IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0011 OF 1997S
(High Court Civil Action No. HBC0038 of 1994S)

BETWEEN:

THE HON. MAJOR-GENERAL SITIVENI L. RABUKA
DR. FILIMONI WAINIQOLO
SOQOSOQO NI VAKAVULEWA NI TAUKEI

APPLICANTS

-and-

RATU VILIAME F. DREUNIMISIMISI
JOSEVATA N. KAMIKAMICA
VILIAME GONELEVU
ILAI KULI
VILIAME TUNIDAU
RATU EMOSI VUAKATAGANE
RATU SERUPEPELI NAIVALU

RESPONDENTS

Mr. K. Bulewa for the Applicants
Mr. S. Matawalu for the Respondents

Date and Place of Hearing : 7 November 1997, Suva
Date of Delivery of Judgment : 14 November 1997

JUDGMENT OF THE COURT

The appellants are seeking leave to appeal to the Supreme Court against the dismissal by this Court of their appeal against the judgment of Fatiaki J. in High Court Civil Action No. HBC0038/94S. He granted four declarations sought by the respondents,

who were the plaintiffs in those proceedings, against the applicants, who were the defendants. The declarations concerned their purported expulsion from the Soqosoqo ni Vakavulewa ni Taukei ("the SVT"), a political party. His Lordship recorded in his judgment that the relevant papers commencing the proceedings had been properly served on the defendants on 1 February 1994 but that the defendants had neither entered an appearance (by which we understand him to mean that they had not acknowledged service of the originating summons) nor filed any affidavit opposing the plaintiffs' claim for declaratory relief. Mr. Bulewa told us that the applicants were not served with the originating summons; he had not previously made that allegation to this Court. However, he said that they had not applied to the judge to set aside his default judgment. We pointed out to him that, as they had not done so, we must proceed on the basis that, as recorded by Fatiaki J., there was proper service. He heard the plaintiffs and delivered a judgment which, although a default judgment, was fully reasoned. He did so on 12 April 1994.

In spite of the fact that the judgment was a default judgment and no application had been made to set it aside, in February 1997 the defendants sought in the High Court an extension of time to appeal to this Court out of time and Fatiaki J., presumably unaware that the appellants would later say that they had not been served, and with the plaintiffs consenting, granted the extension. He required the defendants to file their notice of appeal in this Court within 14 days. They duly filed it on 5 March 1997. However, they did not apply to have the amount of security for costs for the prosecution of the appeal fixed; rule 17(1) of the Court of Appeal Rules required them to make that

application within 30 days of service of the notice of appeal. On 15 May 1997 the respondents' solicitor wrote to the Registrar of this Court requesting that, as provided for in rule 17(2), the appeal be summarily dismissed for non-compliance with rule 17(1).

On 21 May 1997 the Registrar wrote to the appellants' solicitor informing him of that request and stating that all proceedings in the appeal were stayed and that the appeal would be listed for formal dismissal on 7 August 1997. The Registrar further informed him by that letter that, if the appellants wished to show cause why the appeal should not be listed for formal dismissal, he could file within 30 days an *inter partes* application supported by an affidavit.

The appellants did not make an *inter partes* application until 15 July 1997. They then applied by notice of motion for dismissal of the summons for summary dismissal and also for the time for complying with rule 17(1) to be extended. That application was listed for hearing by the Full Court on 7 August 1997. On that day their solicitor attended before this Court and informed it that the matter in issue in the appeal and matters in issue in another High Court action in which the respondents had obtained judgment for unliquidated damages might be settled; he said that he was having discussions with the respondents with a view to reaching settlement. He accepted that rule 17(1) had not been complied with but sought an adjournment of the proceedings pending conclusion of the settlement discussions. In view of the nature of the original proceedings, the Court granted an adjournment for six days as it considered that an amicable settlement of political differences would be in the national interest.

However, when the hearing was resumed on 13 August 1997, there had been no settlement. The applicants' solicitor informed this Court that two of the respondents had been willing to settle, that one was unwilling to do so and that it had not been possible to ascertain the views of those of the others who were still alive. (Two had died.) The respondents' solicitor opposed a further adjournment and submitted that settlement was more likely to be achieved if the appeal was dismissed and there could be no further procrastination on the part of the applicants.

The appellants' solicitor sought to excuse the failure to comply with rule 17(1), and to support his application for an extension of time to do so, by the fact that from about 3 March 1997 until 4 July 1997 he had been very busy as a member of the Joint Parliamentary Select Committee and its Legal Sub-Committee that were working on the drafting of a Bill to amend the 1990 Constitution of Fiji. In view of the appellants' previous and persisting dilatory conduct the Court did not accept that as excusing the failure to comply with rule 17(1) or as a reason for extending time for compliance with rule 17.

It referred to Venkatamma v Ferrier-Watson (Civil Appeal No. CBV0002 of 1992: judgment delivered on 17 November 1995) where the Supreme Court said at page 3 of the typed judgment:-

> ***"After hearing counsel on the question the Court intimated that in the special circumstances the appeal would be allowed to proceed. We took into account that, surprisingly, counsel for the appellants had evidently not been fully alive to the importance of compliance with the Rules, but that this***

is an early case under the Rules; that questions arise of some general significance between landlords and tenants of agricultural holdings; and that there had been mistakes on both sides, as already explained. We now stress, however, that the Rules are there to be obeyed. In future practitioners must understand that they are on notice that non-compliance may well be fatal to an appeal: in cases not having the special combination of features present here, it is unlikely to be excused."

Section 117 of the 1990 Constitution of Fiji provides:-

"117.-(1) An appeal shall lie from decisions of the Fiji Court of Appeal to the Supreme Court in the following cases, that is to say-

(a) from final decisions in any appeal to the Fiji Court of Appeal on any constitutional questions;
(b) from final decisions in any civil proceedings where the matter in dispute is of the value of 20,000 dollars or upwards or where the appeal involves, directly or indirectly, a claim to or a question respecting property or a right of the value of 20,000 dollars or upwards; and
(c) in such other cases as may be prescribed by law.

(2) An appeal shall lie from decisions of the Fiji Court of Appeal to the Supreme Court with the leave of that court in the following cases, that is to say-

(a) from decisions in any civil proceedings where in the opinion of the court the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to the Supreme Court; and
(b) in such other cases as may be prescribed by law.

(3) Nothing in this section shall affect the right of the Supreme Court to grant special leave to appeal from the decision of any court in any civil or criminal matter."

Section 8 of the Supreme Court Decree 1991 provides:-

"8.-(1) An appeal shall lie from decisions of the Court to the Supreme Court in the following cases, that is to say:

(a) from final decisions in any appeal to the Court on any constitutional questions; and
(b) from final decisions in any civil proceedings where the matter in dispute is of the value of 20,000 dollars or upwards or where the appeal involves, directly or indirectly, a claim to or a question respecting property or a right of the value of 20,000 dollars or upwards.
(c) with the leave of the Court from decisions in any civil proceedings where in the opinion of the Court he question involved in the appeal is one that by reason of its general or public importance or otherwise, ought to be submitted to the Supreme Court.
(d) in such other cases as may be prescribed by law.

(2) Nothing in this section shall affect the right of the Supreme Court to grant special leave to appeal from the decision of the Court in any civil or criminal matter."

References to "the Court" are to the Fiji Court of Appeal.

The appellants state, in support of their application for leave to appeal to the Supreme Court, that the following questions of great general or public interest are involved:-

"(i) The freedom of speech of members of the House of Representatives in Fiji and how such freedom is modified by our political culture.
(ii) A political party's implied powers with respect to discipline of its members in the absence of any express provision in its constitution or charter.
(iii) The exercise of summary powers of the Fiji Court of Appeal to dismiss an appeal on the grounds of non compliance with its appeal rules, in particular Rule 17 of the Court of Appeal Rules.
(iv) The application and observance of conventions governing the relationship between the Parliament of Fiji and the Judiciary."

The third of those matters is, in our view, clearly not a matter of general or public interest; this Court is given a discretion and the manner in which such discretions must be

exercised is well established. Nor can we see how the fourth of the matters, which is expressed in the vaguest of terms without any particularity, would be in issue in any appeal. As to the first two of the matters, those were issues raised in the proceedings in the High Court; there the appellants regarded them as of so little importance that, if as Fatiaki J. found they were properly served, they did not acknowledge service of the originating summons or do anything to participate in the proceedings and, if as Mr. Bulewa asserted they were not served, they failed to apply to have the default judgment set aside so that they could present their arguments in the High Court. They then waited for nearly two years before taking any further steps in the matter. Again in this Court they failed to pursue their appeal in an expeditious manner.

What the appellants are seeking now is, in effect, that the Supreme Court should deal at first instance with issues which the appellants should have argued before the High Court and then, if necessary, before this Court on appeal before seeking leave to take a further appeal to the Supreme Court. It would, in our view, be contrary to the best interests of the administration of justice in Fiji to allow that to occur.

Accordingly we are unable to accept that leave should be given to the applicants to appeal to the Supreme Court. They have suggested that they are entitled to appeal as of right because the matter in dispute is of the value of $20,000 or more. In the separate action to which we have referred above the respondents sued the applicants for damages for loss of parliamentary salaries resulting from their expulsion from the SVT. Judgment for unliquidated damages was given against the applicants *in that action*. In this Court,

when it was dealing with the applicants' failure to comply with rule 17(1), Mr. Bulewa said that the actions had been merged. Subsequently, however, when pressed on the matter, he acknowledged that the appeal was in respect only of the action seeking declarations. Before us on the hearing of the application for leave to appeal to the Supreme Court, he has again confirmed that. In our view, therefore, the applicants are not entitled to leave to appeal to the Supreme Court.

The application for leave to appeal to the Supreme Court is dismissed. The applicants are to pay the respondents' costs of the proceedings in respect of the application; we fix them at $300 plus disbursements.

Sir Ian Barker
Judge of Appeal

Mr. Justice I. R. Thompson
Judge of Appeal

Mr. Justice Savage
Judge of Appeal

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