

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

CIVIL APPEAL NO. ABU0055 OF 2003S
(High Court Civil Action No. HBC 203 of 2002S)

BETWEEN:

SUVA CITY COUNCIL

Appellant

AND:

MELI TABU

Respondent

In Chambers:

Smellie, JA

Hearing:

Tuesday 11^h November 2003, Suva

Counsel:

**Mr. H. Nagin for the Appellant
Mr. D. Singh for the Respondent**

Date of Judgment: Wednesday 12th November 2003

JUDGMENT OF SMELLIE – JA

Introduction

The respondent was injured whilst employed by the appellant on the 13 January 2001. He commenced a claim both at common law and under the workers compensation legislation on the 15 May 2002. When the appellant took no action after service the respondent obtained a default judgment on the 11 June 2002. In January 2003 the respondent applied for an interim payment and on the 9 May 2003 an order for such a payment in the sum of \$2,500.00 was made.

Then on the 13 of June 2003 the appellant as defendant in the High Court applied to have the default judgment set aside but the application was refused. In his decision on

the point Singh J. said that the application was over a year after the default judgment had been entered and he was not persuaded that the respondent did not have a good course of action at common law. The penultimate and third last paragraphs of Singh J. 's judgment read as follows:

"In this case the defendant has shown a marked indifference to court proceedings and to protect its own interest. It appears the defendant moved in the conduct of the proceedings at its own leisure and pleasure. The days of leisured pace in conduct of civil litigation are gone. The courts expect a far greater commitment by parties in conduct of litigation. The delay here is inexcusable.

I am also not satisfied that the defendant has shown a defence on merits as it does not disclose what instructions were disobeyed or in what way the plaintiff was at fault."

The appellant then filed a notice of appeal to have the default judgment set aside on the 30 September 2002. The record in respect of that appeal, Mr Nagin advised when appearing before me in chambers, will be ready for filing by 14 November and both Counsel consider that the appeal has a good prospect of being heard in the March 2004 sittings of this Court. If the appellant is successful counsel suggest an August 2004 hearing on both liability and quantum. However one looks at it, it will be over 2 years from the date of issue of the writ before a hearing in the High Court, whether on quantum only or on a full hearing on all aspects, is available.

The respondent's need

The affidavit evidence persuades me that the respondent who has a large family of dependant children (ages 16,15,14,12,8 and all at school) is in dire need of another interim payment.

The respondent's prospects

On the limited information before me during this chambers application it can be said that if the respondent's claim is limited to workers compensation it may not be

extensive. And on any common law cause of action the award may be significantly reduced by contributory negligence should the appellants appeal result in the default judgment being set aside.

Given the respondent's need and prospects I would be prepared to order a modest interim payment if I had jurisdiction to do so. I say modest bearing in mind that a generous interim payment could create false expectations in the respondent and prejudice the appellant if it was more than any future judgment. Realistically recovery of any over payment would be very difficult.

Is there jurisdiction in this Court to Order an interim payment

The respondent relies upon sections 13 and 20 (1)(e) and(k) of the Court of Appeal Act as amended in 1998. Those provisions read as follows:

Powers of Court of Appeal in civil appeals

"13. For all the purposes of and incidental to the hearing and determination of any appeal under this Part and the amendment, execution and enforcement of any order, judgment or decision made thereon, the Court of Appeal shall have all the power, authority and jurisdiction of the Supreme Court and such power and authority as may be prescribed by rules of Court."

Powers of a single judge of appeal

"20-(1) A judge of the Court may exercise the following powers of the Court –

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

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

Mr Singh submits that s.13 vests in this court all the powers available to the High Court and that an order for an interim payment is one such power which should be regarded as incidental to the hearing of the appeal.

Mr Nagin submits to the contrary that an interim payment is not incidental to the hearing and determination of the appellant's appeal to set aside the default judgment.

Neither counsel was able to refer me to any direct authority on the point.

In *Registrar of Titles v. Sharda Prasad and Others* FCA Civil Appeals Nos. ABU0031 and 0041 of 2001S an interim payment was more than the ultimate of award after the Court of Appeal had reduced a judgment of over \$326,0000 to \$25,000. The case contains a sharp caution in regard to "inappropriate" interim payment orders. On the other hand the President Hon. Justice Jai Ram Reddy in *Attorney General v. Baleiwiri* (Civil Appeal ABU0015/2002 judgment 1/7/02) made an order in this court for an interim payment of \$32,000 in the face of what was perhaps only token opposition. It does not appear, however, that the learned President entertained any doubts about jurisdiction.

In the absence of authority to guide me I must decide this issue as a matter of first impression looking both at the words of the statute and taking account of the intention of Parliament when the provisions were enacted.

There are arguments both ways on the literal interpretation of the words used. Also I accept, as Mr Nagin submitted, that there is nothing to prevent the respondent from making a further application for an interim payment in the High Court. The provisions of section 12(3) of the Act whereby the default judgment is deemed not to be an interlocutory order does not, contrary to Mr Singh assertion, prevent such a procedure. Nonetheless on balance I consider that it must have been the intention of the legislature to enable this Court to avoid prejudice to respondents such as Mr Tabu; and for that purpose to vest in this court all the powers of the High Court. I therefore hold I have the power to order an interim payment.

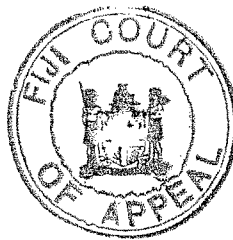
What amount should be awarded

First I am not prepared to be constrained by Mr Nagin's submissions that respondent may be denied Workers Compensation on the basis that he was guilty of serious and willful misconduct. On the sketchy information before me while the respondent may be shown to have been careless – gross misconduct is fanciful.

Secondly, however, the evidence todate shows only a 5% disability arising from a fracture of the proximal third of the right tibia. That on its own, even if significant pain and suffering and loss of earning capacity are established will not produce a large award. Furthermore the prospects of a very significant reduction for contributory negligence cannot be ignored. In all the circumstances I do not consider I can responsibly order an amount that will take the total interim payments beyond \$7,500. I therefore order a further interim payment of \$5,000.00 to be paid within 14 days of the handing down of this judgment.

Costs

I fix the costs of this application at \$250.00 plus disbursement as fixed by the Registrar to be costs in the cause and abide the ultimate outcome.



Robert Smellie
Smellie, JA

Solicitors:

Messrs Sherani and Company, Suva for the Appellant
Messrs. R.I. Kapadia and Company, Suva for the Respondent