

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

CIVIL APPEAL NO. ABU0028 OF 2001
(High Court Civil Appeal No. HBA0020 of 1999)

BETWEEN:

BANK OF BARODA - Proposed Appellant

AND

MOHANLAL CHAMPANERI - Respondent

G.P. Lala for the Proposed Appellant

Ms Renee Lal for the Respondent

Dates of Hearing and Submissions - 8th and 19th June, 1st August 2001

Date of Decision - 18th January 2002

DECISION

The Proposed Appellant to which I shall refer henceforth as "the Bank" applies for an order for leave to be granted to appeal out of time against a judgment of Mr. Justice Fatiaki in the High Court delivered on the 17th of October 2000 wherein he dismissed an appeal by the Bank from a judgment in favour of the Respondent delivered in the Suva Magistrate's Court on the 30th of April 1999. The Magistrate's Court had awarded the Respondent (the Original Plaintiff) liquidated damages for losses sustained

by him as a result of his "enforced retirement" from employment with the Bank (the Original Defendant). The application before me is by Notice of Motion dated 23rd May 2001 and is supported by an affidavit of Shashi Sharma, a Legal Executive employed by the Bank's solicitors.

Miss Sharma deposes that a Notice of Appeal was filed by the Bank on the 8th of December 2000, and a Summons for Security for Costs was filed by the Bank on 12th of December 2000 and served on the Respondent on the same day.

On the 18th of January 2001 the Deputy Registrar of this Court fixed the sum of \$900.00 as Security for Costs, to be paid within 28 days.

Miss Sharma then deposes that "due to Administrative error" the Bank was not informed of the order for payment of Security for Costs. She says that her employer's office believed that everything was in order and that the costs were paid. She then deposes that the Respondent has not been prejudiced in anyway by the delay of the Bank as the court record was not prepared and that the Respondent was always aware of the appeal.

Finally she states that no prejudice will be caused to the Respondent if the Bank is granted leave to appeal out of time and an unconditional Stay of Execution of all proceedings. She says that the appeal has good prospects of success, the Bank has meritorious grounds of appeal and that it would be unfair and unjust if the appeal was not allowed to proceed.

The Respondent has sworn an affidavit in answer to that of the Bank. He says among other things that on the 5th of April 2001 counsel for both parties appeared before the Deputy Registrar wherein orders were made relating to the preparation of the record.

He also says that at this time the Deputy Registrar alluded to the fact that Security for Costs may not have been paid. Both counsel were asked to check with the Court of Appeal Registry.

The Respondent's solicitors wrote on the same day to the Court of Appeal office asking whether the Security for Costs had been paid and the status of the appeal.

On the 10th of April 2001 the Court Registry replied stating that Security for Costs had not been paid by the Bank within the specified time and therefore the appeal was marked as deemed to be abandoned on the 15th of February 2001 under Section 17 of the Court of Appeal (Amendment) Rules 1999.

Thereafter the Bank took no further action until the Respondent through his solicitors issued a Writ of FI FA on the 21st of May 2001. Pursuant to the Writ an inventory was taken at the premises of the Bank on the 22nd of May 2001. On the 24th of May 2001 the Bank's solicitors wrote to the Chief Magistrate at Suva requesting that no further action be taken by the Court on the Writ of FI FA because of the Stay Application then pending before the High Court.

On the 13th of May 2001 counsel for both the Bank and the Respondent appeared before the Acting Deputy Registrar. The Respondent submitted that the Stay Application had lapsed as a result of the appeal being deemed abandoned. The matter was adjourned to the 6th of June 2001 to allow counsel for the Bank to obtain further instructions from her client. On the 6th of June 2001 the Respondent's solicitor appeared before the Acting Deputy Registrar but there was no appearance by the Bank. The Acting Deputy Registrar then made orders that the appeal was deemed to be abandoned, the case closed and the Stay Application struck out.

On the 30th of July 2001 one Sandip Kumar Bagchi the Chief Executive of Operations of the Bank swore an Affidavit in Reply to that of the Respondent. In it he deposes that the Bank paid the judgment sum and costs namely \$23,060.19 into the Magistrate's Court Civil Registry, the effect being that if I should not grant leave out of time or the appeal not be granted the Respondent could recover the sum from the Registry. Mr. Bagchi then states that should the Bank succeed in the Court of Appeal the Respondent will not be in a position to repay the judgment sum as he is a Retiree with no fixed income.

So much for the facts which are not in dispute. I now turn to the law applicable to the present application.

In Sundar and Another v. Prasad No. ABU0022 of 1997 in a ruling delivered on the 10th of November 1997 the then President of this Court said that the factors that were normally taken into account when dealing with an application for leave to appeal out of time were the length of the delay, the reasons for the delay, the degree of prejudice to the Respondent if the application were granted and the prospects of the intended appeal succeeding if the application were granted.

Section 20 of the Court of Appeal Act gives the Court a discretion to do so.

In The Official Receiver v. Petrie Limited No. ABU0049 of 1997 in a decision of the 28th of November 1997 Sheppard J.A. stated that every case must depend on its own facts and circumstances but there are certain matters which ought to be considered in most cases and these were stated by the then learned President of the Court in Sundar v. Prasad.

The Court does not “make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled, pending an appeal” (The Annot Lyle (1886) 11 P.D. 114, p116).

But it has also been said “when a party is appealing, exercising his undoubted right of appeal, the Court ought to see that the appeal, if successful, is not nugatory”. (Wilson v. Church (No. 2) (1879) 12 Ch.D. 454 pp 458, 459 C.A.)

In Atkins v. Great Western Railway (1886) 2 T.L.R. 4000 it was stated that:

“As a general rule the only ground for a stay of execution is an affidavit showing that if the damages and costs were paid there is no reasonable probability of getting them back if the appeal succeeds.”

In Avery v. No. 2 Public Service Appeal Board and Others (1993) 2 NZLR 86 the New Zealand Court of Appeal stated per Richmond J. as a general principle at p.91:

“When once the 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 the circumstances, the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal.”

THE CIRCUMSTANCES OF THIS CASE

The Length of the Delay

When this application was made there had been a delay of over three months from the date on which the appeal was deemed to be abandoned but the application clearly only came as the result of the Respondent's action in executing a Writ of FI FA at the premises of the Bank on the 22nd of May 2001. Likewise, the Bank did not heed the warning of the Deputy Registrar on the 5th of April 2001 wherein he suggested to the parties that the Security for Costs might not have been paid. Despite this warning the Bank did nothing.

In Registrar of Titles v. Sharda Prasad Civil Appeal No. ABU0009 of 2001 Shameem J. said:

"The new rules send a clear message to all prospective Appellants - it is the Appellant's duty to file appeals, and to take all steps to push the appeal to a hearing."

I agree.

The history of this case clearly shows that it was the Respondent who did all the pushing.

The Bank does not give any reason for the delay but simply refers to "an Administrative error" without any attempt to clarify this term. The affidavit of Shashi Sharma only explains why the Security for Costs was not paid in time. It does not clearly explain the reason for the delay in the filing of the application for leave to appeal.

It was said by the then President of this Court that in the last analysis the Court cannot overlook an important determining factor namely that an Appellant will or is likely to suffer an irreparable serious injustice if an extension is not granted. There is nothing in the affidavit of Shashi Sharma to show that the Bank will or is likely to suffer an irreparable serious injustice if an extension is not granted.

For these reasons I am satisfied that the Bank has failed to satisfactorily explain the reason for what I regard as its inexcusable delay. I am also satisfied that the Respondent continues to be prejudiced by the Bank's delay in pursuing the appeal.

I also add that I do not share the apparent optimism of the Bank's Legal Advisers that the appeal is not doomed to fail and that there exists at the very least an arguable case. I have read the judgment of Fatiaki J. and consider it most persuasive. In my view the Bank would face serious problems in the Court of Appeal if I were to grant the extension sought.

For these reasons I refuse the application for leave to appeal out of time and order the Bank to pay the Respondent's costs of \$700.00.



JOHN E. BYRNE

JUDGE OF APPEAL