

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

MISCELLANEOUS APPEAL NO. 16 OF  
2006  
(High Court HBJ No. 15 of 2004L)

**BETWEEN:**            **GENERAL MACHINERY HIRE LIMITED**

*Applicant*

**A N D**        :        **PERMANENT SECRETARY FOR LABOUR, INDUSTRIAL  
RELATIONS AND PRODUCTIVITY**

*1<sup>st</sup> Respondent*

**A N D**        :        **FIJI SUGAR AND GENERAL WORKERS UNION**

*2<sup>nd</sup> Respondent*

**Hearing:**            1<sup>st</sup> and 3<sup>rd</sup> November 2006

**Counsel:**            M Prakash for the applicant  
A Pratap for first respondent  
A Neeta for second respondent

**Date of Judgment:** 7 November 2006

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**R U L I N G**

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[1] This is an application for leave to appeal out of time.

[2] On 5 July 2004, the second respondent made a Compulsory Recognition Order under the Trade Unions (Recognition) Act in respect of the first respondent. The applicant sought judicial review on two grounds; namely, that the second respondent failed to comply with the provisions of the Act before making the Order and that he took irrelevant matters into consideration. In December 2004, Singh J dismissed the application with costs. His judgment was perfected on 3

May 2005 and on 10 May 2005 the appellant filed notice and grounds of appeal and an application for a stay of execution pending appeal.

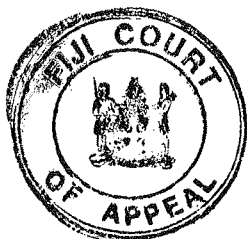
- [3] For a reason which is not apparent on the papers before me, the judgment of Singh J was subsequently pronounced by Connor J in the High Court on 9 June 2005. Application for a stay was filed on 19 July 2005 and an interim stay granted until 18 September 2005.
- [4] The judgment pronounced by Connor J was not sealed until 27 March 2006 and, on the same day, an appeal and application for a stay were filed in the High Court. That appeal was numbered in this Court ABU 34/06 and the interim stay was refused on 28 April 2006. On 3 May 2006 the appeal was deemed abandoned although an attempt to file a further application in this Court for a stay was made on 23 May 2006.
- [5] On 8 June 2006 an appeal was again filed with a further application for a stay and numbered ABU 55/06. The stay was refused on 23 June 2006. In the meantime, motion to fix security for costs had been filed on 14 June 2006. It was heard on 29 June 2006 and fixed at \$750 to be paid in 28 days. Security was not lodged and the appeal was deemed to be abandoned on 27 July 2006.
- [6] The present application for leave to appeal out of time was filed with this Court on 20 October 2006. The affidavit in support by a director of the appellants gives the history of events immediately prior to that application. It appears the applicant wrote to its, then solicitors, Pillai Naidu and Associates on 13 July 2006 enquiring about the progress of the case and asking them to send a number of documents. There was no reply and so, on 31 July 2006, the applicant wrote directing them to pass all the papers to Mishra Prakash, the present solicitors. Notice of change of solicitors was filed with the Court on 22 August 2006.
- [7] On 13 September 2006, the present solicitors wrote to the court registry requesting an extension of time to pay the security for costs and, by letter of 27 September 2006, were advised the appeal had been deemed abandoned for non-compliance with the Rules. The letter concluded, "However, if you wish to proceed with this appeal, you will have to seek leave to appeal out of time." Just over three weeks later, they did so.
- [8] The application is opposed by the respondents. They point out that this is an application to appeal a decision of the High Court made in December 2004. The length of delay is unconscionable and the reasons are inadequate. They rely on the repeated statements by this Court and those of other jurisdictions that the rules are there to be obeyed; *Kenneth Hart v Air Pacific Ltd*, Civ App 23/83, and all such cases require a satisfactory explanation for the delay before leave will be granted; *Tevita Fa v Tradewinds Marine*, Civ App ABU 40/94.
- [9] It has been stated many times that in such cases the court will consider the length of the delay, the reasons for the delay, the chances of success in the appeal and any prejudice the respondent will suffer if leave is granted.

- [10] In the present case the first two aspects are overwhelmingly against a grant of leave. The overall delay is considerable. Twice an appeal was allowed to be deemed abandoned through failure to follow the necessary steps. Even after the second appeal was abandoned, the appellant has shown little sense of urgency. The Rules allow 42 days to file a fresh notice of appeal. Plainly the new solicitors needed time to assess the position of the appeal but they must have realised immediately that previous appeals had been deemed abandoned. At the time they filed notice of change of solicitors, they were still within the period allowed. They should know the Rules. If it was not immediately apparent on the papers they had, it would have taken a moment's enquiry of the registry to ascertain that they were within, but close to the end of, the 42 days time limit. Instead they sought an extension of time to pay security which they should have realised was already so delayed that the appeal in which it was ordered must have been deemed abandoned. This was not a case where they had to start from the beginning and ascertain if there were grounds for appeal. The notice and grounds had been filed twice previously and needed only to be copied and filed again immediately to preserve the position. Instead they failed to do anything until the time had expired and now have to make this application.
- [11] The reasons they give relate to the repeated failures of their first solicitors and then, it must be said, the subsequent failure of the present solicitors to act with sufficient expedition after taking over the case. Whilst this Court has been reluctant to take the strict approach seen in other jurisdictions since *Birkett v James* [1978] AC 297, it has often repeated that the fact the delay is the fault of the solicitors and not of the applicant personally may not be a sufficient reason and non-compliance with the Rules may well be fatal; *Venkatamma v Ferrier-Watson* [1995] 41 FLR 258,259.
- [12] Counsel for the respondents is more direct. Having pointed out the failure of the solicitors to get on with the case, counsel submits that the applicant itself is not serious about the appeal and suggests that, if it had been concerned about the status of the case, it would have made numerous attempts to inquire about the appeal with its solicitors. The timetable set out above gives support to that contention. Instead, the applicant has clearly simply ignored the ruling of the High Court despite a number of unsuccessful applications to have it stayed and has seemingly been content to let matters lie.
- [13] The grounds of appeal suggest the judge erred in law in accepting that there was sufficient evidence to grant a recognition order but that is effectively a challenge to the judge's findings of fact. I accept that, combined with the suggestion it could not satisfy the Wednesbury test of reasonableness, are arguable issues but I do not consider they demonstrate more than a possible chance of success.
- [14] Mr Prakash suggests that the prejudice to the respondent if the appeal is allowed to proceed is not great in a case such as this. I accept there is some weight in that suggestion but there must be a point at which the mere length of the delay itself becomes so prejudicial that the court will refuse leave. I am not satisfied that

point has quite been reached in this case but I am satisfied that to grant this application would undoubtedly prejudice the respondents to a substantial degree.

- [15] On all those grounds the application is refused with costs of \$500.00 to the respondents.

*Gordon Ward*



**Gordon Ward**  
**PRESIDENT**  
**FIJI COURT OF APPEAL**