

*"The Court of Appeal wished to make it perfectly clear that rules governing the filing of documents relating to appeals were not set for perverse reasons but to enable the Court to manage its business properly."*

We respectfully endorse this statement.

Whilst the Lord Chief Justice's statement was made in the context of a criminal case wherein the applicant was seeking leave to apply out of time to renew an application for leave to appeal against conviction, the sentiments expressed by him apply with equal force to filing of documents in civil appeals.

The Fiji Court of Appeal adopted the following as a convenient statement of principle made by the New Zealand Court of Appeal per Richmond J. in Avery v No. 2 Public Service Appeal Board and Others (1973) 2 NZLR 86 -

"When once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all circumstances the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal." (See *Kenneth John Hart v Air Pacific Ltd - Civil Appeal No. 23 of 1983.*)

As rightly pointed out by Counsel for the Respondent there are normally 5 factors that are taken into consideration when dealing with an application for leave to appeal out of time. These broadly are -

- ( i) The reason for the failure to comply
- ( ii) The length of the delay
- (iii) Is there a question which justifies serious consideration?
- ( iv) If there has been substantial delay, have any of the grounds such merit that they will probably succeed?
- ( v) The degree of prejudice to the Respondent in enlarging time.

(As to factors (i), (ii), (iv) and (v) see Van Stillevoeldt BV v EL Carriers Inc [1983] 1 WLR 207.)

It is not always necessary to deal with each of these factors willy nilly. For, as was said in Palata Investments v Burt Sinfield (1985) 2 All ER 517 at 521, where the delay is slight, it is generally unnecessary to go into the merits.

By the same token if the delay is substantial and the Appellants are unable to give a reasonable explanation for the delay and there are no questions requiring serious consideration by the highest judicial tribunal in the land, the Court is not obliged to deal with every factor.

In our view the delay here is substantial, the explanation given for the delay is unsatisfactory and there are no important questions of law requiring the Supreme Court's attention. Furthermore the prospects of success, if any, are minimal.

The onus is on the Appellants to satisfy the Court that in all circumstances the justice of the case requires that they be given an opportunity to attack the judgment of the Court of Appeal. This they have failed to do. On the contrary the justice of the case demands that no such leave be granted. On the question of delay we reiterate the concern expressed by this Court on 26 May 1994 when refusing an earlier application by the Appellants for an order staying

execution of the High Court's judgment and an application by the Respondent to strike out the appeal -

" In these circumstances the failure of the Appellants to make payment and the continued default for a long period is a matter for very strong condemnation by this Court. There has been no ground shown which might have justified such a prolonged failure to comply with the Order of the Court. Having regard, however, to the very large amount of the Judgment we are reluctant to strike the appeal out at this stage. Instead, we propose to adjourn the application to strike out sine die. It may be brought on 7 days' notice and there will be liberty to apply accordingly. We think we should add that, if there should be further default on the part of the Appellants then, when the matter comes before the Court again, we should certainly expect the appeal to be struck out, although that, of course, would be a matter for the Court as it was constituted at that time. The application is adjourned sine die accordingly."

The application for leave to appeal out of time is dismissed. The question, therefore, of granting a stay order does not arise.

Application dismissed with costs to the Respondent.

*M. Tikaram*

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Sir Moti Tikaram  
President

*M. Kapi*

.....  
Sir Mari Kapi  
Judge of Appeal

*I. R. Thompson*  
.....  
Mr Justice Ian Thompson  
Judge of Appeal