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

CIVIL APPEAL NO. ABU0039 OF 2007S
(High Court Civil Action No. HBC0115 of 2001)

BETWEEN:

DEO RAJ

Appellant

AND:

SHELL FIJI LIMITED

Respondent

Coram:

Byrne, JA
Hickie, JA

Hearing:

Friday, 18 April 2008, Suva
Tuesday, 6 May 2008, Suva

Counsel:

I. Samad for the Appellant
P. Salele for the Respondent

Date of Judgment: Friday, 9 May 2008, Suva

JUDGMENT OF THE COURT

- [1] The appellant appeals from a decision of Jitoko J of 26 July 2002 in the High Court at Suva wherein His Lordship dismissed a Winding-Up Petition by the Appellant against the Respondent company.
- [2] The dispute concerned an alleged sum owed to the Appellant by the Respondent company for cartage fees, refunds of deposits on 240 empty oil drums, plus interest.

The Hearing before the High Court in 2002

- [3] Apart from an argument as to whether or not all of the Petitioner's claims had been settled in December 1996 (as well as a claim of \$4600 which was resolved in the Small Claims Tribunal), the crux of the dispute was, as His Lordship succinctly noted at page 4 of his judgment:

*"But even if there exists any debts, the learned Counsel for the Company argued that **the claim is statute-barred under the Limitation Act Cap.35 ... This Petition was filed in December 2001 more than 6 years after the cause of action accrued.** Unfortunately the argument that the Petitioner's Claim is statute-barred was not raised by the Company in its Affidavit or anytime prior to the hearing of the Petition ... As it happens, the Petitioner, while acknowledging that the claim is over 6 years old nevertheless asserts that the limitation period is not applicable to his case ...[as] the Company had been leading him on ... [in] the belief that the Claim was eventually going to be settled ... that prevented him from seeking Court redress sooner."*

- [4] In reaching a decision, His Lordship noted at page 5 of his judgment:

*"The Basic consideration in the Court's determination to grant or refuse an application for a Winding Up Order is **whether there is a substantial dispute as to whether or not a debt is actually owed.**"*

- [5] In this regard, His Lordship also noted at page 5 of his judgment that "the law on this was comprehensively examined by Pathik J **In the Matter of All Safe Safety and Protection Proprietary Limited** (Winding Up Cause No.43 of 2001 Unreported)" who said:

*"To fall within the general principle **the dispute must be bona fide in both a substantive and objective sense.** Thus the reason for not paying the debt must be honestly believed to exist and must be based on substantial and reasonable grounds. 'Substantial' means having substance and not frivolous, which disputes the Court should ignore. There must be so much doubt and question about the liability to pay the debt that the Court sees there is a question to be decided."*

- [6] His Lordship further noted at page 6 of his judgment that the Company had argued:
- (a) That it "has totally denied the existence of any debts owed by the Company to the Petitioner ... which are detailed in the Petitioner's claim";
 - (b) That "the grounds under which the Petition is filed and relied upon, namely that

the Company is unable to pay its debt (s.220 of the Act) is misconceived."

[7] In response, His Lordship also noted at page 6 of his judgment:

(a) That the argument of the Respondent company as to ability to pay was in fact misconceived and that "the definition of what constitutes inability to pay debts ... does not necessarily mean that it can be negated by proving one's ability to pay, but also failure to do so through omission or neglect";

(b) That **"the argument on the application of [the] Limitation Act ... [whilst] unfortunate that the issue was raised very late in these proceedings" was the argument which allowed the Respondent company to succeed** in having the Court dismiss the Winding-Up Petition.

[8] The problem was neatly summarised by His lordship at pages 6-7 of his judgment:

*"... the Petitioner conceded that he was conscious of the fact that his claim falls outside the 6 year limitation period allowed under the Act. But, he argued, that the Company had waived the application of the Act by its continuing negotiation with him ... But to succeed in this argument that Petitioner has to satisfy that exceptions to the limitation period ... [apply]. Unfortunately the Petitioner does not fall into one of the exceptions recognised in law. **The sad fact of the matter is** ... in the absence of any written acknowledgement by the Company of the existence of the debt and even part-payment of the same, **the action is statute—barred.**"*

[9] Thus, the hurdles facing the Appellant are:

(a) The cause of action is statute-barred; and

(b) His Notice of Appeal should have been lodged within six weeks of the judgment which was signed and delivered by His Lordship on 26 July 2002.

[10] The Appellant's argument in response is:

(a) That if he is allowed his appeal, then he will no longer be statute-barred; and

(b) That an Order was taken out by the Appellant and signed by the Court (through the Deputy Registrar) on 18 May 2007 and thus he had six weeks to appeal from that date. As the Notice of Appeal was lodged on 8 June 2007, he argues that was within time.

- [11] A close reading of the Court of Appeal Rules “puts paid” to the Appellant’s argument. Rule 16 states:

“Time for appealing

16. Subject to the provisions of this rule, every notice of appeal shall be filed and served under paragraph (4) of rule 15 within the following period (calculated from the date on which the judgment or order of the Court below was signed, entered or otherwise perfected), that it to say-
(a) in the case of an appeal from an interlocutory order, 21 days;
(b) in any other case, 6 weeks.”

- [12] The judgment of His Lordship was clearly signed on 26 July 2002. Thus, six weeks ran from that date. The Appellant’s Notice of Appeal was lodged on 8 June 2007, just under five years later.

- [13] When the matter first came before the Court of Appeal on 18 April 2008, it had to be adjourned so as to allow:

- (a) Counsel for the Appellant to include in the Court Record an Affidavit of Mr Steven Haines, Finance Manager for the Respondent, sworn on 6 March 2002;
- (b) Counsel for the Respondent to comply with the Court’s request to submit amended submissions as the initial submissions were, in the Court’s view, unsatisfactory.

- [14] When the matter came again before this Court on 6 May 2008, the hearing began by Counsel for the Respondent:

- (a) apologising to the Court as to the unsatisfactory state of her previous submissions; and
- (b) advising that they had refused to accept service from the Appellant of the “Court of Appeal Supplementary Record” as it contained not just the Affidavit of Mr Steven Haines as requested by the Court but other documentation (which had been placed behind Mr Haines’ Affidavit and was not part of the record of the lower court).

- [15] In response, Counsel for the Appellant explained to the Court that since the parties’ initial appearance before this Court on 18 April 2008, the Respondent had filed (as

requested by the Court) amended submissions. Thus, Counsel for the Appellant decided to respond to those submissions, in part, by including supplementary documentation in support of his client's case in the "Court of Appeal Supplementary Record". Counsel for the Appellant advised that he had done this by placing such documentation behind the Affidavit of Mr Haines, even though it was not part of the record from the lower Court.

- [16] Misguided (and however innocent) the actions of Counsel for the Appellant may have been in submitting such documentation in this very irregular manner, this Court condemns in the strongest possible terms such behaviour. Counsel for the Appellant is put on notice that such behaviour will not be tolerated and (were it not that we have accepted Counsel's explanation that this was an innocent error by him), we would have no hesitation in referring such behaviour to the Law Society for disciplinary action. Enough said.
- [17] Turning briefly to the Appellant's argument, Counsel for him was asked by the Court to address us in his oral submissions on two grounds:
- (a) the reasons for the delay in filing the appeal; and
 - (b) the basis upon which he can say that he has a meritorious appeal when he is clearly statute-barred.
- [18] The Appellant submitted through his Counsel:
- (a) That as he was in custody on unrelated matters post-July 2002, he could not pursue the appeal at that time; and
 - (b) That upon his release in 2004, it had taken him some three years to find a lawyer who was prepared to act for him and, indeed, his present lawyer only took instructions in September 2007, after he had filed his appeal in July 2007.
- [19] It is the Court's view that the time-limits set out in Rule 16 are clear. Judgment was delivered on 26 July 2002. Nothing was filed within the six weeks time period required by Rule 16(b). In fact, no appeal was filed until 1 July 2007, just under five

years later. Clearly, the Appellant needs leave to appeal. In view of the serious delay in filing such appeal, it should be refused. In short, the Court expects time limits to be observed: see Rupeni Silimuana Momoivalu v Telecom Fiji Limited (unreported, Court of Appeal, ABU0037 of 2006, 7 September 2007, Byrne, Pathik and Mataitoga JJA).

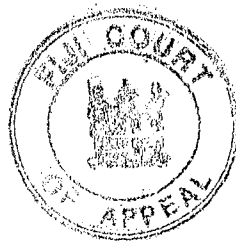
[18] In relation to the merits, when His Lordship heard this matter in July 2002, he was of the view that the claim was statute-barred. This Court not only agrees with that decision, but, as an appellate court, it ought not interfere with the exercise of a discretionary order by a trial judge unless 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. In this case, we fully endorse the actions and reasoning of His Lordship as set out in his judgment of 26 July 2002.

[19] In relation to the question of costs, it is noted that Counsel who respectively appeared before us were severely castigated concerning the poor standard of their submissions. We do not wish to embarrass them further. In the circumstances, however, we believe that each party should be responsible for their respective costs.

Orders of the Court

[65] The Court orders:

1. The appeal is dismissed.
2. Each party is responsible for their own costs of the appeal.



A handwritten signature in black ink, appearing to read "John Byrne", written over a horizontal line.

Byrne, JA

A handwritten signature in black ink, appearing to read "John Hickie", written over a horizontal line.

Hickie, JA

Solicitors:

Samad Law, Suva, for the Appellant
Q.B.Bale & Associates, Suva, for the Respondent