

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0037 OF 1994
(Civil Appeal No. 3 of 1992)BETWEEN:SURESH SUSHIL CHANDRA CHARAN
ANURADHA CHARANAPPELLANTS

-and-

SUVA CITY COUNCILRESPONDENT

The first Appellant for himself and the second Appellant
Mr. R. Gopal for the Respondent

Date and Place of Hearing : 12 February 1996 Suva
Date of Delivery of Judgment : 15 February 1996

JUDGMENT OF THE COURT

On 14 July 1994 the President sitting as a single Judge of the Court dismissed a motion by the appellants with costs. The appellants now seek to set aside his determination. We have treated this as a motion by an aggrieved party to have the matter determined by the Full Court under section 20.

The background to the application as it appears from the record may be stated shortly.

On 24 May 1994 in Civil Appeal Case No. 3 of 1992 this Court increased an award of exemplary damages to the appellants from \$1000.00 to \$3000.00 and interest. The relevant passage reads:-

".....appeal is allowed in respect of exemplary damages and we would substitute an amount of \$3000.00. We further order that interest of 13.5% will apply to this amount until payment."

The following day cheques payable to each appellant for \$1000.37 were pushed under the door of the appellants' home. A covering letter stated it to be "the amount due to you with interest, which is the full and final amount of satisfying this Judgment". This sum was the unpaid balance of the damages and interest, it would appear, for one day.

The first appellant wrote on 26th May pointing out that the interest should have been calculated from the date of the original cause of action and stating he would accept the cheque only if it was without prejudice to his right of appeal from the Court of Appeal decision.

His opinion that interest should have been calculated differently was confirmed by the Chief Registrar and, in a letter of 20 June 1994, the first appellant advised the respondent. The Town Clerk of the respondent replied on 29 June 1994 repeating its previous position and stating the Chief Registrar "in my view has no jurisdiction over a matter dealt with by the Court of Appeal where a judgment has already been pronounced".

On 1 July 1994 the first appellant again tried to correct the sum paid and supported his claims with calculations giving a total of \$4430.00. Yet again, the respondent, in a letter of 7 July 1994, asserted "that Council is not liable to pay any monies demanded by you in your letter".

The first appellant had by that time filed a notice of motion seeking an order from the single Judge that the "Appellant be allowed to accept the monies payable pursuant to the decision of the Court of Appeal, dated 24-5-94 without prejudice to their right of appeal to the Supreme Court..... And the costs of this application be paid by the respondent."

It appears from the single Judge's Decision that, at the request of the first appellant, an early hearing was fixed for 1 July 1994 because the time to appeal was running out but the appellants failed to serve the documents in sufficient time and the matter was adjourned to 14 July 1994.

The learned Judge describes events at both hearings as follows:-

"On 1st July, 1994 I also indicated to the Applicant Suresh Charan that there was no need for the motion before me as all that the Applicants had to do was say in their letter of acceptance to the Suva City Council that they were accepting the cheque tendered in purported satisfaction of the Court's judgment without prejudice to their right of appeal. Of course there was nothing to stop them from returning the cheque if the amount was inadequate or if they felt they would compromise their right

of appeal if the cheque was to be accepted only as full and final satisfaction of the judgment debt. Mr. Charan said he was satisfied with my observations and wished to withdraw his application on condition that each party paid its own costs.

Ms Jayatilleke submitted that it was only proper that the Applicants pay the Respondent's costs for the day because of the short service and as the application was unnecessary.

Mr Charan said that unless the Respondent agreed to pay its own costs he would proceed with the application. I then adjourned the hearing to 14th July, 1994, granted leave to Applicant to file and serve supplementary affidavit on or before 4th July, 1994 and also ordered the Respondent to file an affidavit in reply before 11 July, 1994.

When the hearing commenced on 14/7/94 Mr Charan argued in support of his motion but finally at his own initiative said that the issue was now a "dead one" as he had already filed the Notice of Appeal and had written to Suva City Council rejecting the payment. He also said that the proper avenue open to him was to enforce the Court of Appeal judgment as his appeal was directed to seeking a larger sum than awarded.

The only issue before me therefore is that of costs."

It is the question of costs that the appellants ask the Court to determine. It is not an appeal but a fresh determination of the matter.

This is but one of a long line of cases between these parties and the Court cannot fail to be aware of the fact that personal rancour has all too often been revealed in exchanges between the first appellant and the lawyer for the respondent, Ms. Jayatilleke. In the proceedings before the single Judge, the

first appellant filed an affidavit without leave in which he made a number of allegations both personal and professional against her. She has indicated she will be pursuing her own remedy and we do not consider the affidavit further except as an indication of the appellant's attitude.

On the face of the record, we are considering a case where the appellants moved for an order that was unnecessary. Furthermore, on 1 July, the single Judge explained the appropriate way to proceed thus answering the question posed in the appellant's motion. The first appellant accepted that advice but made his withdrawal of the motion conditional on an order that each side should pay its own costs. The offer was not accepted by the respondent and the case proceeded. In those circumstances the Court would usually order him to pay the costs. However, this particular case needs further study.

We have already referred to the unfortunate bitterness that has appeared between the parties involved. Counsel for the respondent, Ms. Jayatilleke, confronted with an unqualified and unrepresented party (albeit an experienced litigant) seeking what was in effect guidance from the Court, might have been wise to agree to bear her own costs at that stage. They would presumably have been limited to her attendance that day as she sought an adjournment to consider the papers following the short notice. It was apparent the appellants' motion had in part been prompted by her client's refusal to pay interest on a judgment sum and, by that date, she knew of the Chief Registrar's advice whatever she

felt about his right to give it. Rather than questioning his right, it might have been wise for her to reflect on the fact that his view appeared to conflict with hers. It is also relevant that, since the single Judge's decision and, of course, unknown to him on 14 July, following issue of a writ of *fifa*, the respondent has paid the full sum requested at the outset by the appellant.

In those circumstances and faced with an offer by the first appellant to withdraw, it might have been prudent to forgo her costs for a single attendance in order to terminate the proceedings. Counsel appearing today for the respondent has supported his predecessor's action; she had a right, he said, in view of the short notice, to seek an adjournment. We would venture to suggest that, having had a clear day's notice, there was more than ample time to deal with a very simple matter. The fact she chose to assert her right to an adjournment and to refuse a reasonable offer from the appellant is an example of the attitude that has too often emerged in the litigation between these parties and sits uncomfortably with the duty of a lawyer to remain objective. The result was escalating costs and a further hearing all of which would have been avoided if she had agreed to bear the costs of her appearance that day.

We must also bear in mind that, however unnecessary the appellants' motion, they had in an earlier proceeding involving the same parties, moved for and been given guidance by this Court whether or not to accept a proffered payment of a judgment debt.

Although the first appellant eventually withdrew this application, we accept he had been justified in seeking the Court's advice in the face of the respondent's implacable attitude and refusal to pay a sum that was clearly due; we bear in mind also that he had been permitted to make such an application in a previous case. We do not know when or how counsel for the respondent realised the respondent's refusal to pay interest from the date of the cause of action was wrong but, as a qualified lawyer, she should have realised at an early stage.

We feel the attitude of both parties has contributed to the prolongation of this matter but the substantial costs incurred after 1 July would have been avoided if the respondent had accepted an offer by the appellant we consider was reasonable.

The awarding of costs is a matter of discretion; if this were an appeal against the President's decision, we would not disturb it as he exercised his discretion fairly, reasonably and in accordance with established principles. However, as these proceedings are concerned with an application to the Court under section 20 of the Court of Appeal Act (Cap 12), we have to exercise the discretion ourselves; for the reasons we have stated we are satisfied that in the unusual circumstances of this case we should exercise it in a rather unusual manner.

In the circumstances we conclude the parties should pay their own costs up to and including 1 July but the respondent should pay one third of the appellants' costs incurred subsequently in the proceedings before the single judge. We assess the appellants' further costs including disbursements would reasonably be \$45.00 meaning the respondent must pay the appellant \$15.00.

The respondent must pay all the appellants' costs of this hearing which we assess at \$200.00.

Gordon Ward

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Mr. Justice Gordon Ward
Judge of Appeal

I. R. Thompson

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Mr. Justice I. R. Thompson
Judge of Appeal

J. D. Dillon

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Mr. Justice J. D. Dillon
Judge of Appeal