IN THE COURT OF APPEAL, FIJI AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0042 OF 1999
(Appeal from the decision of Byrne J. dated 26.8.99 in HBA0018 of 1997)

In Chambers

BETWEEN: SURESH CHARAN *Applicant*

AND: BANSRAJ *Respondent*

Mr Suresh Charan Applicant in Person
Mr R.P. Singh for the Respondent

DECISION

(Whether a single judge has power to vary his/her own interlocutory order)

A default judgment for $2000.00 was entered against the Applicant by the Small Claims Tribunal on 8 November 1996.

On 16 September 1999 I granted the Applicant/Appellant Suresh Charan a conditional stay order against execution of a decision of Byrne J., whereby the Applicant had to deposit the judgment sum of $2000.00 into Court pending appeal. (See my full chamber decision dated 16 September 1999.)

On 27 September 1999 he deposited the sum into Court.

On 15 October 1999 the Applicant filed an application to vary my order to the extent that the sum of $2000.00 be refunded to him with interest. He made the application under Section 20 of the Court of Appeal Act without specifying the subsection he was invoking.

The relevant part of the application reads as follows -

"an order that the stay of execution of judgment order granted by the Honourable Justice Sir Moti Tikaram on 16 September, 1999 be varied to the extent that the order for the Appellant to deposit sum of $2000.00 into Court be discharged and the said deposit of $2000.00 by the Appellant into Court on 27.9.99 pursuant to that order be refunded to the Appellant forthwith with interest of 13.5 percent from the date of the payment into Court until refunded."

The Applicant's grounds for making the application is stated as follows -

"that the order made by the Referee on 8 November, 1996 and/or made by Byrne J. on 26.8.99 for the Appellant to pay to the Respondent the sum of $2000.00 is wholly irregular, cannot be enforced, the Appellant is entitled to have it set aside as of right and his Lordship erred in law in granting on 16.9.99 a conditional order for stay of execution of the said judgments ordering the Appellant to deposit the sum of $2000.00 into Court."

The main basis for the application was that I had wrongly exercised my discretion in attaching the condition. He was initially seeking determination by the full Court under the proviso to the old Section 20 of the Act. Alternatively he asked that I review my Order and discharge the condition.

On 1 November 1999 the parties appeared before me when I pointed that Section 20 of the Court of Appeal Act had been repealed, revised and replaced by the Court of Appeal (Amendment) Act 1998 whereby inter alia the right to seek a review by the full Court had been deleted. (See Section 9 of Act No. 13 of 1998 which came into force on 27 July 1998.) The Applicant said he was not aware of the amendment. However he contended that the deletion of the right was not specific enough. He also submitted that I could deal with the application as a single judge and vary the Order. Both parties agreed to file written submissions whereby the Applicant was to do so within 30 days and the Respondent within 30 days thereafter. The Applicant filed his submissions on 17 January 2000 by way of letter addressed to the Registrar. The Respondent failed to file his submissions as ordered.

The parties again appeared before me on 17 January 2000. On this occasion the Respondent was represented by Mr R.P. Singh who was confined to the issue before me, i.e. whether a single judge has power to review his own decision.

Mr Charan has argued that I can vary the Order as it is an interim order.

Mr Singh argues that I am functus because I had exercised my discretion after taking into account all the relevant facts and law.

By consent Respondent's Counsel was given 7 days within which to file a reply to Applicant's submissions. By consent this decision is being given on notice without further oral hearing.

I now have had time to consider submissions from both sides including Applicant's reply filed on 31 January 2000.

Whether an applicant aggrieved with a single judge's decision has a right under the new Section 20 to ask that his application be determined by the full Court?

In my view there is now no right in the aggrieved party to seek a review of a single judge's order by going to the full Court in civil matters. The Legislature in my view has purposely and deliberately taken away that right in civil matters. Sections 20 and 35 of the Act were reviewed following recommendations made by the Beattie Commission whose Report was adopted by the Parliament (see "Commission of Inquiry on the Courts" - Parliamentary Paper No. 24 of 1994). Extensive submissions were made to the Commission on Sections 20 and 35 of the Court of Appeal Act. It is important to note that in criminal matters the Parliament decided to retain the aggrieved party's right to ask for review by the full Court in certain circumstances only. (See Section 35 as repealed and revised by Act No. 13 of 1998 in particular 35(3).)

Before the amendment Section 20 read as follows -

"

Powers of a single judge of appeal

20. The powers of the Court under this Part—

(a) to give leave to appeal;

(b) to extend the time within which a notice of appeal or an application for leave to appeal may be given or within which any other matter or thing may be done;

(c) to give leave to amend a notice of appeal or respondent's notice;

(d) to give directions as to service;

(e) to admit a person to appeal in forma pauperis;

(f) to stay execution or make any interim order to prevent prejudice to the claims of any party pending an appeal;

(g) generally, to hear any application, make any order, or give any direction incidental to an appeal or intended appeal, not involving the decision of the appeal,

may be exercised by any judge of the Court in the same manner as they may be exercised by the Court and subject to the same provisions; but, if the judge refuses an application to exercise any such power or if any party is aggrieved by the exercise of such power, the applicant or party aggrieved shall be entitled to have the matter determined by the Court as duly constituted for the hearing and determining of appeals under this Act.

(Inserted by 37 of 1965, s. 13.)"

After the amendment it reads as follows -

"Powers of a single judge of appeal

20.—(1) A judge of the Court may exercise the following powers of the Court—

(a) to give leave to appeal;

(b) to extend the time within which a notice of appeal or an application for leave to appeal may be given or within which any other matter or thing may be done;

(c) to give leave to amend a notice of appeal or respondent's notice;

(d) to give directions as to service;

(e) to stay execution or make an interim order to prevent prejudice to the claims of any party pending an appeal;

(f) to give judgment by consent or make an order by consent;

(g) to dismiss an appeal for want of prosecution or for other causes specified in the rules;

(h) to dismiss an appeal on the application of the appellant;

(j) to deal with costs and other matters incidental to matters in any of the above paragraphs;

(k) generally, to hear any application, make any order or give any direction that is incidental to an appeal or intended appeal.

(2) If a judge of the Court considers it appropriate to do so, he or she may recommend that legal aid be granted to a party.

(3) A reserved judgment of the Court may be delivered by a single judge of the Court if any or all judges who heard the appeal are absent.".

The Applicant submits that the deletion of the aggrieved party's right to have the application determined by the full Court as if it were constituted for the hearing of an appeal, must have been due to an oversight on the part of the Legislature. I do not think so. It should be noted that the Court of Appeal Act was further amended in September 1998 without any queries arising on the deletion of the right. (See Act No. 38 of 1998 amending Section 22 of the Court of Appeal Act.)

The Applicant has cited the decision of this Court in Attorney-General & Another v Pacoil Fiji Ltd in Civil Appeal No. ABU0014 of 1999S in support of his argument that the deletion of the right is in any case immaterial because a single judge exercises the powers of the Court. At p.2 of the judgment the Court said -

> ***"In its term S.20 confers powers on a single judge. However the powers in question are powers of the Court and as such they may be exercised by the full Court."***

I respectfully agree but the question is - "Can the Applicant have two or more bites at the cherry as of right in the light of clear legislative intent to delete that right under Section 20?" It must be borne in mind that the Court of Appeal is a creature of statute. In my view he cannot do so if the Applicant chooses to go to a single judge in the first instance and the single judge exercises the Court's power to deal with the application. In Pacoil the full Court itself dealt with the application.

Whether a single judge has power to vary or review his or her own interlocutory order

The general rule is that no court or judge has power to rehear, review or vary a judgment or order except by way of an appeal.

See (i) *Preston Banking Company v William Allsup & Sons 1895 1 CH 141.*
(ii) *MacCarthy v Agard (1933) ALL E Rep 991.*

In general interlocutory orders stand in the same position as final Orders and cannot be altered save by means of an appeal.

See (i) *Kelsey v Doune (1912) 2 KB 482.*
(ii) *White Book (1967) 312.*

I might add that the Order I made is interim or interlocutory only in the sense that it lasts until determination of the appeal. Otherwise I have finally disposed of the application.

However I am of the view that in exceptional and rare circumstances it is open to a single judge to review any Order made by him to prevent any serious prejudice to the Applicant for instance where there was clear misapprehension of fact or law on the part of the judge which misapprehension warrants an early review in the interest of justice. Such a power vests in the final Courts and can in my view be exercised with variation by a lower Court or judge in exceptional and rare circumstances.

See (i) *S.S.C. Charan & Anuradha Charan v Shah, Suva City Council & Attorney-General - FCA Civil Appeal No. 29 of 1994.*

(ii) *S.S.C. Charan & Anuradha Charan v Suva City Council - Supreme Court's Civil Appeal No. CBV0006 of 1994.*

The misapprehension or mistake on the part of the judge must be manifest, the consequent injustice or prejudice must be both serious and apparent, and any delay in seeking rectification by way of appeal (if any such rights exists) would render the exercise futile.

Other situations where an Order may be reviewed by a single judge are -

(1) Where new circumstances have arisen after making of the Order which circumstances could cause irreparable damage to the Applicant (or his Estate) if the interlocutory order is not reviewed, e.g. where the Applicant dies before he could comply with the Court Order.

(2) Where through oversight or clerical error the Order sealed is not in accord with the judgment given and there is clear need to amend the sealed order to prevent an injustice or prejudice occurring. (See Order 20 r 10 of the High Court Rules.)

(3) Where liberty is reserved to the Applicant (or both parties) to apply.

(4) Where the parties consent to the review of the interlocutory order or decision to prevent any injustice or prejudice occurring and the judge has no objection.

The circumstances outlined in (1), (2) ,(3) and (4) (above) are clearly not applicable here.

As to any misapprehension there was none on my part either as to law or fact involved. I was clearly seized of the Applicant's contention that he was entitled to have the Tribunal's judgment set aside as of right because the rule as to the length of service for an adjourned hearing was not complied with, i.e. there was short service, 3 days instead of 10 days. (See Small Claims Tribunal Rule 3(2)(a)(2).)

The Applicant proceeds on the basis that every irregularity warrants setting aside of judgment. I do not think this is so. It is now a matter for the Appellate Court to decide in the light of the nature of breach and especially having regard to the inordinate delay on the part of the Applicant to seek a setting aside Order. Furthermore it must be borne in mind that the Applicant has so far not been able to obtain leave to appeal out of time and that Judge Scott's 2 decisions remain undisturbed and are not the subject of any appeal.

I am also aware of the Court of Appeal's recent judgment in Abdul Kadeer Kuddus Hussein v Checkaboard Furnishings & Ors. (Civil Appeal No. ABU0060 of 1998S) where the High Court's judgment was set aside because the service was a nullity. Nor have I overlooked the Court of Appeal's decision in Wearsmart Case in Civil Appeal No. ABU0030/97S dated 29 May 1998. I took into account all the relevant law and facts into account in exercising my discretion to grant a stay order and attach a condition to it.

There are no exceptional or rare circumstances to enable me to reopen the matter and set aside or discharge the condition I imposed. The Applicant is clearly attempting to agitate the same argument afresh. To allow him to do so would set a dangerous precedent which will offend against the principle that it is in public interest that there should be finality to litigation.

I rule that I am functus and have no power to discharge the condition.

This application is therefore dismissed. The Respondent is entitled to costs which are to be taxed if not agreed.

Dated at Suva this 24th day of February 2000.

FIJI COURT OF APPEAL

Sir Moti Tikaram
President, Court of Appeal, Fiji