

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

MISCELLANEOUS APPEAL NO. 05 OF
2007
(High Court Civil Case No. 15 of 2006)

BETWEEN: MAHENDRA PAL CHAUDHRY
 FIJI LABOUR PARTY

Appellants

AND : SUPERVISOR OF ELECTIONS
 ELECTORAL COMMISSION OF FIJI
 ATTORNEY GENERAL OF FIJI

Respondents

Hearing: 30 April 2007
Ruling : 16 May 2007

Counsel: R Chaudhry for applicants
 E Tuiloma for first and third respondents
 N Basawaiya for second respondent

RULING

- [1] This is an appeal against an award of costs. It was initially filed as an application for leave to appeal out of time and for a stay of execution pending appeal. No grounds were filed and, as the Court must consider the nature and apparent strength of the appeal in order to make such a determination, the case had to be

adjourned to allow counsel to file a proper notice of appeal. Counsel should also have sought leave to appeal but no such application has been filed. However, the respondents have not objected to the inclusion of an application for leave although counsel for the second respondent challenges the right of a single judge to grant such leave. I can deal with that briefly.

- [2] Section 12 (1) of the Court of Appeal Act provides that an appeal shall lie from any decision, not being a criminal proceeding, of the High Court sitting in first instance. That is subject to the provisions of subsection (2) that no appeal shall lie without the leave of the Court from an order as to costs only.
- [3] Counsel for the second respondent points out that the Act defines "Court" as the Court of Appeal and so the application should be made to the full Court. However, the provisions of section 20 (1) allow a judge of the Court to exercise certain of the powers of the Court including the power to give leave to appeal; section 20(1) (a) and, in terms of this hearing, the power to extend the time for an appeal.
- [4] Section 20 was correctly relied on by counsel for the applicants but I note he quoted the wording of the section prior to the amendment by the Court of Appeal (Amendment) Act, 13 of 1998. Such mistakes should not occur.
- [5] In deciding whether to grant leave to appeal from a costs order only, the Court must look to the likelihood of success. Such an order is a matter for the judge's discretion and it has long been long established that appellate courts will only interfere with the exercise of such a discretion if it was based on a mistake of fact or an error of law. A similar consideration applies should leave be granted and the Court consider whether it is appropriate to extend time.
- [6] The action in the High Court was commenced by originating summons filed on 21 March 2006 seeking various declarations and orders under the Constitution and the Electoral Act 1998.

- [7] The defendants applied to strike out the action and, in a judgment given on 30 March 2006, Coventry J refused all relief sought and awarded costs against the applicants. Those costs were to be on a party to party basis up to 28 March 2006 but on an indemnity basis from the morning of 29 March 2006. This appeal is against that costs order.
- [8] It is not necessary at this stage to go into the grounds of appeal in any detail. I should not, at this stage, determine the merits of the appeal. That is a matter for the Court at the hearing of the substantive appeal. I must consider whether there is any proper ground of appeal and whether it has any real prospect of success; to grant leave otherwise would be a pointless exercise.
- [9] The High Court action challenged the manner in which the Electoral Rolls had been prepared prior to the General Election in 2006. It was brought shortly before the election was to be held. The first applicant was, at that time, the secretary general of the second applicant and he brought the case in that capacity. His argument is that such an action involved a substantial public interest element and, therefore, an award of indemnity costs was inappropriate and punitive.
- [10] As I have stated, the decision is a matter for the judge's discretion and an appellate court will not lightly interfere. However, the applicants's contention is also that the judge did not give sufficient reasons for his decision to order indemnity costs.
- [11] In dealing with this aspect of the case, Coventry J explained:

“The defendants sought their costs on an indemnity basis. The reason for this is that the entire plaintiffs' case was being struck out as having no basis. Second, on Tuesday 28 March [*two days before the hearing by Coventry J*], by letter from the second defendants, the very reasons for which the case has been struck out were brought to the attention of the plaintiffs.

The plaintiffs respond that there should be no order for costs. They say that at the commencement of these proceedings there

was no Electoral Roll that it is only since the proceedings were commenced that an Electoral Roll has been published. On the face of the affidavits it was known that the publication of a Roll was imminent.

Having read the decisions and brief reasons to the Court on 30 March I informed the parties that I would allow indemnity costs from the morning of 29th March in view of the way this case has concluded and the letter from the second defendants to the plaintiffs. There will be an Order the plaintiffs pay the defendants' costs on a party and party basis up the end of Tuesday 28 March."

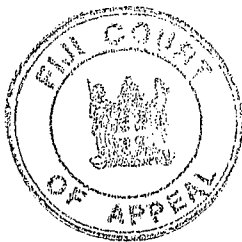
- [12] Whilst the Court accepts that the presence of a strong public interest element in a case would frequently militate against an order for indemnity costs, this was a case where the judge had found that there was no merit in the case and had struck out the whole action. Faced with that, he was entitled in his discretion, to order indemnity costs. Even then, he only awarded them after a letter had been delivered to the plaintiffs. I have not seen the letter but it is clear from his judgment that it warned of the very same grounds as those on which the judge struck out the action.
- [13] However, it is clear that this case was brought by the first applicant in his capacity as the secretary general of the Labour Party and, as such, was to some extent representing the public or a substantial portion of it.
- [14] In those circumstances, with some hesitation, I grant leave to appeal against the costs order.
- [15] I pass now to the question of leave to appeal out of time.
- [16] The order for indemnity costs was made on 30 March 2006 and the defendants then filed their bills of costs. However, the order of 30 March was not sealed until 24 April 2006 and the time within which an application for leave to appeal should be filed started to run from that date. It is clear from the papers that the substantial sum being claimed as indemnity costs was known by then.

- [17] At that time, the applicants were represented by Mr Anand Singh who was in partnership with Mr Rajendra Chaudhry, the son of the first applicant.
- [18] No application was made to this Court. The first applicant deposes that he and the Labour Party were then heavily involved in the election. After the election, the first applicant was to nominate a number of Senators. Mr Singh hoped to be included in the nominees and the first applicant suggests that the failure to nominate Mr Singh resulted in the latter's severance of his ties with the second applicant and also led to the dissolution of the partnership with Rajendra Chaudhry.
- [19] The first applicant explains to the Court that he was not advised by his legal advisors that he could appeal the costs order. It was only after the papers had been delivered to his son following the dissolution of the partnership in October 2006 and further advice had been sought that he realised he could do so. He points out that he was away until 3 November 2006 and, whilst he does not state the actual date he came to learn of his right of appeal, it appears it was after his return.
- [20] The initial application for leave to extend time to appeal and for a stay was filed on 26 February 2007, more than 16 weeks after his return and 44 weeks after the order of Coventry J had been sealed.
- [21] In considering an application to extend the time for appealing, the Court must consider the length of and the reasons for the delay, the likelihood of success if the appeal is allowed to proceed and the prejudice to the parties, particularly to the respondent.
- [22] The delay in this case was very considerable but the nature of the case is such that I am satisfied that it does not prejudice the respondents beyond mere inconvenience.

[23] The first applicant is a well known and experienced politician and trade unionist. I cannot accept that he would be unaware that there is generally a right of appeal from any court action. I accept, for the purpose of this application, that Mr Singh left the party and broke the partnership with the first applicant's son because of his disappointment over the Senate nomination but that occurred some months after the decision of Coventry J. Even if Mr Singh failed to advise on the right of appeal, the first applicant's son was also involved as an instructed lawyer. He has frankly told the Court that he was very inexperienced at the time and, as such, took little active part in a court case being conducted by such a senior counsel. I accept that but this was not an ordinary case. The disappointed litigant was his father. Whether he felt confident enough to take an active part in the conduct of the case in court, he would undoubtedly have taken an active interest in the situation in which his father found himself. In those circumstances, I am not satisfied that there is adequate reason for a delay of such length.

[24] I have already referred to the manner in which the Court must consider the exercise of the judge's discretion which is the principal thrust of the grounds of appeal and I do not consider that there is a substantial prospect of success in the appeal. In those circumstances, I refuse the application to extend time.

[25] The applicants must pay the first and third respondents' costs of this application in the sum of \$300 and those of the second respondent in a similar sum, i.e. a total of \$600 costs.



A handwritten signature in cursive script, appearing to read "Gordon Ward".

Gordon Ward
PRESIDENT