

20/3/98

SC 537

PAPUA NEW GUINEA
[In the Supreme Court of Justice]

SCA NO 77 of 1996

BETWEEN:

Joe Chan & PNG Arts
- Appellants -

AND:

Matthias Yambunpe
- Respondent -

Waigani: Kapi DCJ, Los & Jalina, JJ
1997: 13 June
16 December

APPEAL---Appeal from District Court to the National Court---the National Court has jurisdiction to dismiss appeal for want of prosecution---Principles which govern the exercise of discretion set out under O 7 r 53 of the Supreme Court Rules are applicable to appeals from District Court to the National Court-----Reasonable explanation given for non appearance of counsel at the trial.

J Aisa for Appellants

D Koiget for Respondent

16 December 1997

BY THE COURT: This appeal is from the decision of the National Court on the 25th of October where Justice Woods had dismissed an appeal from the District Court for want of prosecution. The substance of the proceedings before the District Court emanated from the complaint by the Respondent on a breach of an agreement. The Respondent complained that he had sent some 89 clay pots from Wewak to Port Moresby to the Appellants but they had failed to pay for them. On the other hand the appellants in their cross-claim said of the 89 claypots 22 had been broken during shipment and so the Respondent was not entitled to claim the costs of all of them. They also claimed from the Respondent the freight costs.

The claim was dismissed by the District Court for want of prosecution. Subsequently the Respondent reinstated the claim and the judgment was entered for the Respondent. The Appellants had then lodged an appeal against that decision to the National Court but that appeal was dismissed for want of prosecution and hence this appeal to the Supreme Court.

The decision of the National Court was very brief:

"This motion was set down for hearing on 23rd October but was adjourned till to day. The substantive appeal is from an order of the District Court over two years old. The appeal itself was filed in October 1995." There has clearly been undue delay in the prosecution of the Appeal. The Court is not here to be clogged up with files which lie around awaiting the pleasure of the applicants. The Court is entitled to take control. If an applicant before the court does not bother we will."

The Appellants have listed four grounds of appeal. They are-

- (1) That His Honour erred in law and in fact in proceeding with the Application of the Respondent by dismissing the Appellants Appeal 224/95 in the National Court in the absence of the Appellants counsel, who was committed in a substantive trial before another National Court Judge on that day;
- (2) That His Honour erred in law and fact that by dismissing the Appellants Appeal in the absence of the Appellants counsel was irregular;
- (3) That His Honour erred in law and in fact that His Honour failed to consider the merits of the case and the merits of the proceedings in the District Court before dismissing the Appeal;
- (4) That in the circumstances the Appellants were denied the rights to be represented by their counsel and the rights to be heard before dismissing the Appeal for want of prosecution.

In the grounds 1, 2 & 3 the appellants emphasise absence of their lawyer as the most important argument. Indeed we consider it as the central issue but we do not consider it important in the way the appellants raised it. Any court is entitled to dismiss an appeal in the absence of a lawyer if the absence forms a part of or aggravates want of prosecution with due diligence. The jurisdiction and authority to hear and determine appeals from the District Court is given to the National Court under Part X1 of the *District Court Act*. But this part does not include any specific provision relating to dismissal for want of prosecution such as is given in Order 7 Rule 53 of the Supreme Court Rules relating to dismissal of an appeal from the National Court for want of prosecution. In our view however, the principles discussed by the Supreme Court in applying Order 7 Rule 53 are just as relevant and authoritative in their application to an appeal from the District Court. Matters relevant to want of prosecution have been held

by Courts to include failure to attend on settlement of the appeal book, failure to explain non attendance, failure to respond to correspondence and failure to provide any explanation for dilatory conduct where an explanation could properly be expected. See for example *General Accident Fire & Life Assurance Corporation Ltd-v-Ilimo Farm Products Pty Ltd* [1990] PNGLR 331.

The motion judge relied on delay in the prosecution of the appeal as a factor. He had also relied on absence of the counsel. He also mentioned the age of the order of the District Court which was appealed from but we will address that under a different heading.

General Accident Fire & Life Assurance Corp.Ltd v. Ilimo Farm Products Pty Ltd suggests that the Courts discretionary power be exercised in favour of dismissing an appeal for want of prosecution if there has been (1) intentional or malicious or (2) inordinate and inexcusable delay and (3) if such delay may give rise to a substantial risk that it may not be possible to have a fair hearing. In our view the third consideration was not relevant for the National Court to rely upon because it would only apply to where evidence may be needed to call at a hearing. Except where fresh evidence may be called, it is not normal to call evidence on an appeal. In the proceedings before Justice Woods, all the matters were documented.

When the motion to dismiss the appeal came before the National Court, it was 12 months since lodging the appeal. Whether that alone constituted undue delay in the prosecution of the appeal we cannot ascertain. But one thing clearly needed was for counsel to explain why the motion to strike out the appeal for want of prosecution could not be heard. Mr Aisa had a time conflict. He was caught between two cases. He did have an explanation. And he gave it through the Respondent's lawyer. It was not his fault that the two matters were set at the same time. He was to appear before Salika, J on the same day on a more substantive hearing. The date for motion was set by the Respondent's lawyer.

Mr Aisa could not be at the two places at the same time. Indeed he protested and asked his professional colleague to see his dilemma. So on the material before us, it was not true that the appellants or their lawyer did not bother as the judge had criticized. In the circumstances the trial judge should have listed the matter on a different date.

The merit of the Appeal

In view of our conclusion, it is not necessary to consider the grounds on the merit of the appeal. We would uphold the appeal and quash the dismissal order. We order that the appeal be relisted for hearing immediately. We award the costs of the appeal to the appellants.

Lawyer for the Appellants

*JFAisa & Associates
Lawyers*

Lawyer for the Respondent

The Public Solicitor