IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0027 OF 2003S
(High Court Civil Action No. HBC 984 of 1986S)

BETWEEN:

AHILYA SHARMA

First Appellant

DINESH CHANDRA SHARMA

Second Appellant

AND:

MAHENDRA PRATAP SINGH

Respondent

Coram: Ward, President
Penlington, JA
Wood, JA

Hearing: Thursday, 4th November 2004, Suva

Counsel: Mr G. O'Driscoll for the Appellants
Mr V. Maharaj for the Respondent

Date of Judgment: Thursday, 11th November 2004

JUDGMENT OF THE COURT

There are three applications before this Court; (a) an application for an order extending the time for filing an application for leave to appeal to the Supreme Court; and if time is extended; (b) an application for leave to appeal to the Supreme Court against the judgment of this Court delivered on 19th March 2004; and in the event that leave is granted; (c) an application staying execution of the judgment pending the hearing and determination of the appeal in the Supreme Court.

We deal at once with the application for an extension of time because unless the appellant succeeds on this application that is an end to the matter.

This Court delivered its judgment on 19 March 2004. It dismissed the appeal of the appellant. It was a final judgment.

Under Rule 65 (1) of the Court of Appeal Rules an application for leave to appeal to the Supreme Court must be made by way of notice of motion filed in this Court within 28 days of the delivery of judgment against which leave to appeal is to be sought. Thus, in this case, the last day for filing an application for leave to appeal to the Supreme Court was 16 April 2004. The application was not filed until 26 May 2004. It was therefore 40 days out of time.

The relevant principles in relation to an application to extend the time to file an appeal are well settled. Those principles are equally applicable to an application for leave to extend time to file an application for leave to appeal to the Supreme Court.

The power of the Court to extend time is an unfettered discretionary power. An intending appellant is seeking an indulgence because of the effluxion of time. We are assisted by the observations of Richmond J. in *Avery v. No.2 PSA Board* [1973] 2 NZLR 86 (CA) at p.91:

> ***"When once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all the circumstances the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal."***

The discretionary considerations which are normally taken into account in deciding whether to grant an extension of time in a case such as this are; (a) the length of the delay; (b) the reasons for the delay (c) the chances of the application for leave to appeal

succeeding, if time is extended; and (d) the likely prejudice to the parties from the granting or the withholding of leave.

Ultimately this Court has to consider whether it is in the interests of justice, having regard to the whole history of the case, to extend the time for the filing of an application for leave to appeal to the Supreme Court.

Of the relevant discretionary considerations the critical one in this case is the merits of the application. In other words, if time is extended, the question is whether the application for leave to appeal to the Supreme Court has any chance of success.

Here, we remind ourselves of the relevant principles which apply to an application for leave to appeal from this Court to the Supreme Court.

Under s.122(2)(a) of the Constitution an appeal may not be brought from a final judgment of this Court unless it gives leave to appeal "on a question certified by it to be of significant public importance."

This requires the applicant to demonstrate the existence of a question of public importance and that it is a significant one. ***Lal v. The State*** Cr. App AAU0004/2001S, 22 November 2001; ***Air Pacific Limited v. The Fiji Aviation Workers Association and The Arbitration Tribunal*** Civ. App. ABU0033/2001S 19 August 2003. A "question" on appeal within the meaning of s.122(2)(a) must be one that is realistically capable of argument. The applicant for leave must satisfy this Court that he has a tenable argument that the proposed question will be resolved in that party's favour. ***Air Pacific Limited v. The Fiji Aviation Association and the Arbitration Tribunal*** (supra) ***Maika Soqononaivi v. The State*** Cr. App.-AAU0008/1997S 12 February 1999.

In ***Maika*** this Court said :

> *"Generally speaking, it is not enough for an applicant to put forward a challenge to existing law already finally settled by long standing authority..."*

The appellant pleads that:

"the questions involved in the Appeal which are of significant public importance are:

i) whether a contractual term can be construed narrowly thus avoiding the contra preferentum (sic) rule, which is established and binding law;

ii) The question involves a contract and the interpretation of contracts that potentially affect all peoples and companies in Fiji that might contemplate entering in to a contract for service."

We are only concerned with (i) as (ii) is not a question.

In order to examine the proposed question put forward by the appellant against the yard stick of the above tests we must first of all set out the history of the case.

Regretably it has followed a tortuous path over more than 30 years. The origins of the case were a written agreement between Ram Chandra Sharma, now deceased, (Sharma) the father of the appellant and the respondent, who is a registered surveyor. It was dated 23 March 1970. Under that agreement the respondent, having prepared a subdivisional plan of a designated area of land, covenanted to prepare other plans and to obtain the approval of the Subdivision of Land Board to the subdivision. Under the agreement he was also obliged to carry out certain subdivisional and engineering work for Sharma. The latter agreed to transfer to the respondent Lot 10 in the subdivision for the sum of $1,300.

Later in 1970 the respondent paid Sharma $100 by way of deposit on the purchase of Lot 10. This left a balance of $1,200.

The respondent contended that he carried out his obligations under the agreement although not within the contractual time limits. On the other hand, Sharma disputed that contention. Notwithstanding these differences the parties entered into a second written

agreement on 24 August 1971 which they drew up themselves without professional help. Under the second agreement the respondent was obliged to carry out various professional and supervisory services for a total fee to the respondent of $2,500. The second agreement required the payment by Sharma of a deposit of $1,200 and it provided that the respondent could utilize that sum to pay the balance owing on Lot 10. On the day the second agreement was signed Sharma issued the respondent with a receipt for $1,200 this being the balance of the purchase price for Lot 10.

While various works were carried out and completed Lot 10 was not transferred to the respondent. In spite of the non transfer the respondent commenced to occupy the lot and once in possession erected a small building on it.

In the years following the entry into the second agreement the relationship between Sharma and the respondent deteriorated. The former alleged that the latter had not carried out his contractual obligations. The latter denied these allegations. Acrimonious correspondence followed. Solicitors were engaged. By August 1976 there was an impasse between the parties with the respondent caveating the title to Lot 10. Two years later in 1978 the respondent commenced to erect a house on Lot 10.

Another 6 years passed. Then Sharma, on 26 March 1984, gave the respondent one month's notice to vacate Lot 10. The respondent did not comply.

Later in 1984 Sharma issued a writ against the respondent seeking vacant possession of Lot 10. That action was tried and dismissed by Rooney J. in 1986. Sharma then unsuccessfully appealed to this Court. His appeal was dismissed on 4 July 1986.

In the meantime, on 15 October 1984, between the commencement of Sharma's action seeking possession and the dismissal of his appeal, he transferred Lot 10 to his son, the appellant . On the same day he took a mortgage back from the appellant for the full amount of the purchase price, $15,000. Both the transfer and the mortgage were registered.

After the dismissal of the Sharma's appeal the respondent made the next move. On 17 September 1986 he commenced an action against Sharma and the appellant. In that proceeding the respondent sought: (a) an order keeping the caveat on Lot 10 until the hearing and determination of the action; (b) an order that the transfer and mortgage were sham transactions and fraudulent and of no effect; and (c) an order for specific performance.

The respondent's action came on trial before Scott J. He delivered judgment on 17 April 2003. He granted the relief sought by the respondent and ordered the appellant to transfer Lot 10 to the respondent free of encumbrances. By the time of trial Sharma had died and his interests had been carried on by his executrix.

The appellant then appealed to this Court. In a judgment delivered on 19 March 2004 this Court found that the respondent was entitled to specific performance and that both the transfer and the mortgage back were a sham and were within the definition of "fraud" in terms of section 40 of the Land Transfer Act. This Court further held, as the trial Judge had held, that the appellant was not entitled to rely on indefeasibility of title and that the respondent was entitled to the transfer of Lot 10 free of encumbrances.

The proposed appeal to the Supreme Court is from the judgment of this Court as just outlined.

We now ask ourselves what are the chances of the appellant successfully persuading this Court to grant leave to appeal to the Supreme Court, if time is extended, on the proposed question (i).

The appellant's counsel, at the commencement of his oral submissions and in answer to the Court, frankly conceded that, even if the time was extended, he had "nothing to go on" and, in effect, that the proposed application for leave to appeal was hopeless. In our view counsel was correct in making this concession. Indeed we are concerned that the

matter was allowed by counsel, acting responsibly, to get to the stage of a hearing before us. We shall return to that topic later in the judgment. Without any hesitation we find that the proposed question (i) does not raise, on any view, a question of law let alone a question of significant public importance. The matters in issue between the parties were contractual in nature. They were confined to the facts of the case They did not concern any other persons. We cannot help but note that the application of the contra proferentum rule as an aid to the construction of the second agreement was not advanced to or considered by either of the High Court Judge or this Court. In both Courts the outstanding issues were decided in accordance with principles which have been settled by long standing authority.

For these reasons we conclude that the appellant would fail on an application for leave to appeal to the Supreme Court if time was extended. There is no basis at all for such an application. That finding is sufficient to dispose of the application for leave to extend time. However, for completeness we add that the appellant has failed to satisfy us as to the other relevant discretionary considerations.

First as to delay. As we have said earlier the delay amounted to 40 days. In our view this was a significant period of delay given the long history of the case.

Secondly as to the reasons for the delay. In support of his application the appellant filed a short affidavit in which he deposed:

> *"(4) That I am late with my appeal as I had sought legal advice from various solicitors around Suva and Nausori and they had taken some time to get back to me regarding my case.*
>
> *(5) That I have just gathered all information concerning my appeal within the last few days."*

The names of the solicitors consulted and the dates on which they were consulted are not disclosed in the appellant's affidavit and there is no other evidence on these matters. In our view the appellant has given an inadequate explanation for his delay. An

intending appellant to the Supreme Court who is faced with an adverse judgment of this Court must act with promptitude. In the event that an intending appellant cannot obtain definitive advice as to whether to bring an application for leave to appeal within the time prescribed by the rules he must fully explain his delay. It is not sufficient for an intending appellant to describe his actions with the generality adopted by this appellant.

And lastly the question of prejudice. After 30 odd years the respondent is entitled to finality. That was his position when the time for filing an application for leave to appeal to the Supreme Court expired. If an extension of time is granted to the appellant that would occasion further delay for the respondent in achieving finality in a dispute which has spanned three decades. Given our view on the merits there is no prejudice accruing to the appellant in refusing leave.

Accordingly for the reasons given the application for leave to extend the time for the filing of an application for the leave to appeal to the Supreme Court will be dismissed. It is therefore unnecessary for us to consider the other two applications.

We now turn to the question of costs. Not surprisingly Mr Maharaj sought costs on a solicitor and client basis. He informed us from the bar (and without objection by Mr O'Driscoll) that the appellant and Sharma had not met previous orders for costs in this Court and the High Court not only in the subject action but also in other proceedings. Mr O'Driscoll indicated that he was unable to resist Mr Maharaj's application for costs on a solicitor and client basis.

In our view the applications before this Court should not have been brought by the appellant. They were hopeless. As we have said earlier we were surprised that counsel for the appellant took the matter to the point of a hearing in this Court. In our view costs on a solicitor and client basis are plainly justified. The appellant must now realize that this litigation is at an end and that the orders of the Court must be obeyed. In the future if he acts to the contrary he will be doing so at his peril.

Result

The formal orders of the Court are as follows:

(1) The application for an order extending the time for filing an application for leave to appeal to the Supreme Court is dismissed.

(2) The judgment of this Court of 19 March 2004 is affirmed.

(3) The appellant is ordered to pay the costs of the respondent on a solicitor and client basis together with all necessary disbursements. In the absence of agreement those costs are to be taxed by the Registrar.

Ward, President

FIJI COURT OF APPEAL

Penlington, JA

Wood, JA

Solicitors:

Messrs. O'Driscoll & Shivam, Suva for the Appellants
Messrs. Sherani and Company, Suva for the Respondent

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