

IN THE FIJI COURT OF APPEAL,
CIVIL JURISDICTION
FROM THE HIGH COURT OF FIJI

Civil Appeal No. ABU0038 of 2008
[High Court at Labasa, Civil No: HBC 38 of 2001]

BETWEEN: **SHELL FIJI LIMITED**

Appellant

AND: **SUSHIL CHAND**

Respondent

Coram: **Hickie, JA**

Dates of Hearing: **21 January and 18 February 2009**

Counsel: **Mr A. Reddy for the Appellant**
Mr M. Raza (21 Jan.) & Mr A. Sen (18 Feb.) for the Respondent

Submissions Ordered: **23 February 2009 (Respondent)**
25 February 2009 (Appellant) – not exercised

Date of Decision: **2 April 2009**

DECISION

A. BACKGROUND

[1] On 27 May 2008, Jitoko J sitting in the High Court of Fiji at Labasa entered judgment against the Appellant in the sum of \$32,987.93 as well as cost summarily fixed at \$650.00 after hearing a claim for damages for injuries sustained by the Respondent as a result of the alleged negligence of two Defendants.

[2] The Order was sealed and perfected on 6 June 2008. According to the Court of Appeal Rules, the parties had six weeks (42 days) to appeal from that date, that is, on or before 18 July 2008.

- [3] On 24 June 2008, the Appellant filed in the Fiji Court of Appeal a *Notice and Grounds of Appeal*.
- [4] On 7 July 2008, the Appellant filed a *Notice of Motion* in the High Court of Fiji at Labasa seeking a Stay of Execution of the said Judgment pending determination of the Appeal.
- [5] On 18 July 2008, Scutt J sitting in the High Court of Fiji at Labasa, heard the Appellant's *Notice of Motion*, and ordered that the judgment of Jitoko J be stayed conditional upon the Appellant paying the judgment sum into Court within seven days.
- [6] On 18 July 2008, the Appellant filed a *Summons to Fix Security for Costs*.
- [7] The Appellant paid the sum of \$33,637.93 into the High Court of Fiji at Labasa for which a receipt was issued by the Court on 28 July 2008. There is a dispute as to when the sum was actually paid and whether this was on 24 July 2008.
- [8] On 30 July 2008, the Respondent's Solicitors wrote to the Appellant's Solicitors seeking their confirmation as to the compliance of the Order, that is, that the judgment sum had been paid into the Court as Ordered by Scutt J on 18 July 2008. The Appellant's Solicitors did not respond until 1 August 2008 and not formally until 2 February 2009 when a copy of a receipt was sent by facsimile transmission to the Respondent's Solicitors evidencing a receipt issued on 28 July 2008 by the High Court of Fiji at Labasa.
- [9] On 5 August 2008 (17 days out of time), a *Summons and Affidavit in Support of a Cross-Appeal* was filed on behalf of the Respondent which sought:
- (a) That the Respondent be given leave to file his cross-appeal as *Forma Pauperis*;
 - (b) That Security for Costs, if any, for the Cross-Appeal by the Respondent be waived;
 - (c) That the Respondent be given leave and/or time for filing of Cross-Appeal be extended.

[10] The Respondent's *Summons* was opposed by the Appellant. This judgment is in relation to that *Summons*.

B. THE SUMMONS

1. The Hearing of the Summons

[11] The Hearing of the Summons took place on 21 January 2009 when it was adjourned part-heard until 18 February 2009 with the Appellant granted liberty to file a Supplementary Affidavit and the Respondent also granted liberty to file an Affidavit in Reply.

[12] At the conclusion of the hearing Counsel for the Respondent was given time to file and serve copies of the case law he was relying upon with a one page cover sheet. Similarly, Counsel for the Appellant was given time to respond by filing and serving copies of the case law he was relying upon with a one page cover sheet. Counsel for the Respondent has complied with this Order. Counsel for the Appellant has chosen not to do so.

[13] Counsel for the Respondent has submitted:

- (a) That as the Respondent's Solicitors were never advised by the Appellant's Solicitors as to whether they had complied with the Order of Scutt J of 18 July 2008, they did not file their cross-appeal in time as if the Appellant was not pursuing their Appeal, then they would not be pursuing a Cross-Appeal;
- (b) That the Court needs to consider –
 - (i) The merits of the Appeal;
 - (ii) Any prejudice caused to the other party;
 - (iii) Whether there has been an inordinate delay.

[14] On the question of merits, Counsel for the Respondent has submitted that the grounds of appeal have been set out in the supporting Affidavit and the Appellant in opposing the Application has not addressed the grounds or merits of the Appeal. Thus, he has concluded that the chances of success of the Appeal are not in issue.

- [15] On the question of prejudice, Counsel for the Respondent has submitted that the Appellant has not addressed this issue and, as such, there is no prejudice to the Appellant if leave be granted.
- [16] On the question of whether there has been an inordinate delay, Counsel for the Respondent has submitted that the length of delay is only 17 days. In support, Counsel has cited:
- (a) *Pacific Educational Resources (Fiji) Limited* (Unreported, Fiji Court of Appeal, Miscellaneous Action No. 16 of 2007) – appeal allowed although 42 days out of time;
- (b) *McCaig v Manu* (Unreported, Fiji Court of Appeal, Miscellaneous Action No. 21 of 2006, 20 April 2007, Scott JA; Paclii: [2007] FJCA 55, <http://www.paclii.org/fj/cases/FJCA/2007/55.html>) – appeal allowed although 4½ months delay (caused by delay in service of sealed order and hence technically only 3 days out of time);
- (c) *Native Reserves Commission v Ratunisiwa* (Unreported, Fiji Court of Appeal, Miscellaneous Action No. 21 of 2006, 20 April 2007, Scott JA; Paclii: [2007] FJCA 53, <http://www.paclii.org/fj/cases/FJCA/2007/53.html>) – appeal allowed although 2 ½ year delay.
- [17] At the hearing, Counsel for the Respondent also submitted that they were waiting to see whether the Appellant had paid the judgment sum into Court which would have confirmed that the Appellant was proceeding with their Appeal and hence the Respondent would then have proceeded with the Cross-Appeal. On this issue, Counsel for the Appellant responded at the hearing that whether or not the judgment sum was paid into Court was irrelevant as to the Respondent filing their Appeal within time as required by the Rules.
- [18] Despite the single judge cases cited by the Respondent, it must be noted that the Court expects time limits to be observed: *Rupeni Silimuana Momoivalu v Telecom Fiji Limited* (Unreported, Court of Appeal, ABU0037 of 2006, 7 September 2007, Byrne, Pathik and Mataitoga JJA); *Shah v Fiji Islands Revenue and Customs Authority and 2*

Ors (Unreported, Court of Appeal, ABU0001 of 2007, 4 July 2008, Byrne, Pathik and Hickie JJA), where it was held at paragraph 34: “*That it was the responsibility of the Appellant’s Solicitors as the Solicitors on the Record for the Appellant to pursue the Appeal in accordance with the Rules ...*” and “*That the Court will expect adherence to the Rules save in the absence of special circumstances.*”

[19] Having considered all of the above, including the nature of the matter, the merits and prejudice and how the Respondent says the delay was caused, as well as the fact that an Appeal is already on foot and that the cross-appeal can be heard without much more time and expense, I am of the view that the Order sought in the Summons for leave to file the Cross-Appeal out of time should be granted. I am also of the view that having regard to the financial position of the Respondent, the Orders sought in the Summons in relation to that issue should also be granted.

ORDERS

[20] **Thus the Court makes the following Orders:**

- 1. That the Respondent be given leave to file his Cross-Appeal as Forma Pauperis.**
- 2. That Security for Costs, if any, for the Cross-Appeal by the Respondent be waived.**
- 3. That the Respondent be given leave for filing of his Cross-Appeal such that it be filed on or before 14 days of today.**
- 4. That the costs of the Summons shall be costs in the Appeal, that is, to be determined by the Full Court after determination of the Appeal.**

The Hon. Thomas V. Hickie
Judge of Appeal

Solicitors:

Maqbool & Comonay, Solitors, Labasa (City Agents: Mehboob Raza & Associates, Barrister & Solicitor, Suva)

Gibson & Company, Solicitors, Labasa (City Agents: Neel Shivam Lawyers, Barristers & Solicitors, Suva for the Respondent)