IN THE COURT OF APPEAL, FIJI AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0021 OF 2000
(High Court Civil Action No. HBC 273 of 1996S)

In Chambers

BETWEEN: MOHAMMED YASIN *Applicant*

AND: BASIC INDUSTRIES LIMITED *Respondent*

Mr S. Samuels for the Applicant
Mr G. Leung for the Respondent

DECISION
(Application for leave to appeal and stay)

This is an application by the Applicant (Original Defendant) for leave to appeal to this Court against an Order made by the High Court (Scott J.) on 6 April 2000 ordering him to pay into Court a sum of $349,413.20 by midday on 7 April or to face possible committal for failure to do so. (April 2000 Order.)

The Applicant also asks that the April 2000 Order be stayed pending the hearing and final determination of his appeal to this Court.

It is essential to set out briefly the circumstances leading up to the making of April 2000 Order and to this present application before dealing with them.

The writ in this case was issued on 12 June 1996. In that writ the Respondent (Original Plaintiff) claims from the Applicant a sum of $349,413.20 which the Applicant says it lent to the defendant on or about 7 September 1995 by paying the sum into the Trust Account of Messrs Maharaj Chandra & Associates, Solicitors of Suva.

In his defence the Applicant does not deny the payment alleged but says that such payment is not refundable for various reasons not material for present purposes.

On 19 August 1996 the Respondent applied to the High Court for an Order that the sum of $349,413.20 paid into the Trust Account of Messrs Maharaj Chandra & Associates be paid into Court because it feared that the funds would otherwise be dissipated.

The application came before Scott J. on 4 December 1996. That application was opposed by the Applicant and after hearing Counsel and considering the affidavit evidence before him the Learned Judge ordered that the said sum be paid into Court by the Applicant "forthwith", because he concluded that otherwise there "was a real risk of dissipation of the sum." (December 1996 Order.)

On 9 December 1996 the Applicant applied to the High Court for leave to appeal to this Court from the December 1996 Order.

He also applied to "stay" the December 1996 Order pending the hearing and determination of his appeal to this Court. Both applications came before Scott J. and he dismissed both on 6 February 1997.

It is common ground, that no application for leave to appeal from the December 1996 Order was made to this Court. Nor was the Order of the Court complied with. The December 1996 Order remained a subsisting Order of the High Court at all relevant times.

Between May and October 1997 the Respondent made two attempts to have the Applicant committed for contempt for not complying with the December 1996 Order.

The committal proceedings were dismissed by Scott J. on 1 October 1997 because of the Respondent's inability "to properly handle" the application to commit. It is obvious that the application failed for procedural deficiencies and not on merit. It seems that matters rested there until July 1999 when Scott J. while reviewing progress made in bringing the case to a hearing raised the question of the continuing non-obedience by the Applicant of the December 1996 Order, and his right to take further part in the proceedings. He called for written submissions from Counsel for both parties on the course of action open to him, considered the authorities cited to him, and at the end of a reasoned decision came to the following conclusion:-

> *"In view of the stage which this litigation has reached I do not think that merely refusing to hear the Defendant until he has purged himself of his contempt will advance the matter. However I am not prepared merely to watch an Order of the High Court being flouted and take the view that the Defendant's disobedience is indeed impeding the course of justice. In the circumstances I propose therefore to give the Defendant a final opportunity to comply with my Order. He will have until midday 7 April 00 to pay the full sum into Court. I will hear Counsel again at 9.30 on Monday 10 April and will then decide what further action, possibly including committal, if any, is warranted."*

It is from that Order that the Applicant now seeks leave to appeal to the full Court.

I should also mention that on 10 April 2000 Scott J. refused the Applicant leave to appeal to this Court and he also refused to "stay" the April 2000 Order. Hence

the application to a single Judge of this Court.

The April 2000 Order is an interlocutory Order. The subject matter of the Order, namely the sum of $349,413.20 and costs (altogether $349,763.20) has now been paid into Court by the Applicant (on 12/4/2000).

The monies will now be held in Court until the final resolution of the dispute between the Applicant and the Respondent by the High Court (subject to appeals if any). The Courts do not, as a general rule encourage appeals from interlocutory Orders. The requirement for leave to appeal from interlocutory Orders is designed to reduce appeals from interlocutory Orders as much as possible. The legislature by requiring leave of the Court in order to appeal from interlocutory Orders has evinced a policy against bringing of interlocutory appeals except where the Court, acting judicially, finds reason to grant leave.

I am not sitting on appeal from the judgment of Scott J., nor is it my function to review his decision.

I have looked at the submissions made by the Applicant and his proposed grounds of appeal to determine if they raise arguable issues affecting his substantive

rights which require further ventilation before the full Court. I am of the opinion that they do not and no prejudice will be done to the Applicant if I refused the Applicant leave.

In this case, as I see it, the Learned Judge took a robust common sense approach to his December 1996 Order. As he pointed out the breach of the Court Order was so flagrant, deliberate, and of such long standing that to ignore it would invite derision and disrepute to the administration of justice and pointed out that waiver in such cases is not decisive.

Mr Samuels, Counsel for the Applicant, in his proposed Petition of Appeal attacks the April 2000 Order mainly on the ground that the Respondent had by his conduct waived compliance with the December 1996 Order, and that it was not for the Learned Judge to intervene in the matter, by insisting that the Order be complied with. The alleged waiver is said to arise because of the two unsuccessful attempts that the Respondent made in 1997 to have the Applicant committed under Order 52 of the High Court Rules, for non-compliance with the December 1996 Order. In support of this argument, Mr Samuels points out that on the 23 of November 1999 Mr G. Leung Counsel for the Respondent told the Learned Judge that "he was inclined to agree" with the Applicant's contention that the Respondent had waived the failure to obey

the December 1996 Order and that it was not for the Court to intervene in the matter.

With respect to Counsel, this particular ground is misconceived and in my view has little prospect of success. I do not see how the two aborted attempts to have the Applicant committed can be said to constitute waiver. The contempt proceedings failed not because the Applicant was not in contempt, but because the Respondent had not complied with the procedural requirements of Order 52 of the High Court Rules. Furthermore, whatever may have been Mr Leung's disposition on the 23 November 1999, the fact of the matter is that on the 6 of April Counsel for the Respondent insisted upon compliance with the December 1996 Order.

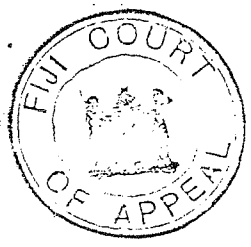
It is pertinent to point out here that it was suggested in argument before me that the liberty of the Applicant had been threatened by the April 2000 Order, and that proper procedures were not invoked to have the Applicant committed for not complying with the April 2000 Order. Indeed much of the written submissions before me were premised upon the assumption that the Applicant was committed for not complying with the Order. This is clearly incorrect and, I see little merit in this argument. It is obvious that no committal proceedings were instituted against the Applicant. The Learned Judge merely indicated that if the Order was not complied with then he may have to - in his words "decide what further action, possibly including committal, if any is warranted". (Emphasis added.)

No doubt the Applicant paid the money into Court because he feared that he might be committed, if he did not, but that does not mean that a committal Order was held over his head to secure such payment. Non-compliance with Court Orders must, in the order of things attract some retribution, committal being one.

In the circumstances the application for leave to appeal is dismissed. Consequently the application for stay is also refused.

The costs of this application shall be costs in the cause.

Dated at Suva this 15th day of May 2000.



.....

Justice Jai Ram Reddy
President, Court of Appeal, Fiji