IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT, FIJI ISLANDS

CIVIL APPEAL NO.ABU0013 OF 2001S
(High Court Civil Action No. HBC350 of 1996)

BETWEEN: D. GOKAL & COMPANY LIMITED
a limited liability company having
its registered office in Suva

Appellant

AND: RAJESH PRAKASH
(son of Bhaganti Prakash) of Princess
Road, Tamavua, Suva, Technician

Respondent

Coram: Reddy, President
Sheppard, JA
Smellie, JA

Hearing: Thursday, 23rd May, 2002, Suva

Counsel: Mr. H. Lateef with Mr. I. Razak for the Appellant
Mr. R.I. Kapadia with Mr. D. Singh for the Respondent

Date of Judgment: Friday, 31st May, 2002

JUDGMENT OF THE COURT

This is an appeal from the decision of the High Court (Pathik J.) given on the 15th of February 2001, refusing an application by the Appellant to set aside a judgment entered against it by the Judge on the 19th of November 1999. It will be useful to set out briefly the facts leading up to the application.

The Respondent was injured in a road accident on 24th February 1994 while he was a passenger in a motor vehicle owned by the Appellant and driven by its servant Kamlesh Ramesh Parmar. The Respondent alleged negligence against Parmar, and claimed that the Appellant was vicariously liable for his negligence.

The Writ of Summons was served on the Appellant on the 24th of July 1996. Thereafter, Messrs Sherani & Co., solicitors, on instructions from the Appellant filed an acknowledgment of service and notice of intention to defend, but failed to deliver a defence within the time stipulated by the Rules. No defence had been delivered until the 5th of September 1997, when interlocutory judgment on liability was entered, for damages to be assessed. More than a year passed between the service of the writ and the interlocutory judgment, and, during that period the Respondent's solicitors wrote to Sherani & Co., on at least 4 separate occasions, asking them to settle the matter, or they would proceed with the case in the usual way. These letters were ignored.

The interlocutory judgment was served on Sherani & Co., on 29th of April 1998, and on the Respondent on the 19th of May 1998.

On the 9th of December 1998 the Deputy Registrar of the High Court fixed the 11th of March 1999 for assessment of damages. This was apparently done in the presence of solicitors for the Appellant and the Respondent.

On the 11th of March 1999, the matter came before Pathik J. for assessment of damages, and since there was no appearance by the Appellant or its solicitors he adjourned the matter

to 13th of May 1999 for hearing. The learned Judge ordered that notice of the adjourned hearing be served on the Appellant as well as their solicitors, Sherani & Co. The notice of hearing which is dated 15th of March 1999, was served on the Appellant on the 18th March, and on Sherani & Co. on the 19th of March 1999.

Pathik J., heard the Respondent and his witnesses on the 13th and 26th of May 1999. There was no appearance by the Appellant or its solicitors. On the 19th of November 1999, the learned Judge gave judgment for the Respondent in the sum of $121,224.50 against both the Appellant and its servant Parmar. The judgment was sealed on 23rd November 1999, and copy served on Sherani & Co. on the 26th of January, and the Appellant on 15th February 2000. On 14th of March 2000 the Respondent's solicitors wrote to the Appellant seeking payment of the judgment debt. The letter of 14th March 2000 and subsequent reminders did not draw any response, and on the 1st of August 2000, the Respondent's solicitors threatened to commence winding up proceedings against the Appellant if the judgment debt was not paid within 7 days of the demand. No payment was made, and, on the 29th of September 2000 the Respondent made demand, under the Companies Act, requiring it to pay the judgment sum within 21 days, or to face winding up proceedings. On the 12th of October 2000 the Appellant filed the summons to set aside the judgment.

On the 7th of August 2000 the Appellant commenced proceedings in the High Court against New India Assurance Company Limited, seeking a declaration that they were liable to indemnify the Appellant for the judgment sum under a Contract of Indemnity. They also joined the Respondent in that Action, and, asked for a stay of execution of the judgment. The Action against the Respondent was subsequently struck out by Scott J., on the Respondent's

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application, on the ground that it was frivolous and vexatious and an abuse of the process. We were told from the Bar that the Appellant has now obtained judgment against New India, who have appealed the judgment to this Court.

THE APPLICATION TO SET ASIDE

The application to set aside the judgment, was made under Order 35 rule 2 of the High Court Rules. The summons is supported by an affidavit sworn by Vinod Gokal (Gokal).

Gokal seeks to explain the Appellant's non-appearance on the 13th and 26th of May, on the basis that it had handed the writ to its insurers, New India, and, expected them and the solicitors instructed by it to protect its interests, and in this respect they were let down by both. Furthermore, the Appellant claimed that it received conflicting advice as to which of the insurers, Dominion Insurance Company Limited or New India covered the liability arising from the accident. There are no other reasons given for its failure to appear before Pathik J. on the 13th and 26th of May 1999 when damages were assessed.

On the quantum of damages assessed by the learned Judge, Gokal in his affidavit asserts, first, that it is well beyond the range of damages awarded in similar cases, and second, that two months after the accident the Respondent resumed work, and was earning $80-$100 per week as evidenced by the Respondent's P4-1 forms, and therefore the damages awarded to the Plaintiff for loss of earnings was "far too excessive", and that the damages awarded were excessive for the injuries suffered.

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LEARNED JUDGE'S FINDINGS

On the merits of any challenge to the damages assessed by him the learned Judge made the following finding:-

> ***"Apart from stating that the amount assessed is excessive there is no substantial or meritorious defence disclosed. If anything, it is a case where the applicant should have appealed against the judgment. The reason given is, in my view, no reason at all to set aside the judgment."***

The learned Judge also found that the Appellant failed to provide any satisfactory explanation for its failure to appear at the hearing on 13th May and 26th of May 1999 and for the inordinate delay in applying to set aside the judgment.

On this issue the learned Judge concluded:-

> ***"In the outcome, in completely disregarding the Rules of the Court and making the application after such a long delay which has not been satisfactorily explained particularly after notice of hearing was given and evidence properly adduced, bars the applicant and cause the Court to refuse to exercise its discretion in the matter by granting the application."***

He concluded that setting aside the judgment would prejudice the Respondent who had waited long enough for his case to be dealt with. He said that justice had to be done to both parties, and the Respondent should not be deprived of the judgment which was obtained regularly.

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THE APPEAL

The Notice of Appeal sets out eight separate grounds of appeal. At the hearing these were consolidated into two, as follows:-

1. That the learned Judge erred in law in holding that the Appellant should have appealed the decision as opposed to making an application to set it aside.

2. The learned trial Judge erred in not accepting the Appellant's explanation as to why it was unrepresented at the hearing and why it should be given a chance to challenge the quantum of the award.

GROUND 1

We do not see any merit in this ground of appeal. This was an application to set aside a judgment entered in the absence of the Appellant. Although the application was not made within 7 days of the entry of judgment, as required by Order 35 rule 2, and it appears that application for extension of that time was neither made nor granted, nonetheless the parties, and the learned Judge proceeded on the basis that the application was properly before the Court. The Court proceeded to deal with the application on its merits, and the learned Judge directed his mind to all those considerations that are relevant to any application to set aside a judgment entered in the absence of a party to the proceedings. The learned Judge dealt with the merits of the challenge that the Appellant wished to mount against his assessment, he looked at the reasons why the Appellant allowed the judgment to be entered, and he

considered the issue of possible prejudice to the Respondent of setting aside the judgment. Having considered all of these matters, he decided that it would be unjust to set aside the judgment. Learned Counsel for the Appellant argued, that the learned Judge refused to set aside the judgment, because he held as a matter of law, that the Appellant should have appealed the assessment. His comment about an appeal, was made on the context of his statement that the proposed challenge to the assessment was without merit. The learned Judge said: "Apart from stating that the amount assessed is excessive there is no substantial or meritorious defence disclosed." Absence of "meritorious defence" is clearly a reference to the damages assessed, and not to the judgment on liability. We see nothing in the judgment to lead us to the conclusion that the learned Judge held that the Appellant should have appealed the judgment instead of applying to set it aside. Mr Lateef, submitted that the learned Judge did not appreciate that the application was to set aside the assessment of damages and not the interlocutory judgment on liability. Again we cannot agree. Before directing his attention to what he called the "issues" in the case, the learned Judge reminded himself that he was dealing with an application to set aside the "judgment on the assessment of damages" and not the interlocutory judgment. Thereafter, reference to the "judgment" is clearly a reference to the damages assessed by the learned Judge.

GROUND 2

We see no merit in this ground of appeal. The Appellant gave no plausible explanation for its failure to appear on the 13th and 26th of May 1999 when damages were assessed. On the 9th of December 1998, the Deputy Registrar fixed the 11th of March 1999 for the assessment of damages with the consent of the solicitors for the Respondent.

On the 11th of March 1999, neither the Appellant nor its solicitors appeared. Pathik J. could have proceeded to assess damages on that day in their absence, but he did not do so. He adjourned the matter to the 13th of May, and directed the Registry to serve notice of adjourned hearing on both the Appellant and its solicitors. Notice was duly served as directed. There is no excuse for the Appellant and its solicitor's non-appearance on the 13th of May. The courtesy extended to them by Pathik J., was not acknowledged. If the insurance companies were still squabbling as to which of them was liable, the Appellant and/or its solicitors should have appeared, to explain the situation. Their non-appearance, is consistent with an attitude of indifference that has characterised the Appellant's conduct of its case from the beginning. Nor, did the Appellant offer any satisfactory explanation for the long delay between the entry of the judgment, and the application to set it aside, a lapse of some 11 months. It is clear that the Appellant did not move until it was confronted with a winding up notice served on it by the Repondent's solicitors.

Mr Lateef argued that there is merit in the Appellant's proposed challenge to the damages assessed by the learned Judge. We cannot agree. Pathik J. awarded the Respondent $45,000 for pain and suffering and loss of amenities of life. The Respondent suffered a fracture of the left ankle, and he has developed painful arthritis of the ankle which has resulted in a limp. He may have to undergo further surgery to "freeze the joint" but this could lead to a permanent loss of function of his ankle joint. Since the original report on his injury, his ankle swelling has increased due to chronic arthritis, and a repeat x-ray of his ankle shows reduced space - suggesting active arthritis. His permanent incapacity was assessed at 20%. While this award may be the on the higher side of awards for similar injuries, we do not

consider it to be such as to justify it being set aside. Mr Lateef also challenged the learned Judge's award of $58,000 on account of the loss of earnings. On this issue the learned Judge said:-

> ***"On future loss (loss of prospective earnings) I am substantially in agreement with Mr Kapadia in his approach. His economic loss is $75 per week being made up of the difference between future earnings of $180 and present earning of $105 per week."***

The award under this heading represents the loss or diminution in the Respondent's earning capacity because of the injury he suffered. The Respondent was 32 years of age at the time of the accident and has several years of working life ahead of him. Using a multiplier of 15 to a year's loss of $3900 the learned Judge arrived at the figure of $58,000. We do not see any error of principle in the learned Judge's approach.

In Russell v Cox [1983] NZLR 654, McMullin J., delivering the judgment of the Court of Appeal said:

> ***" ..... The test against which an application to set aside a judgment should be considered is whether it is just in all the circumstances to set aside the judgment, and the several factors mentioned in the judgments discussed should be taken, not as rules of law, but as no more than tests by which the justice of the case is to be measured, in the context of procedural rules whose overall purpose is to secure the just disposal of litigation."***

The learned Judge found that the Appellant had no good reason for allowing the judgment on damages to be entered against it, and for the inordinate delay in applying to set it aside. He also found that the proposed challenge to the assessment of damages was without

merit. He concluded that it would be unjust to penalize the Respondent by setting aside the assessment, and reopening, the issue of damages.

We see no reason to interfere with what was a proper exercise of a discretionary power.

RESULT

This appeal is without merit. It is dismissed. The Respondent is entitled to costs in this Court which we fix at $1500.00 plus disbursements as fixed by the Registrar if Counsel are unable to agree.

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Reddy, President

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Sheppard, JA

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Smellie, JA

FIJI COURT OF APPEAL

Solicitors:
Messrs Lateef & Lateef, Suva for the Appellant
Messrs R.I. Kapadia & Co., Suva for the Respondent