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

MISCELLANEOUS CASE NO. 1 OF 2007
(High Court Civil Case No. ABU0045 of 2006)

BETWEEN:		**TERESINA VAKAENEI**	*Appellant*
A N D	:	**CARPENTERS (FIJI) LIMITED**	*1st Respondent*
A N D	:	**SUN INSURANCE COMPANY LIMITED**	*2nd Respondent*

Hearing: 30 January 2007
Ruling: 2 February 2007

Counsel: L Vaurasi for the appellant
H Lateef for first respondent

RULING

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[1] This is an application for leave to appeal out of time. The applicant brought a claim in the High Court for damages for negligence and breach of statutory duty under the Health and Safety at Work Act and for compensation under the Workmen's Compensation Act.

[2] The applicant had been employed by the respondent company and, as she and two others were opening the company premises early one morning, they were attacked and robbed by three armed men. The principal claim was that the company had failed to provide a safe place of work. That was denied by the company but it did not resist the claim under the Workmen's Compensation Act. The respondent had joined the Sun Insurance Company as a third party and claimed indemnity by them for any liability.

[3] On 4 April 2006, the learned judge dismissed the claim for damages but awarded compensation and also found that the third party was liable to indemnify the respondent.

[4] It is clear from the affidavit in support of this application, that the applicant gave firm instructions that she wished to appeal and the solicitors filed the notice and grounds of appeal on 16 May 2006. Application to fix security for costs was filed on 1 June 2006 and it was set down for hearing before the deputy registrar on 15 June 2006. The court file shows that a minute sheet was prepared for that date but no hearing appears to have taken place. Similar sheets were prepared for 22 and 29 June but it was only on 29 June that there is any record that a hearing was held. There was no appearance by the appellant. The minute appears to record that the sum suggested was $500.00 and there follows a standard, typed pro-forma minute:

> "Ct; Security for cost is fixed at the sum of $..... to be paid in ..... days. Records to be filed in ..... days or .....days upon receipt of the judges notes if any, whichever is the later."

[5] The deputy registrar has entered $500 in the first blank and the figure of 28 in each of the next two. The final space is left with no entry.

[6] It appears the judge's notes were collected by the applicant's solicitors on 15 August 2006. The record was not filed and, on 13 September 2006, the registrar marked the appeal as having been deemed abandoned under rules 17 (2) and 18 (10).

[7] The applicant's solicitors did nothing until 4 December 2006 when they wrote to the Court complaining, "Please be advised that we are now in December 2006, and yet we have not received the Court Record which had expired on the 27th of July 2006."

[9] The registrar replied the same day:

> "On 15/8/06 the Judge's notes were uplifted by your staff upon payment of $64.00 plus VAT.
> Pursuant to the Registrar's orders of 29/06/06 you were to submit appeal record within 28 days of receipt of the judge's notes..
> This appeal was marked as deemed to be abandoned pursuant to Rule 18(10) on 13/9/06 for non compliance of the above order."

[10] The solicitor replied immediately on receipt of that letter suggesting there had been a misunderstanding as to the compilation of the record and seeking a further fourteen days to compile it.

[11] The registrar replied that this could not be done because of the deemed abandonment but pointed out that they could file a motion for leave to appeal out of time. This application was filed more than five weeks later on 11 January 2007.

[12] Rule 18 (1)(a) clearly places on the appellant the primary responsibility for the preparation of the record in all civil appeals and Ms Vaurasi frankly tells the Court that she had not been familiar with that rule. Such a failure to follow or even, it would appear, to read the Rules when accepting instructions for an appeal is a serious omission. This Court, as with courts in other jurisdictions, is increasingly reluctant to consider the failure of the lawyer as sufficient reason in itself for granting leave.

[13] However, it is also clear from the letter of 4 December 2006 that the decision by the registry to mark the appeal as abandoned was based on a misreading of the deputy

registrar's order thus taking it as a direction that the record be filed within 28 days of the judge's notes being available. That was not the order. It was simply that the record should be filed within 28 days with no additional provision for the receipt of the judge's notes. As it was, in fact, worded, it required the record to be filed within 28 days. The judge's notes had not been made available by then and so obedience to the order by the applicant was impossible.

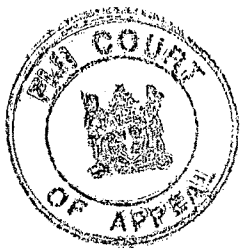
[14] In those circumstances I do not consider the length of the delay is a matter to be taken against the applicant.

[15] The remaining issues for the court are the likelihood of success if the appeal is pursued and the degree of prejudice to the respondent.

[16] Ms Vaurasi suggests the appeal raises an important question about the extent to which an employer's duty to provide a safe workplace will cover protection from criminal attacks. The courts in Fiji, she suggests, have given little guidance on that point. On the other hand, there is ample authority to guide our courts from other jurisdictions. The learned judge considered some of those cases and the appeal is, in real terms, largely a challenge to his conclusions on the evidence in respect of defined parameters. Appellate courts are reluctant to interfere with a primary judge's findings of fact. I accept there is an arguable appeal but I consider it has, at best, only a moderate chance of success.

[17] The final issue is the possible prejudice to the respondent if the leave is granted. Mr Lateef did not point to any specific prejudice save that the respondent, understandably, hopes for finality. That is a reasonable aspiration but I note that the learned judge has found the insurance company would be liable to indemnify the respondent for any award under the policy of insurance. I do not consider the respondent will be prejudiced to anything more than a slight degree should leave be granted.

[18] However, taking all those circumstances into account, I am not satisfied that the applicant has established that the justice of the case requires that she be given an opportunity to pursue this appeal out of time. The application is dismissed with costs to the respondent of $200.



Gordon Ward
PRESIDENT