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

CIVIL APPEAL NO. ABU0081 OF2006S
(High Court Civil Action No. HBC 394 of 1999)

BETWEEN: WOODSTOCK HOMES (FIJI) LIMITED

Appellant

AND: SASHI KANT RAJESH

Respondent

Coram: Byrne, JA
Hickie, JA
Powell, JA

Hearing: Tuesday, 15 April 2008, Suva

Counsel: S Maharaj for the Appellant
R P Chaudhary for the Respondent

Date of Judgment: Friday, 18 April 2008, Suva

JUDGMENT OF THE COURT

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[1] The appellant appeals from a decision of Finnigan J of 31 March 2006 in the High Court at Lautoka. Before addressing that decision it is useful to set out a summary of proceedings prior to that decision.

November 1999 – The Default Proceedings

[2] In 1997 the respondent was an employee of the appellant.

[3] By Writ of Summons and Statement of Claim issued in the Lautoka Registry of the High Court on 22 October 1999 the respondent claimed that during the course of his employment he was injured while operating a radial saw. The respondent claimed damages against the appellant as his employer and against two other defendants, the owner of the resort where the carpentry work was taking place and the Japanese corporation that manufactured the radial saw.

[4] The appellant did not file a Statement of Defence within 14 days and on 18 November 1999 the respondent obtained default judgment with an order that damages and costs be assessed before a single Judge ("the Default Proceedings")

October 2000 – The Utopia Proceedings

[5] On 6 October 2000, following a hearing in the High Court at Lautoka on 10, 11 March 1999 and 25 & 26 September 2000 , Madraiwiwi J gave judgment for the appellant against Utopia Foods Ltd ("Utopia") for breach contract. Judgment was for the sum of $61,695 with interest at 13.5% from date of breach (June 1996) to date of judgment.

[6] These proceedings ("the Utopia Proceedings") were unrelated to the 1999 claim by the respondent against the appellant.

[7] Utopia appealed to the Court of Appeal from this judgment.

January 2001 – The Exparte Proceedings

[8] On 19 January 2001, following an ex-parte hearing on 18 January 2001, and upon reading an affidavit of the respondent sworn 16 January 2001 and an Ex-parte Summons dated 17 January 2001, Gates J in the High Court at Lautoka ordered that

(1) no moneys be paid by Utopia to the appellant until the respondent's damages against the appellant had been assessed and

(2) that if the Court of Appeal upholds the judgment of Madraiwiwi J, then Utopia is to first pay to the respondent the amount of damages and compensation assessed in the respondent's favour by the High Court.

[9] Gates J ordered that copies of the Ex-parte Summons, affidavit and Order be served on the appellant at its registered address, on any one director of the appellant, on the appellant's solicitors and on Utopia.

[10] It is convenient to refer to these proceedings as "the Ex-parte Proceedings".

The Decision of Finnigan J of 31 March 2006 – the Subject of this Appeal

[11] The appellant claims that it first became aware of the Default Proceedings and the Ex-parte Proceedings when a copy of the Orders made in the Ex-Parte Proceedings was served on its then solicitors Suresh Maharaj & Associates.

[12] It is not clear exactly when that was but obviously before 1 March 2001 because on that day the appellant filed a Notice of Motion in the High Court at Lautoka seeking to set aside the Default Judgment and for leave to file a Defence.

[13] Five years passed before this simple interlocutory matter was heard by the High Court in Lautoka.

[14] Following a hearing on 28 March 2006 before Finnigan J, on 31 March 2006 the learned judge delivered an "Interlocutory Ruling".

[15] Finnigan J noted that the application to set aside the Default Judgment was filed 15

months after judgment. He noted that the application had two grounds, namely that the appellant by its director claimed it had not been properly served with the Writ and Statement of Claim and that a meritorious defence had been disclosed.

[16] The learned judge held that on the first ground the appellant *"must fail."* He said that he was satisfied that the appellant *"was amply served with notice of the substantive proceedings in plenty of time to take steps before the default judgment was entered against it."*

[17] Finnigan J dismissed the application with costs.

Leave to Appeal Granted 1 August 2006

[18] The Notice of Appeal in these proceedings was filed on 9 August 2006 following leave given by Scott JA on 1 August 2006.

[19] Leave to appeal was sought on the basis that the decision of Finnigan J was an interlocutory one. Scott JA discusses in his judgment of 1 August 2006 whether or not the decision of Finnigan J, although expressed to be interlocutory, was truly so, given that the effect of the decision was to finally determine the proceedings between the parties. Scott JA noted that the Court of Appeal had been taking two different approaches to the question, *"the application approach"* and *"the order approach"*, and that the co-existence of the approaches was causing some difficulty. Scott JA expressed the hope that a future Court of Appeal would determine the issue.

Notice of Appeal Filed 9 August 2006

[20] The Appellant has four grounds of appeal, namely that Finnigan J erred in law and in fact in:

- First not considering the proposed Defence on its merits;
- Second in failing to set aside the default judgment when the evidence showed that the appellant had a good Defence on the merits;
- Third in putting too much emphasis on the service of the Writ of Summons on the defendant when the evidence regarding service was equivocal or unsatisfactory.
- The Fourth ground is that the failure to set aside the default judgment is against the interests of justice and is depriving the appellant of its right to be heard and is contrary to section 29(2) of the Constitution.

Ground 1 - Not considering the proposed Defence on its merits

[21] Order 19 Rule 9 of the High Court Rules provides that *"The Court may on such terms as it thinks fit just, set aside or vary any judgment entered in pursuance of this order"*.

[22] The discretion is in its terms unconditional: see ***Evans v Bartlam*** (1937) 2 All ER 646 at 650.

[23] An appellate court ought not interfere with the exercise of a discretionary order by a trial judge unless it appears that some error has been made in exercising the discretion and that a substantial wrong has occurred: ***House v The King*** [1936] 55 CLR 499.

[24] Finnigan J at paragraph 3 of his ruling expressed "pleasure" that the appellant sought to establish its proposed Defence, not merely by tendering a proposed Statement of Defence, but by proving by affidavit the facts on which it would rely for its Defence. He does not appear, however, to consider the merits of the proposed Defence but says that *"it is on the first ground that (the appellant) must fail"*.

[25] As noted in paragraph 16 above, Finnigan J went on to find that the appellant had been served with the notice of the substantive proceedings in October or early November 1999. In view of the serious delay in making the application to set the default judgment aside, the judge decided that the application should be refused whatever view he took of the merits of the proposed defence.

[26] The appellant had argued before Finnigan J, citing various authority including ***Evans v Bartlam*** (supra) that a defendant with an apparently good defence should be permitted to defend proceedings whatever amount of time had elapsed. Finnigan J did not find the argument or authority *"persuasive here"*.

[27] The appellant says that the learned judge was required to consider the merits of the defence in exercising his discretion and cites **Halsbury's Laws of England** (4th Edition, Vol 1) para 415 which provides that in relation to setting aside default judgments in an admiralty action a judgment *"may, in the discretion of the court, be set aside upon application made without undue delay by the defendant, who will normally be required to show either that he has a good defence on the merits, or that the judgment was irregular."*

[28] The appellant also relies on ***Patterson v Wellington Free Kindergarten*** (1966) NZLR 975 at 983 where the New Zealand Court of Appeal set aside a 10 year old default judgment and said:

> *"But, whilst it appears from these cases that delay, if reasonably explained and if it does not create irreparable injury, is not of itself good reason for refusing to set aside ..(the judgment)."*

[29] The appellant also cites ***Shocked v Goldschmidt*** (1998) 1 All ER 372 at 379ff where Legatt LJ said:

> *"These cases relating to default judgment are authority for the proposition that when considering whether to set aside a default judgment, the question*

of whether there is a defence on the merits is the dominant feature to be weighed against the applicant's explanation both for the default and any delays, as well as against prejudice to the other party."

[30] What is said in Halsbury and the New Zealand case are both predicated on the application to set aside not being unduly delayed or, if delayed, the delay being reasonably explained.

[31] Whether or not there is a defence on the merits may be, as ***Shocked v Goldschmidt*** (supra) contends, the *dominant* feature to be considered but that does not mean that it cannot be swamped by other features such as unexplained delay in bringing the application to set aside the judgment.

[32] *"As a general rule .... the court requires an affidavit showing prima facie that the defendant has a good defence on the merits and also an explanation of his absence which shows that justice requires that in the circumstances it should be excused"*: Jordan CJ cited with approval by Herron CJ in ***Exparte Vigilant Finance Re Cameron*** (1964) NSWR 1282 at 1285.

[33] Finnigan J did consider the merits of the proposed defence, but, as noted above he took the view that he did not need to express a view as to those merits because of the unexplained delays. However assuming that his view was that the proposed defence had merit, in this Court's opinion he was entitled to refuse the application because of the unexplained delay.

[34] It is in this Court's view strictly unnecessary for it to review the merits of the proposed defence but the Court will consider them under Ground 2.

[35] Ground 1 of the appeal fails.

Ground 2 - Failing to set aside the default judgment when the evidence showed that the appellant had a good Defence on the merits

[36] The appellant, in arguing that it had a good defence on the merits, relied on two affidavits filed by Allen Harris sworn 28 February 2001 and 7 March 2001 respectively.

[37] The affidavit of 28 February 2001 claims at paragraph 9:

> *"(i) That the Plaintiff was only employed by it as a Casual Labourer and was paid weekly wages of about $75.00.*
>
> *(ii) 'That at the time of the said accident, the Plaintiff was on his Lunch break. He was not allowed by the Defendant to work during the Lunch break period.*
>
> *(iii) That the Plaintiff was not authorised/allowed/permitted by the 1st Defendant Company to use tools/machines etc belonging to any other person/Company or those belonging to the 2nd Defendant.*
>
> *(iv) That the Radial Arm Saw by which the Plaintiff allegedly injured his armed belonging [sic] to the second Defendant Company.*
>
> *(v) That the Plaintiff was using the said Saw to make a roller pin for himself."*

[38] The Affidavit of Allen Harris of 7 March 2001 claims in part at paragraph 4:

> *"(i) That the 1st Defendant Company at the time of the alleged accident had a insurance policy for workmen's Compensation.*
>
> *(ii) That I further say that the 1st Defendant had made no claim under the policy for the alleged accident because the Plaintiff was not injured during his working hours but he was injured during his lunch break and doing work for himself.*
>
> *(iii) That the insurance company would not have paid any compensation to the Plaintiff then because the alleged accident was not within the terms of the policy".*

[39] The Court drew the attention of the appellant's counsel to these paragraphs and a *"Notice by employer of accident causing injury/death to a workman or death of a workman from any cause whatsoever"* signed by "A.J. HARRIS" on *"15/12/97"* some six months after the respondent was injured on 6 August 1997 (see annexure "I" to the affidavit of 7 March 2001) .

[40] Some inconsistencies between the affidavits and the earlier Notice include:

(a) Section "1. Employer", *"(iv) Name and address of Insurance Company, if insured against accident to workmen."*

This section of the form had not been completed and indeed was left blank. No details were placed before Finnigan J in either of the affidavits of Allen Harris on this issue.

(b) Section *"2. Workman", "(iv) Occupation"*

The form had been completed: *"Carpenter"*.

(c) Section *"3. Accident", "(i) Date and hour"*.

The form had been completed: *"2pm. 6/8/9"*.

(d) Section "3. Accident", *"(iii) Description of accident/death including a clear statement what the workman was doing at the time of the accident/death"*.

The form had been completed: *"severe laceration of left arm when operating electrically driven bench saw"*.

(e) *"Gross Weekly Earnings at the date of the accident"*, *"Gross cash wage"* and *"Total gross earnings per week"*.

The form had been completed: *"$99.00"*.

[41] Further, the affidavit of 28 February 2001 claims at paragraph 11: *"That the Labour Department after carrying out its investigation with the 1st Defendant Company had advised that it was not responsible for the injury sustained by the Plaintiff"*.

[42] When pressed by this Court as to the whereabouts of such advice, the appellant's counsel said that he had been instructed that it was a verbal advice only. However, no details as to the date, time or name of the officer from the Department was ever supplied in either affidavit as might have been expected.

[43] Some of the inconsistencies highlighted above also appear in the *'Proposed Statement of Defence of the First Defendant'*.

[44] Taking into account the above matters, this Court is of the view that the affidavits upon which the appellant sought to rely upon for its defence, did not disclose a good defence on the merits.

[45] Ground 2 of the Appeal fails.

Ground 3 - Putting too much emphasis on the service of the Writ of Summons on the defendant when the evidence regarding service was unequivocal or unsatisfactory

[46] The trial judge's finding that the appellant *"was amply served with notice of the substantive proceedings in plenty of time to take steps before the default judgment was entered against it"* is a finding of fact and unreviewable by an appellate court.

[47] Ground 3 of the appeal fails.

Ground 4 – Section 29(2) of the Constitution

[48] Section 29(2) of the Constitution provides that *"Every party to a civil dispute has the right to have the matter determined by a court of law or, if appropriate, by an independent and impartial tribunal."*

[49] Section 29(2) of the Constitution has not been breached because the appellant has had its civil dispute determined by a court of law, albeit in the absence of the appellant. The section does not prevent the legislature or the Courts making laws or rules allowing default judgment where a party to a civil dispute fails to file a Defence within time.

[50] More to the point is 29(3) of the Constitution namely that *"Every person charged with an offence and every party to a civil dispute has the right to have the case determined within a reasonable time."*

[51] It would seem indisputable that the failure by the Court to hear the appellant's Notice of Motion for 5 years amounts to a breach of the appellant's constitutional right.

[52] What does emerge from this case and other cases before the Court of Appeal is that for a number of years, until at least 2006, the High Court in Lautoka was not provided with an adequate number of judges, and that such judicial resources as were provided were but a fraction of the resources that the High Court in Suva enjoyed. It is difficult to escape the conclusion that responsibility for this lies either at the feet of the relevant chief justices during this period or attorneys-general or the legislatures of the time.

[53] It is, unfortunately, a breach for which there is no remedy now and no relief is sought for such breach in these proceedings. Whether it would have been appropriate for the appellant to have taken proceedings against the Attorney-General at the relevant time is not something this Court can address in these proceedings.

[54] Ground 4 of the appeal fails.

When is a Judgment Interlocutory ?

[55] This issue, raised by Scott JA and reference to in paragraph 19 above, was not fully argued in the appeal and therefore it is not appropriate to determine the issue in these proceedings. However some useful observations can be made.

[56] All judgments are either final or interlocutory though it is sometimes difficult to define the borderline with precision. When there is a matter of doubt leave should be sought. Generally the distinction is that a final judgment finally disposes of the proceedings or finally determines the rights of the parties.

[57] In England the test whether an order is interlocutory or final depends on the nature of the application (***White v Brunton*** (1984) QB 570).

[58] In ***Suresh Charan v Shah*** (1995) 41 FLR 65 the Fiji Court of Appeal held that for the orderly development of the law in Fiji it was generally helpful to follow the decisions of the English courts unless there were strong reasons for not doing so and accordingly adopted the *"application approach"*.

[59] However ***in Jetpatcher Works (Fiji) Ltd v The Permanent Secretary for Works & Energy & Ors*** [2004] Vol 1 Fiji CA 213, a differently constituted Court of Appeal declined to follow ***Suresh Charan***, (supra) holding that the *"order approach"* should be followed.

[60] Different results will follow. If the ***Suresh Charan v Shah*** (supra) and the *"application approach"* is followed then an order refusing leave to apply for judicial review is an interlocutory matter. If ***Jetpacker Works (Fiji)*** (supra) and the *"order approach"* is followed then whether such an order is interlocutory would depend on analysing the circumstances of the case.

[61] Although, as stated above, these are not suitable proceedings to resolve the difference of approach, the prudent course for practitioners is to assume that where proceedings are commenced in the High Court in the Court's original jurisdiction and the matter proceeds to hearing and judgment and the judge proceeds to make final orders or declarations, the judgment and orders are not interlocutory.

[62] Every other application to the High Court should be considered interlocutory and a litigant dissatisfied with the ruling or order or declaration of the Court needs leave to appeal that ruling, order or declaration.

[63] The following are examples of interlocutory rulings:

- the refusal of an application to set aside a default judgment ***Atwood v Chichester*** (1878) 3 QBD 722; ***Carr v Finance Co of Australia Ltd*** (1981) 34 ALR 449;
- an order staying proceedings: ***Hall v Nominal Defendant*** (1966) 117 CLR 423 at 444;
- an order striking out a pleading: ***Hall v Nominal Defendant*** (supra);
- an order refusing an extension of time in which to commence proceedings: ***Hall v Nominal Defendant*** (supra);
- an order refusing leave to appeal:
- an order dismissing proceedings for want of prosecution: ***Shore Buses v Minister for Labour*** FCA ABU0055 of 1995.

[64] If leave has not been sought then an appeal should not be permitted to be filed. At that point the would-be appellant can apply to the Court of Appeal for leave to seek leave to appeal out of time.

[65] However as held by this Court in ***Vimal Constructions & Prakash v Vinod Patel & Co Ltd*** [2008] ABU0093 of 2006S, litigants should assume that leave to bring or maintain appeals or other applications where those appeals or applications are out of time will not be given unless there are clear or cogent reasons for the delay. "Merit" of an appeal or proceeding, without more, will rarely justify an extension of time except where the delay is minimal and no prejudice was occasioned by the delay.

Orders of the Court

[65] The Court orders:

[66] The appeal is dismissed.

[55] The appellant is to pay the respondent's costs of the appeal as agreed or taxed.

Byrne, JA

Hickie, JA

Powell, JA

Solicitors:

Suresh, Maharaj and Associates, Lautoka for the Appellant
Chaudhary and Associates, Lautoka for the Respondent

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