IN THE SUPREME COURT OF THE FIJI ISLANDS
AT SUVA

CIVIL APPEAL NO. CBV0001 of 2008S
(Fiji Court of Appeal No. ABU0084 of 2007S)

BETWEEN:

1. **BAHADUR ALI**
2. **KAMRU DEAN**
3. **SAFIRA ALI**
4. **VALLEY ARTESIAN WATERS (FIJI) LIMITED**

Petitioners/Applicants

AND:

1. **CREDIT CORPORATION (FIJI) LTD**
2. **NALIN PATEL**
3. **DIRECTOR OF LANDS**
4. **ATTORNEY GENERAL OF FIJI**
5. **WESTERN BUILDERS LTD.**

Respondents

In Court: The Hon Justice Keith Mason, Judge of the Supreme Court

Hearing: Thursday, 21st February and 26th February 2008, Suva

Counsel:
S Chandra for the Petitioners/Applicants
V Kapadia for the 1st and 2nd Respondents
A Pratap for the 3rd and 4th Respondents
A K Narayan for the 5th Respondent

Date of Judgment: Wednesday, 27th February 2008, Suva

JUDGMENT OF THE COURT

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[1] The petition for special leave was filed on 11 February 2008. It seeks orders to set aside an order of Byrne J sitting as a single Judge of Appeal on 4 February 2008 and an order of Singh J sitting as a Judge of the High Court on 18 January 2008. On 4 February 2008 Byrne J dissolved interim orders he had made on 22 January 2008.

The orders of 22 January 2008 had been made ex parte and in aid of an appeal to the Court of Appeal on an interlocutory matter that had itself been filed on 24 December 2007.

[2] On 13 February 2007 the petitioners filed a summons in this Court seeking a stay and an interlocutory injunction pending the hearing and determination of the underlying action in the High Court and the aforesaid appeal in the Court of Appeal.

[3] I gave directions in the summons on 19 February and heard it on 21 February and today.

[4] The summons is opposed on several grounds including that the petition is doomed to fail on jurisdictional grounds because the orders of the Court of Appeal under challenge are not final judgments of the Court of Appeal within s.122 of the Constitution.

Background facts

[5] In 2000 the first respondent lent $1.2 million to a company associated with the petitioners Valebasoga Tropic Board Ltd. The security for the loan included a mortgage over an interest in the fourth petitioner's land in the form of an Approval Notice of Lease described as the Catchment Lease.

[6] In 2001 a Mortgage Debenture was given by the fourth petitioner to cover a sum of $2 million.

[7] Demand under the mortgage was made in about May 2001 and there was default. In September 2002 the second respondents were appointed receivers and managers of the fourth petitioner's business under the Mortgage Debenture.

[8] On 14 September 2006 the first and second respondents entered into a Sale and Purchase Agreement with Western Builders Ltd, exercising powers arising upon the defaults. The land sold under this agreement was the aforesaid Catchment Lease and another lease under similar tenure referred to as the Industrial Lease. As regards the Industrial Lease it would appear that the right of sale arose under the Mortgage Debenture and was vested in the first respondent. The combined purchase price was $1,525,000. The agreement was subject to various conditions including the dissolution or removal of any injunction restraining the vendors from selling.

[9] The action out of which these proceedings have arisen was commenced on 5 January 2007. Little appears to have been done to bring it on for hearing.

[10] A proposed amended statement of claim is annexed to the affidavit in support of the present summons. The allegations in that proposed amended statement of claim include challenges to the validity of the Debenture Mortgage for want of proper registration, a claim of negligence on the part of the first respondent in prematurely appointing the receivers and managers, a claim that various transactions have effectively reduced the balance of the loan account, allegations that the receivers and managers have failed to act diligently, an allegation that the mortgagee sale was at an undervalue, and an allegation of fraud in relation to the steps taken in completion of the mortgagee sale on 20 or 21 December 2007 to which reference is later made.

[11] The relief sought in the proposed amended statement of claim includes a claim for damages as well as declarations and orders having the effect that all moneys due under the loan have been paid or are deemed to have been paid. I am prepared to view the latter orders as a claim for the taking of accounts and redemption of the mortgaged property.

[12] It is clear that the action is disputed in all respects. As regards the prayers for redemption of the mortgaged properties, I have been informed that the first

respondent claims that over $4 million is presently due under the loan having regard to the accrual of interest.

[13] During the pendency of the High Court action there have been unfulfilled settlement negotiations, posturing, incidents of violence on site, action by the secured creditor to realise its security by sale of the two properties and a flurry of interlocutory applications.

[14] On 5 January 2007 Pathik J sitting in the High Court granted an interlocutory injunction ex parte. Singh J dissolved that injunction on 19 December 2007 on the basis of material non-disclosure by the plaintiff. There is no jurisdictional basis why a fresh application for interlocutory relief might not be brought upon notice in the High Court (see ***Thomas A Edison Ltd. v Bullock*** (1912) 15 CLR 679 at 683).

[15] Freed on 19 December 2007 of the restraints of the ex parte interim injunction, the creditor and the receiver and managers appear to have moved promptly to complete the Sale and Purchase Agreement by transferring the two properties to Western Builders Ltd on 21 December 2007. This involved obtaining consents to transfer from the Director of Lands (the third respondent), paying stamp duty, registering the transfers as deeds and lodging the transfers with the third respondent. There is a dispute as to whether anything remains to be done on the part of vendors and purchaser to complete the sale transaction. I was informed that it would be the practice of the third respondent to issue fresh Approval Notices to the transferee in due course.

[16] The petitioners claim to have been ignorant of the September 2006 mortgagee sale agreement until 10 January 2008. They contend that the sale is at a gross undervalue. The respondents have filed evidence suggesting that the petitioners have known the true situation for a considerable time. It is not incumbent on me to resolve this factual dispute in this application.

[17] On 24 December 2007 an application for a stay was filed in the High Court. On 2 January 2008 Scutt J made orders ex parte granting a temporary stay of Singh J's dissolution order of 19 December 2007. Upon the hearing of the petitioners' application Singh J dissolved this last mentioned stay on 18 January 2008. A fresh summons for an interlocutory injunction and other orders was filed in the High Court on 16 January 2008. Directions have been given for the filing of affidavits and the summons stands adjourned to 31 March 2008.

[18] Also on 24 December 2007 the petitioners filed a notice of appeal in the Fiji Court of Appeal. This challenged Singh J's orders of 19 December 2007.

[19] On 22 January 2008 the petitioners approached Byrne J as a single Judge of Appeal. They obtained ex parte the following orders:

> *(i)* ***That the ruling of Honourable High Court of 18th day of January, 2008 by Justice Jiten Singh be stayed pending determination of the appeal.***
>
> *(ii)* ***That an interim injunction be granted to the Appellants to have exclusive and continuous possession of all 3 properties contained in LD 4/7/2503, LD 4/7/2485 and LD 4/7/2502 until determination of the substantive High Court Civil Action No.6 of 2007 on the following conditions:-***
>
> > *(a)* ***The Appellants to deposit $100,000.00 (One Hundred Thousand Dollars) today in Court and;***
> >
> > *(b)* ***The sum of $1.2 million within 28 days from the date of this order.***
>
> *(iii)* ***That First and Second Respondents by their agents or servants including any prospective purchasers of the properties LD 4/7/2485 and LD 4/7/2503 to be restrained from entering and or selling the properties and to keep status-quo until the final determination of the substantive High Court No.6 of 2007.***

(iv) ***That the Third Respondent be restrained further not to process or issue any other approval notices or leasees in respect of LD 4/7/2485 and LD 4/7/2503 until the determination of the substantive High Court Action No.6 of 2007.***

(v) ***An order that the Police Officers to assist in execution of the orders (2) and (3).***

(vi) ***The Respondents to be served with all documents within 48 hours i.e. on or before 25th January, 2008.***

(vii) ***The matter be adjourned to 1st February, 2008 at 9:30am for mention only."***

[20] Order (v) was amended by Byrne J on 24 January 2008. It was further amended on 1 February 2008 to contain what is described as an assurance that the petitioners do not interfere with the possession of the servants and agents of Western Builders Ltd. This confirms that Western Builders Ltd has taken up possession of the two properties in reliance on its claimed rights as purchaser under a completed contract of sale.

[21] On 1 February 2008 police and army officers forcibly removed the fourth petitioner and 18 other men from the subject land. Western Builders Ltd appears to be in exclusive possession at the present time.

[22] There was an urgent hearing before Byrne J on 1 February 2008. All parties were represented. I am informed that his Lordship dissolved the orders of 22 January 2008, but stayed that order up to and including 2.30pm on 4 February 2008.

[23] A further hearing took place before Byrne J on 4 February 2008, at which all parties were represented.

[24] According to the affidavit of the petitioner Mr Niwaz Ali, Byrne J said that he had been called by the DPC Lautoka and the Commissioner of Police regarding the

incidents of 1 February 2008. His Lordship referred to a cutting from a newspaper article. He said that he had not read the affidavits filed in the case and that he did not have time "to hear the cases".

[25] According to that affidavit, Byrne J dissolved his injunction of 22 January 2008. The petitioners have expressed concern about not having had a hearing or the benefit of reasons. As indicated, it is this order in particular that is said to ground the Supreme Court's jurisdiction to grant special leave and my jurisdiction, as a Judge of the Supreme Court, to grant the interim relief sought in the summons before me.

[26] According to counsel for the first and second respondents, what happened on 4 February 2008 was that the 72 hour stay was allowed to lapse without extension. If this is correct, the presently significant interlocutory hearing occurred on 1 February. There is a dearth of evidence about what happed that day before Byrne J.

The petition is incompetent and doomed to fail

[27] It would be of concern, if it were the case, that Byrne J dissolved his earlier injunction without giving the petitioners any hearing on that matter and without giving reasons. I am not in a position to assess exactly what transpired on 1 and 4 February. It may be that his Lordship considered the reasons to be manifest from what was discussed in the presence of the parties. If the absence of reasons was an oversight, then it is inconceivable that his Lordship would not provide a brief indication of them if requested to do so.

[28] Be all this is it may, an order dissolving the interlocutory orders granted ex parte on 22 January 2008 that were slightly amended (on notice) on 24 January 2008 could not conceivably amount to a final judgment of the Court of Appeal within s.122(1) of the Constitution. However fruitless or misconceived may be the petitioners' attempt by appeal to overturn Singh J's orders of 19 December 2007 (which did no more then dissolve earlier ex parte orders in the High Court for material non-

disclosure), the appeal instituted on 24 December 2007 has yet to be heard, let alone decided. There is no judgment in that appeal, let alone a final one.

[29] The petitioners argue that their rights asserted in the underlying action will be wholly frustrated and rendered nugatory if the Supreme Court turns its back upon them. Such an argument assumes the very matter to be proved, namely whether there is any recourse to the Supreme Court at this stage of the dispute. The argument cannot overreach the language of the Constitution itself. In ***Native Land Trust Board v Narawa*** [2004] FJSC 7 this Court held (at [34]) that "[t]here is no discretion available under the Constitution to allow the Supreme Court to entertain applications for leave to appeal against decisions of the Court of Appeal which are not final."

[30] Mr S Chandra, representing the petitioners, has relied upon passages in this Court's decisions in ***Native Land Trust Board v Narawa and Anor*** [2004] FJSC 7 and ***Ralumu v Commander, Republic of Fiji Military Forces*** [2004] FJSC 11. On analysis, they do not assist.

[31] **Native Land Trust Board** involved an application for special leave to appeal from a judgment of the Court of Appeal in which it had set aside an order of the High Court summarily dismissing proceedings claiming declarations, injunctions and mandamus. The Court of Appeal allowed the appeal, quashed the order made by the High Court dismissing the proceedings, and ordered that the proceedings be converted into an ordinary action.

[32] The Court of Appeal's decision did not fully dispose of the rights of the parties in the underlying action, quite the reverse. The effect of the Court of Appeal's decision was to allow those rights to be determined after a trial. But the Court of Appeal's decision did fully dispose of the appeal brought to it.

[33] The Supreme Court held that the petition challenging the orders of the Court of Appeal was competent in the sense that the Supreme Court had jurisdiction to entertain it, although special leave was refused as a matter of discretion for the reasons set out at para [41] of the reasons for judgment.

[34] The Supreme Court held that determination of the competency issue did not turn upon the technical nature of the first instance judgment for summary dismissal. Rather, s.122 directed attention to the nature of the decision in the Court of Appeal that was sought to be challenged in the Supreme Court. The critical passage is at paras [34] to [37] of **Native Land Trust Board** and it is unnecessary to set it out.

[35] Para [35] in that passage shows that an appeal by leave from an interlocutory judgment of the High Court may yet result in a final judgment in the Court of Appeal. But equally clearly, it shows that interlocutory decisions within the Court of Appeal are not themselves final judgments of the Court, for constitutional purposes. The examples of decisions not amounting to final judgments of the Court of Appeal include "decisions providing for the stay of execution or of proceedings under the judgment at first instance." The orders of Byrne J under challenge in the pending petition are very much of this nature and quality. They are anything but "final judgments" of the Court of Appeal.

[36] **Ralumu** involved a decision of a single Judge of Appeal refusing an extension of time to appeal to the Court of Appeal from a judgment of the High Court refusing habeas corpus. This Court held that the petition was competent because the order refusing leave to extend time was a final judgment of the Court of Appeal within the Constitution.

[37] As the Supreme Court pointed out, there was no power in the Court of Appeal to review the decision of the single Judge (Penlington JA) who had refused the extension of time. That was because the power was exercised in respect of something other than an appeal against conviction or sentence and so was a civil

appeal. (The same goes for the status of the order of Byrne J as an interlocutory order made in what is undoubtedly a civil appeal.)

[38] It was held that the judgment of Penlington JA was a final judgment of the Court of Appeal within s.122 of the Constitution.

[39] It was a "final judgment" because (1) there was no mechanism for review by a Full Bench of the Court of Appeal and (2) it effectively brought an end to the petitioner's attempt to appeal against the decision of the High Court judge who had refused habeas corpus. It was the combination of these two factors that rendered the petition in **Ralumu** competent. The Court cited the passage from ***Native Land Trust Board v Narawa*** that is referred to above. Their Honours continued (at [51]):

> ***"In our opinion the better view is that a final judgment of the Court of Appeal, for the purposes of section 122 of the Constitution, is any judgment of the Court of Appeal which finally disposes of a proceeding in that Court. It was conceded by the first respondent that refusal by a judge of the Court of Appeal of an extension of time to bring an appeal is a final judgment of the Court of Appeal for the purposes of section 122 of the Constitution and may be the subject of a petition for special leave provided that it meets the criteria for the grant of such leave. We are satisfied that the concession was a proper one and that what occurred in this case was in substance a final judgment."***

[40] See also ***Penioni Tubuli v The State*** , Supreme Court CAV 0009/06, 25 February 2008.

[41] Once again, this does not assist the present petitioners. The orders of Byrne J that are complained of do not finally dispose of the proceedings in the Court of Appeal that was launched on 24 December 2007.

[42] Mr Chandra has also relied upon s.14 of the Supreme Court Act which provides:

> ***"For the purposes of the Constitution and this Act, the Supreme Court has, in relation to matters that come before it, all the power and authority of the Court of Appeal and that power and authority may be exercised, with such modifications as are necessary, according to the circumstances of the case."***

[43] It was argued that, when placed alongside s.12 of the Court of Appeal Act, s.14 armed the Supreme Court, and myself on a Judge of it, with statutory jurisdiction in the present matter.

[44] I cannot accept this submission. It is to be observed that s.14 is found in Part 4 – Miscellaneous and that its heading is "Powers of the Supreme Court generally." Section 14 does not enlarge the Supreme Court's jurisdiction. It merely confers powers with respect to matters of which the Supreme Court is properly seized. It does not override the Constitution. The words "in relation to matters that come before it" make these limitations plain.

[45] The petition also seeks orders setting aside an order of Singh J sitting as a Judge of the High Court on 18 January 2008. The Supreme Court has no jurisdiction to set aside a High Court judge's orders otherwise than in the exercise of appellate power exercised as an incident of a competent appeal from a final judgment of the Court of Appeal.

[46] For these reasons the petition is incompetent and doomed to fail. Accordingly, I have no jurisdiction to entertain an application for interlocutory relief in aid of such a petition.

Further Difficulties

[47] There is an additional discretionary reason why I would not grant the relief sought

even were I satisfied of this Court's jurisdiction. This interlocutory dispute should take place in the High Court, not the Supreme Court. There is no jurisdictional impediment to the High Court hearing a motion on notice for interlocutory relief. This Court is unquestionably an unsuitable venue for such an application. I agree with the proposition advanced in para 6 of the affidavit of Mr U R Sen that the filing of multiple applications for interlocutory orders, concurrently in the High Court and the Supreme Court, is (in the technical sense at least) abusing the process of the Court.

[48] The orders that I will make on the disposal of the summons remove any impediment in this regard.

[49] In these circumstances I shall refrain from expressing any concluded view as to the merits of the present application for interim relief. I stopped Mr Chandra when was proceeding to address me on these issues.

[50] I content myself with observing that the petitioners face several hurdles. They appear to accept the validity of the 2001 mortgage. Accordingly, they appear not to dispute the obligation to repay at least the initial $1.2 million plus accruing interest. On this basis alone, default has occurred under the mortgage. I am not in a position to assess the merits of the claim that the Debenture is invalid for want of registration of the statutory particulars.

[51] The claims for damages propounded in the proposed amended statement of claim may or may not have merit, but that is a matter to be tried in the High Court. It is not a defence to action taken to enforce the mortgage (and the Debenture, if valid), nor can it be the basis of an interlocutory injunction restraining completion of any sale: see generally ***Inglis v Commonwealth Trading Bank of Australia*** (1972) 126 CLR 161; **Halsbury's Laws of England**, 4th ed vol 32, "Mortgage" para. 658.

[52] The petitioners have very recently paid the costs awarded summarily in various proceedings in the High Court. But they have still failed to make an unconditional tender of what is due under the mortgage. The mortgagor company appears itself to be insolvent.

[53] The signs are not propitious, but I refrain from going further.

The practice of seeking injunctions and stays ex parte

[54] I do wish to say something about what appears to be a common practice in Fiji. The difficulties with the practice are evident in some of the wasted costs and needless applications that have occurred in recent months in this litigious saga.

[55] An ex parte injunction or stay ought never to be granted except for good reason and then only for such limited time (usually less than a couple of days) as is necessary to enable the other party to have time to respond to notice of the urgent interlocutory proceedings. If there is no threat of immediate adverse action by the defendant, there is no need for an immediate injunction or stay.

[56] The Court always can and should usually shorten the time within which a motion on notice will be returnable and fix a shortened time for its service. In this event ex parte relief may be unnecessary. At the very least, it can be limited until the abridged return date. On the return date the interlocutory issues can then be addressed (often by agreement). If the defendant needs more time to consider its position and to file evidence and is willing to undertake to maintain the status quo in the meantime, a short adjournment may be appropriate before the interlocutory dispute is heard.

[57] Proceeding this way has advantages for all parties, including the Judge. The prospects of agreement as to a mutually satisfactory holding arrangement are

increased. Sterile disputes about non-disclosure on the part of a plaintiff moving ex parte are avoided. The Judge with the carriage of the matter has the opportunity for reflection overnight about the best way to proceed and he or she will get the benefit of hearing from the other side before setting an interlocutory regime in place. There is the opportunity to explore the worth of the plaintiff's undertaking as to damages and other matters relevant to the balance of convenience. Directions for the speedy disposition of the action itself can be given to all parties at the same time that interlocutory relief is awarded or refused.

Orders

[58] For these reasons I propose to dismiss the summons.

[59] It seems to me that this leaves the petition on foot. If the petitioners do not withdraw it voluntarily yet decline to prosecute it then the Supreme Court Rules provide a means for its summary disposal. There may be other methods for summarily disposing of the petition which, in light of my rejection of the summons and the reasons for it, seems to have no future.

[60] The third and fourth respondents did not seek costs. But Mr Kapadia representing the first and second respondents and Mr Narayan representing the fifth respondent sought orders for costs to be assessed summarily. Each suggested the sum of $2,000. Mr Chandra for the petitioners balked at this sum. The parties agreed that I could consult with the Registrar. On that basis I have determined that $1,400 is an appropriate sum.

[61] I therefore made the following orders:

(I) Summons dismissed.

(ii) Petitioners to pay the costs of the first and second respondents (assessed together at $1,400) and the costs of the fifth respondent (assessed at $1,400). No order as to the costs of the third and fourth respondents.

Hon Justice Keith Mason
Judge of the Supreme Court

Solicitors:

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Sherani and Company, Suva for the 1st and 2nd Respondents
Office of the Attorney General Chambers, Suva for the 3rd and 4th Respondents
A K Lawyers, Ba for the 5th Respondent

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