

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 64 OF 1992

(High Court Civil Action No. 472 of 1992)

BETWEEN

ANTHONY FREDERICK STEPHENS

APPELLANT

-and-

THE ATTORNEY-GENERAL OF FIJI

RESPONDENT

Mr. G.P. Lala for the Appellant  
Mr. D. Singh for the Respondent

Date of Delivery of Judgment : 16 May 1996, Suva

JUDGMENT OF THE COURT

The appellant has applied to this Court to reinstate his appeal in its hearing list. It was commenced in time in December 1992; but the appellant's then solicitors failed to apply within time to have security for costs fixed, as is required by rule 17 of the Court of Appeal Rules. On 30 January 1995 the Registrar served on the appellant's solicitors a summons to show cause why the appeal should not be dismissed on account of that failure. The appellant forthwith changed his solicitors, who moved the Court to extend the time for making the application, to fix the security for costs and to list the appeal for hearing. On 28 February 1995 the Court, constituted by the President and one Justice of Appeal ordered that the summons to show cause be suspended, subject to the appellant paying into court within 14 days specified amounts for security for costs and

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for preparation of the appeal record. It ordered further that, if the order was not complied with, the summons would stand dismissed.

On 8 March 1995 the specified amounts were paid into court, so that the summons to show cause remained suspended. The appeal was then called over on 25 April 1995 with a view to its being listed for hearing during the session of the Court which was to be held in May 1995. Upon the matter being called over the President set a hearing date, 19 May 1995, and ordered that fresh and concise grounds of appeal were to be filed and served on or before 10 May 1995. Subsequently it became apparent that the Court would not be able to hear the appeal on 19 May. On the President's instructions the Registrar conveyed this information to the parties by a letter dated 9 May. In the letter he informed them that the President would see counsel for both parties in chambers on 19 May so as to fix a new hearing date. He stated also that "the order to file concise grounds of appeal and submissions etc. still stands".

On 11 May the appellant's new solicitors wrote a letter to the Registrar stating that it was intended to brief Queen's Counsel from overseas but that that could not be done immediately. Accordingly, they wrote, they would move the Court on 19 May "to move this case off the list and to be reinstated only be (sic) motion and affidavit when we are ready possibly for the August session." Endorsed on the letter were the words

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"We hereby consent to this case being taken off the list as suggested in the letter" and beneath then a signature apparently of the Solicitor-General. On 12 May, on the instructions of the President, the Registrar wrote to the appellant's new solicitors, with a copy being sent to the Solicitor-General, informing them that, in view of the Solicitor-General's consent, their application was granted, the appeal was taken off the list and might be reinstated only by way of a motion supported by an affidavit. He stated further that, if no such application was received by 30 December 1995, the Court reserved the right to issue a summons to show cause why the appeal should not be dismissed. He said that it was no longer necessary for counsel to appear in chambers on 19 May.

The next event to occur was the filing of a notice on 29 December 1995 that the appellant had again changed his solicitors and a summons applying to a Justice of Appeal for an order that the appeal be reinstated for hearing during the session of the Court to be held in February 1996. The summons was accompanied by an affidavit sworn by the appellant stating that he had arranged "overseas counsel" to appear at the hearing and that "as an overseas Queen's Counsel will be involved" he was requesting a hearing date towards the end of the session.

On the return date of the summons the Solicitor-General opposed the application on the ground of "inordinate delay". The President ordered the parties to file and serve affidavits and

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written submissions; he reserved his decision until after receipt of them. It was agreed that there was no need for any further oral addresses by counsel. Subsequently, after receipt of the affidavits and written submissions, the Registrar wrote to the parties, under the President's direction, informing them that the application was to be placed before a bench of three judges for adjudication. He informed them also that, as the affidavits and written submissions had been filed in the Court, the Court would not hear counsel further unless either party wished it to do so. The solicitors who are now representing the appellant subsequently wrote to the Registrar stating that they would be happy to appear before the Court for an oral hearing but only if the Court deemed it necessary. Counsel for the respondent subsequently informed the President on call-over day that he did not wish to be heard orally. We are, therefore, deciding this application on the basis of the parties' written submissions.

The appellant's solicitors have submitted that the respondent is estopped by the consent endorsed on their predecessors' letter from opposing the reinstatement of the appeal to the hearing list. The respondent denies that he consented to a postponement of the hearing to later than August 1995 or, at the outside, November 1995. He submits that there have been inordinate and inexcusable delays by the appellant and his solicitors.

In the affidavit sworn by the appellant in February 1995, before the Court made its order on 28 February 1995, the delay to that point was not explained, as the summons to show cause was issued because of the failure to comply with rule 17, not because of delay. No explanation for that delay was given in the appellant's affidavit of 29 December 1995. However, the appellant was not put on notice in February 1995 regarding the delay up to that date. The respondent did not himself take out a summons to show cause for want of prosecution, as he might have done if he had been concerned about it then.

The delay thereafter until at least August 1995 was expressly acquiesced in by the respondent when he gave his consent to it. When the Registrar wrote his letter dated 12 May 1995 stating that the Court reserved the right to issue a summons to show cause why the appeal should not be dismissed for want of prosecution, i.e. delay, if the appellant did not apply by 30 December 1995 for reinstatement of the appeal, the respondent did not apply to the Court to order that the hearing should proceed either in August 1995 or November 1995; nor did he inform the Court that he was dissatisfied with the terms of Registrar's letter. Those facts provide an explanation of the delay from May 1995 to December 1995. Although the delay before then has not been explained, the terms of the summons to show cause, the manner in which the Court dealt with it and the respondent's failure to raise the matter of want of prosecution at that stage,

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in our view, preclude us from now refusing to reinstate the appeal in the hearing list on the ground of want of prosecution before February 1995. Similarly the events since then preclude us from refusing it on the ground of want of prosecution since then.

The appellant has sworn that an overseas Queen's Counsel has been briefed to represent him. We should, we are satisfied, order the reinstatement of the appeal in the hearing list.

However, we are most concerned that the appellant has not complied with the order made on 25 April 1995 for the filing and service of fresh and concise grounds of appeal. That must now be done without further delay or the Court may of its own motion dismiss the appeal for non-compliance with its directions. Further, the appeal must now proceed to hearing at the earliest opportunity and all the necessary preliminaries for that hearing must be completed by dates which we shall fix now. If the appellant fails to comply with the directions in respect of those preparations, the Court may dismiss the appeal on that ground.

Accordingly we order -

- (a) that the appeal be reinstated in the hearing list forthwith;

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- (b) that on or before 28 May 1996 the appellant file in the Court's registry and serve on the respondent fresh and concise grounds of appeal and that, in default of his doing so, the appeal be listed before the Court at 9:30 a.m. on 29 May 1996 when the Court will move itself that the appeal be dismissed by reason of non-compliance with this order and with the order made on 25 April 1995;
  
- (c) that, subject to (b) above and (d) below, the appeal is to be heard in the August 1996 session of the Court and is to be listed for call over on 18 July 1996 to fix the date of the hearing;
  
- (d) that on or before 28 June 1996 the appellant is to file in the Court's registry and serve on the respondent written submissions setting out fully the arguments which will be advanced at the hearing in support of his appeal and that, in default of his doing so, the appeal will not be listed for call-over but will be listed for hearing at 10:45 a.m. on the first day of the August 1996 session when the Court will move itself that the appeal be dismissed for want of compliance with this order;

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- (e) that, subject to (d) above, on or before 15 July 1996 the respondent is to file in the Court's registry and serve on the respondent written submissions setting out fully the arguments which will be advanced at the hearing in support of his case; and
- (f) that the appellant is to pay the respondent's costs of this application in any event.

*Moti Tikaram*

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Sir Moti Tikaram  
President, Fiji Court of Appeal

*I.R. Thompson*

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Justice I.R. Thompson  
Judge of Appeal

*J.D. Dillon*

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Justice J. D. Dillon  
Judge of Appeal