

IN THE FIJI COURT OF APPEAL
(AT SUVA)

APPELLATE JURISDICTION

CIVIL APPEAL NO. ABU 0032 OF 2001

IN THE MATTER of MOTOR VEHICLES
(THIRD PARTY INSURANCE) ACT, CAP.
177 and the MOTOR VEHICLES (THIRD
PARTY INSURANCE)(AMENDED)
Regulations, 2000

AND

IN THE MATTER of an application by
TOWER INSURANCE (FIJI) LIMITED for a
Judicial Review.

THE STATE v THE MINISTER FOR TOURISM AND TRANSPORT

- APPLICANT

TOWER INSURANCE (FIJI) LIMITED
DOMINION INSURANCE LIMITED
QUEENSLAND INSURANCE (FIJI) LIMITED
NEW INDIA ASSURANCE COMPANY LIMITED

- RESPONDENTS

W. Calanchini for the Applicant/Proposed Appellant

A.K. Narayan for the Respondents

Date of Hearing : 10th August 2001

Date of Decision : 12th November 2001

DECISION

In a Judgment delivered on the 13th of October 2000 Shameem J. declared the Motor Vehicles (Third Party Insurance) (Amendment) Regulations 2000 invalid and quashed them. A Petition of Appeal was filed in this Court on the 21st of November 2000 and on the 1st of December 2000 the Applicant applied to the Judge for stay of the judgment pending the appeal.

On the 8th of December 2000 Shameem J. refused the application and ordered the Applicant to pay the Respondents' costs of \$200.00.

On the 13th of June 2001 the Applicant applied to this Court by Summons for an order that the Applicant have leave to file a Notice of Appeal out of time. The application is made pursuant to Rule 17(3) of the Court of Appeal (Amendment) Rules 1999.

Following Shameem J's judgment of the 13th of October 2000 the Applicant/Appellant filed an application for security of costs as required by the rules which was heard by the Deputy Registrar (Legal) on the 7th of November 2000. The Deputy Registrar handed down her decision on the 3rd of January 2001. She did not make an order for security for costs but gave directions that Order 18 of the Court of Appeal rules must be strictly complied and allowed 30 days for the appeal record to be lodged for certification.

On the 13th of June 2001 the Applicant filed the present application for leave to appeal out of time as the appeal was deemed to have been abandoned for failing to take the step ordered within the 30 days.

The Summons for leave is supported by an affidavit by one Ajay Singh, an Executive Officer (Litigation) in the Solicitor-General's Office. After setting out the background to the proceedings both in the High Court and in the abandoned appeal to this Court the deponent proceeds at paragraph 8 of his affidavit to explain the circumstances under which his office did not proceed further with the appeal. He states that the Deputy Registrar's decision was forwarded to the Solicitor-General's Office attached to a Memorandum dated 9th January 2001 from the Registrar of the Fiji Court of Appeal. These documents were received in the Solicitor-General's Office on the 11th of January 2001. Mr. Singh then says that, "Due to a misunderstanding in this office, the office file was inadvertently subsequently filed in a filing cabinet instead of being passed to me for preparing the appeal record".

The non-compliance with the order was not discovered until the 8th of June 2001. In between the period from being notified of the decision on the 11th of January 2001 to the 8th of June 2001 neither the Registrar of this Court nor the Respondents' solicitors reminded the Appellant's Legal Advisers that the appeal was deemed abandoned.

The Notice of Appeal contains ten grounds, eight of which are on questions of law and the remaining two on questions of fact.

The brief history of this matter is that on 10th February 2000, the Government gazetted the Motor Vehicles (Third Party) (Amendment) Regulations 2000. On the 9th of May 2000 the four Respondents which are insurance companies each involved in the business of selling third party insurance premiums to the public sought leave to judicially review the decision of the Minister for Tourism and Transport (hereinafter "the Minister") to gazette these regulations.

In a closely reasoned judgment Shameem J. held that the Regulations were ultra vires for failure to consult and failure to consider relevant matters. The Judge based her decision primarily on the fact that the intention of the legislature in enacting the Motor Vehicle (Third Party Insurance) Act Cap. 177 was to ensure consultation with the bodies most affected by the regulation of premium rates. She held that there was a statutory duty on the Minister to consult the representative of the insurance companies, namely the Insurance Council of Fiji, before the regulations were made law.

In addition the Judge held that, apart from any statutory duty the Minister had a common law duty to consult with the insurance companies either severally or jointly and that the Minister failed to do so.

The factors to be considered by the Court in an application seeking leave to appeal out of time are:

- (i) the length of the delay;
- (ii) the reasons for the delay;
- (iii) the degree of prejudice to the Respondent if the application is granted;
- (iv) the chances of the appeal succeeding if the application is granted.
(Norwich and Peterborough Building Society v Steed (1991) 2 ALL ER 880 C.A.)

It is well settled now that this Court has an unfettered discretion in deciding whether or not to grant the leave out of time. (CM Van Stillevolt BV v EL Carriers Inc (1983) 1 WLR 207 at 212.)

It was also thus held by this Court in Latchmi and Another v. Moti and Others 10 FLR 138. Each case depends on its own facts. Those which I find relevant here are first that having received the Memorandum and Ruling of the Deputy Registrar on the 11th of January 2001 the Applicant had until the 3rd of February 2001 (i.e. 30 days from the 4th of January 2001) to comply with the Deputy Registrar's order.

Secondly, having failed to comply within the 30 days, Rule 18(10) of the Court of Appeal (Amendment) Rules 1999 enabled the Applicant to lodge a fresh appeal provided this was done before the expiry of 42 days. Effectively this would have given the Applicant until the end of March but no steps were taken until the 8th of June. Has there been a satisfactory explanation for this delay? In my judgment there has not. I consider the affidavit of Ajay Singh deficient in many relevant respects of which I consider some to be the following:

- (1) The affidavit does not say who put the file away in the filing cabinet.
- (2) Nothing is said of what became of the Memorandum and the Ruling.
- (3) Nothing is said about whether the Solicitor-General's Office has a system of maintaining diary notes.
- (4) Nothing is said about who is responsible for maintaining records. If there is any such person no explanation is given as to how and why the practice was overlooked in this case.
- (5) Nothing is said as to how the oversight or misunderstanding was brought to the attention of Ajay Singh.

- (6) What prompted him to make enquiries with the Registry only on the 8th of June 2001? Why had he not previously made such an enquiry?

The Applicant appears to be labouring under the mistaken belief that the Registry of this Court had a duty to inform Mr. Singh's office about the non-compliance or that the Respondents' solicitors had a duty to correspond with his office. Clearly there was no such obligation as Mr. Singh should have realised if he read the Rules of this Court.

It is pertinent to note the observation of Marsack J.A. in Latchmi v. Moti who said at page 145:

"In deciding whether justice demands that leave should be given, care must, in my view, be taken to ensure that the rights and interests of the respondent are considered equally with those of the applicant."

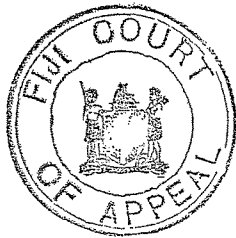
The Applicant's affidavit does not mention any prejudice which will be caused to the Applicant if leave is refused nor, in my judgment can there be any such prejudice because the quashing of the regulations by the High Court does not preclude the Minister from prescribing new premiums by fresh regulations.

On the other hand an affidavit by Paul Absell the General Manager of Tower Insurance (Fiji) Limited sworn on the 1st of August 2001 sets out in detail the prejudice that will be suffered by the Respondents if this Court grants leave. All the Respondents have budgeted for the future and have made capital expenditure on the basis of the premiums they are now charging.

In my view on the material before me any prejudice which the Applicant may suffer is likely to be outweighed by the prejudice suffered by the Respondents.

The Applicant has a simple remedy available to her: consult with the Respondents before passing any new regulations and so accord with the intentions of the Act and the previous practice of the industry.

Finally as to the merits of any proposed appeal, I have serious reservations whether such an appeal would succeed for the reasons set out in her Judgment by Shameem J. Accordingly I refuse leave to appeal out of time and order the Applicant to pay the Respondents' costs which I fix at \$400.00.



John E. Byrne
JOHN E. BYRNE
JUDGE OF APPEAL