IN THE SUPREME COURT OF FIJI
ON APPEAL FROM THE COURT OF APPEAL

Appellate Jurisdiction

PETITION FOR SPECIAL LEAVE NO. CBV0007/09
[On appeal from Court of Appeal Civil Appeal No. ABU0039 of 2007S]

[On appeal from High Court Civil Action No. HBC0115 of 2001]

BETWEEN:

DEO RAJ — ***Petitioner [Applicant]***

AND:

SHELL FIJI LTD. — ***Respondent***

Coram: **The Hon Chief Justice Anthony Gates, President of the Supreme Court**
The Hon Mr Justice Sathyaa Hettige, Justice of the Supreme Court
The Hon Mr Justice Suresh Chandra, Justice of the Supreme Court

Counsel: **The Petitioner in Person**
Ms P. Salele for the Respondent

Date of Hearing: **Tuesday 9th April 2013, Suva**

Date of Judgment: **Wednesday 24th April 2013**

JUDGMENT OF THE COURT

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[1] The Applicant seeks enlargement of time within which to lodge his petition for special leave. His application was filed almost a year after the decision he seeks to reverse, that given by the Court of Appeal on 9th May 2008. He lodged his application with this court on 4th May 2009.

[2] In the Court of Appeal, it was found that his appeal to that court required enlargement of time within which to appeal since he had filed his appeal almost 5 years after the High Court decision. Jitoko J had delivered his decision in the High Court on 26th July 2002 and the Applicant filed his appeal to the Court of Appeal only on 8th June 2007. Under the Rules the time for appealing to the Court of Appeal is within 6 weeks from a decision of the High Court involving a final judgment [Rule 16(b) Court of Appeal Rules Cap 12].

[3] The Court of Appeal refused enlargement of time. It ordered dismissal of the appeal and that each party should be responsible for their own costs.

High Court

[4] The Applicant had sought an order for winding up of the Respondent company. In his petition to the High Court, he had claimed a debt owing to him by the Respondent of $238,396.78 said to be for cartage fees, refunds of deposits on 240 empty oil drums, and for interest for the period July 1993 to April 1994. The Applicant was a trader in Vanua Levu and a distributor for the Respondent's products. The Respondent disputed the debt.

[5] Because of billing mistakes by the Respondent's staff the Petitioner said he terminated the agreement prematurely on 28th April 1994. The Respondent company replied saying it had settled all of the Applicant's outstanding claims in December 1996, except for one matter which went to the Small Claims Tribunal. The Tribunal decided that issue in favour of the Applicant. The Respondent denied owing anything further.

[6] The Respondent also said the Applicant had failed to provide any details of the alleged debt. The judge noted: "for example, while he is claiming cartage fees, there are no details provided by the Petitioner. Similarly the refund on drums although identifiable in the numbers (240 drums) no specific details as to delivery and documentation has been provided".

[7] The Respondent raised the argument before the judge that the Applicant's claim was statute barred under the Limitation Act Cap 35, for it had been brought more than 6 years after the cause of action had accrued. The Applicant said the Limitation Act provision did not apply

in his case since the company had led him on into thinking that it recognised the existence of the debt, and thereby waived the protection of the Limitation provision.

[8] The learned judge had this to say on that argument [at p.7]:

> "But to succeed in this argument that Petitioner has to satisfy that exceptions to the limitation period provided under any of the provisions of Part III of the Act [apply]. Unfortunately the Petitioner does not fall into one of the exceptions recognised in law. The sad fact of the matter is whilst it may be strongly argued by the Petitioner that the Company had continued to openly entertain approaches on his claims even after the 6 years period had expired, in the absence of any written acknowledgments by the Company of the existence of the debt and even part-payment of the same, the action is statute-barred."

[9] Accordingly the judge dismissed the petition with $200 costs to the company.

Court of Appeal

[10] 5 years later the Applicant took his case on appeal to the Court of Appeal. That court reviewed in its judgment the proceedings, and the decision of the learned judge. It set out the passage taken from Palmer's Company Law [Vol. 3 para 15.214] which had been referred to in Pathik J's decision in another winding up matter: *In the matter of All Safe Safety and Protection Pty Ltd*, Winding Up Cause No. 43 of 2001, 9th November 2001, also cited by Jitoko J in these proceedings:

> "To fall within the general principle **the dispute must be bona fide in both a substantive and objective sense.** Thus the reason for not paying the debt must be honestly believed to exist and must be based on substantial and reasonable grounds. 'Substantial' means having substance and not frivolous, which disputes the Court should ignore.<u>There must be so much doubt and question about the liability to pay the debt that the Court sees there is a question to be decided</u>."

[11] The company's argument that the claim was statute-barred had not been raised in the company's affidavit or any time prior to the hearing of the winding up petition. However the limitation argument applied to the facts of the case. The judge had found that the issue was

whether there was a substantial dispute as to whether or not a debt was actually owed. He concluded there was not, and that the claim was misconceived. This court agrees with that conclusion.

[12] The Court of Appeal found that the Limitation Act provision and the very late filing of his appeal by the petitioner were determinative in refusing enlargement of time.

[13] Since the court's decision on 9th May 2008, the then Acting President made an amendment to Rule 16 of the Court of Appeal Rules. Rule 16 now reads:

> "Time for Appealing
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> 16. Subject to the provisions of this rule, every notice of appeal shall be filed and served under paragraph (4) of rule 15 within the following period (calculated from the date on which the judgement or order of the Court below was pronounced) that is to say—
>
> *(a)* in the case of an appeal from an interlocutory order, 21 days;
> *(b)* in any other case, 6 weeks.
>
> This amendment takes effect as and from 31st December 2008."

[See Republic of Fiji Islands Government Gazette Vol. 11 Friday 9th July 2010 No. 80 at para 1170.]

Enlargement of Time Application

[14] The Applicant must satisfy this court that his application for enlargement of time should be allowed when considering the principles for the grant of such discretionary relief, and secondly that his petition is likely to meet the civil appeal criteria of section 7(3) of the Supreme Court Act.

[15] The criteria of section 7(3) are:

> " (3) In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant special leave to appeal unless the case raises—
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> *(a)* a far-reaching question of law;
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> *(b)* a matter of great general or public importance;
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> *(c)* a matter that is otherwise of substantial general interest to the administration of civil justice."

Factors to be considered

[16] This court in its recent decisions has found that it possesses the jurisdiction and the necessary power to enlarge time for appealing. In *Kamlesh v The State* CAV0001.09 21st August 2012, the court said [para 3]:

> "[3] The Supreme Court is the final court of appeal, and the procedure, save where leave has been granted beforehand by the Court of Appeal, is by way of special leave to be sought upon petition. The decision to grant special leave to hear an appeal, whether timely or not, lies with the court. At this final level special leave could allow a late appeal in cases meeting the leave criteria of section 7(2) of the Supreme Court Act or where in a rare case there is irremediable injustice otherwise compelling the intervention of the Supreme Court: see *The State v Eliki Mototabua* CAV0005.09 9th May 2012; *Fernandopulle v Premachandra de Silva and Others* [1996] 1 Sri: LR 70."

[17] Five factors are usually, but not exhaustively, considered. They are:

> "(i) The reason for the failure to file within time.
>
> (ii) The length of the delay.
>
> (iii) Whether there is a ground of merit justifying the appellate court's consideration.
>
> (iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?

> (v) If time is enlarged, will the Respondent be unfairly prejudiced? ”

The reason for the failure to file within time

[18] In his affidavit filed in support of this application the Applicant explained why he was late. At para 5 he said:

> “5.I DEPOSE that I was instructed by my lawyer that he will file the petition within the prescribed period of time under the supreme court rules but instead when I came to know that he has not filed the petition to the supreme court I was then caught in surprise, I then obtain to file myself.”

[19] In court, the Applicant informed us he had a counsel appearing for him. There was no difficulty over the fees. He asked his counsel about the filing of the petition. It had not been done, nor has his counsel deposed that the delay had been caused by his error such as by overlooking the matter.

[20] Mr Deo Raj had been late in filing twice before. He was late in making his claim, which so far two courts have found to be out of time. He did not appeal to the Court of Appeal for 5 years, and then was a year late in filing with this court. He must have realised, though a layman, that delay in taking action at court could result in the loss of his case. Nor would it be enough for a litigant just to leave the matter to his lawyer. There is no evidence before us that he made inquiry of his lawyer concerning the contents of the petition or that he asked for or received a copy of the filed petition document.

[21] The delay in filing his appeal to this court therefore has not been explained satisfactorily.

The length of the delay

[22] To be almost one year late in filing is a lengthy period of delay in this long drawn out proceedings. In civil proceedings involving business dealings or commercial matters it is too

long a period. Such a delay will cause undoubted prejudice to the Respondent. Courts will always be mindful of the need for even-handedness and consider equally the rights and interests of the parties: *Latchmi & Anor v Moti and Others* [1964] 10 Fiji LR 138 at 145G per Marsack JA.

Whether there exists a ground of merit

[23] The Applicant seeks to petition against the decision of the Court of Appeal. That decision was to refuse enlargement of time for appealing after a delay of almost 5 years. After such a period there would have to exist most compelling grounds to remedy injustice. The existence of a debt which was not disputed on substantial grounds was not established by the Applicant. He had failed to condescend into particulars and hence was unable to satisfy the court this was a debt which could not be contested on substantial grounds: *Offshore Oil N.L. and Investment Corporation of Fiji Ltd* Civil Appeal 29/84 Court of Appeal (at p.15).

[24] The Applicant was unable to establish inability or neglect to pay. Additionally the grounds dealt either with factual matters [Ground 1], or the insubstantial argument on the time when the appeal period commenced, or the perfecting of orders below [Grounds 2, 3 and 4]. One ground raised the limitation argument but did not state the nature of the error. None of these grounds can be described as grounds of merit.

Will a ground probably succeed?

[25] None of the grounds focus on the supposed errors of the Court of Appeal's decision. None are of substance or likely to create disquiet concerning the High Court's decision. The answer to this question must be "No".

If time were to be enlarged, would the Respondent be unfairly prejudiced?

[26] The Applicant's claim relates to events in the early 1990s. To revisit these matters now by the grant of further time to appeal would undoubtedly prejudice the Respondent.

Conclusion

[27] Not only has there been a failure to meet the usual requirements for enlargement of time within which to appeal, the Applicant by his petition is unlikely to be granted special leave on the main appeal either since his case does not meet the leave criteria of section 7(3). Accordingly we refuse the application for enlargement of time and dismiss the petition.

[28] The orders of the court are:

(a) Enlargement of time application refused.
(b) Petition for special leave dismissed.
(c) Costs for the Respondent of $1,500.

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Hon Chief Justice Anthony Gates
President of the Supreme Court

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Hon Mr Justice Sathyaa Hettige
Justice of the Supreme Court

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Hon Mr Justice Suresh Chandra
Justice of the Supreme Court

Solicitors:

Applicant in Person
Messrs Q.B. Bale and Associates, Suva

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