

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

CIVIL APPEAL NO. ABU 001 OF 2007  
(High Court Civil Action No. HBJ 42 of 2015)

BETWEEN :            DILDAR SHAH

*Appellant*

AND:                    FIJI ISLANDS REVENUE AND CUSTOMS AUTHORITY

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

AND:                    FIJI PUBLIC SERVICE COMMISSION

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

AND:                    THE ATTORNEY-GENERAL OF FIJI

*3<sup>rd</sup> Respondent*

Coram:                Byrne, JA  
                             Pathik, JA  
                             Hickie, JA

Hearing:             Friday, 27 June 2008, Suva

Counsel:             S. Chandra for the Appellant  
                             B. Solanki for the 1<sup>st</sup> Respondent  
                             L. Daunivalu and V. Chang for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Date of Judgment: Thursday, 3 July 2008

---

**J U D G M E N T**

---

## THE APPLICATION

- [1] This is an Appeal by DILDAR SHAH in relation to a judgment in the High Court at Suva on 10 November 2006 whereby the Court refused an Application for Judicial Review against the Fiji Islands Revenue and Customs Authority ("FIRCA"), the Public Services Commission ("PSC") and the Attorney-General in relation to the termination of the Appellant's employment with FIRCA and refusal to reinstate him.
- [2] After joining the Public Service in March 1977, the Appellant had risen by 1998 to the position of Chief Administrative Officer with the Department of Customs and Excise.
- [3] In 1998, the Fiji Islands Revenue and Customs Authority ("FIRCA") was established whereupon the Appellant was advised by way of letter from the Secretary of the Public Services Commission ("PSC") that the Appellant's position in the Public Service was to terminate as at 1 January 1999 and thereafter he was to be employed with FIRCA.
- [4] The Appellant commenced his employment with FIRCA, however, after just under three months, he was advised on 25 March 1999 that his position of Chief Administrative Officer had been abolished and he was made redundant and received a cheque in the amount of \$38,319.23 as his redundancy payment.
- [5] The Appellant initially accepted and then rejected the redundancy, returning the cheque and seeking high compensation. Whilst the redundancy issue was pending, an allegation of serious misconduct in relation to the Appellant was referred to the Police. This resulted in FIRCA suspending the Appellant on full salary.

- [6] Eventually, some two and a half years later, on 16 November 2001, the Appellant was advised by the Acting Commissioner of Police that the Director of Public Prosecutions had advised against proceeding further, no charges were laid and the investigation was closed.
- [7] Soon afterwards, the Appellant sought reinstatement with FIRCA and for his redundancy to be re-considered with such request being rejected by FIRCA on 7 December 2001.
- [8] The Appellant then filed an Application for Judicial Review on 19 December 2001. He also joined in the proceedings the Public Service Commission ("PSC") with whom he had also sought reinstatement during the period between 1999 and December 2001.
- [9] The issue before the High Court when this Application for Judicial Review was ultimately heard on 2 November 2006 was whether this was a public law claim and thus subject to judicial review? FIRCA had argued it concerned matters of private law and thus the application was bound to fail. As for the PSC, it was argued that the Appellant never took objection to the transfer nor sought a review of that decision. Thus once transferred and the relevant PSC position extinguished, it was impossible for the Appellant to be transferred back or "re-absorbed" into the civil service.
- [10] In light of the above, the High Court ordered that the Third Amended Notice of Motion for Judicial Review was refused. The Appellant is now seeking Leave of the Full Court of the Court of Appeal to appeal out of time that decision.
- [11] On 2 January 2007, the Appellant filed an Appeal to the Court of Appeal. This was followed soon afterwards by his filing on 5 January 2007, a Summons for Security for Costs, which was heard on 25 January 2007, whereby the following Orders were made by consent:

- (a) *That the Appellant to pay the sum of \$1500.00 Security for Cost within 28 days, that is, by 23 February 2007;*
- (b) *That the Record be prepared and filed by the Appellant within 28 days from the date of the Order or within 14 days upon receipt of the Judge's Notes whichever is later.*

[12] The Appellant paid the \$1500.00 Security for Costs on 21 February 2007. The preparation of the Court Record, however, was another matter.

[13] According to the Affidavit of the Appellant sworn on 22 October 2007 at paragraph 6:

*"The part of the order (b) of 25<sup>th</sup> January, 2007 was not complied [with] and the appeal was deemed to have been marked abandoned."*

[14] Further, at paragraph 7, the Appellant admits that it took until 2 October 2007, some eight months later, for his daughter to follow up with his Solicitors. They, in turn, then contacted the Court on 3 October 2007 to ask for collection of the "Judge's Notes" and then on 5 October 2007 attempted to pursue the Appeal.

[15] Finally, on 12 November 2007, the Appellant filed his Summons for Leave to Appeal out of time.

[16] The Appellant has set out eight (8) Grounds of Appeal in his Notice of Appeal filed on 28 December 2006. Before this Court can consider those grounds, however, the onus is on the Appellant to satisfy the Court as to why Leave should be granted to pursue his Appeal.

#### **THE DELAY IN PURSUING THE APPEAL**

[17] In his Affidavit sworn on 22 October 2007, the Appellant sets out at paragraph 7 his "reasons for delay and non compliance". In his Submissions of 21

January 2008, the Appellant's Counsel clarified this delay and made further submissions in relation to it.

- [18] Citing *Ports Authority of Fiji v C&T Marketing Limited* [2001] FJCA 1 (Paclii: <http://www.paclii.org/fj/cases/FJCA/2001/1.html>);(Unreported, ABU0004.2001, 22 February 2001, Shameem JA), the Appellant's Counsel also submitted in his submissions of 21 January 2008:

*“that when there is any special circumstances after the expiry of the time allowed under Court of Appeal Rule 17(2) the Court could consider granting leave to file appeal out of time under Rule 17(3)”.*

- [19] In fact, Shameem JA in *Ports Authority of Fiji v C&T Marketing Limited* (at Paclii report page 6), said (to which we will refer again later in this judgment):

*“Non-compliance with the rules of the court may be fatal to an appeal, especially in the absence of any special circumstances.”*

- [20] The Appellant's Counsel then proceeded to outline in his submissions “that the circumstances under which the appeal has been abandoned makes it a very special one “ are:

- (a) That the non-availability of the Judge's Notes caused the delay and therefore the abandonment;
- (b) That the Appellant became very sick and could not keep tab on the progress of the appeal;
- (c) That although the Appellant's Solicitors are on record it was the Appellant who was to have “followed up” with the Registry to obtain the Judge's Notes and compiled the Record;
- (d) That the Appellant in very special circumstances was made redundant.

- [21] In what were often repetitive submissions, the Appellant's Counsel then clarified the basis of why leave should be granted:

*“The Appellant submits that the delay being caused by 2 main reasons. One being that [the] Judges [sic] Notes were not available to the Appellant[,] second being the seriousness of the illness of the*

*Appellant. He had no opportunity to oversee the compilation of the Records."*

- [22] Citing *Waqaitanoa [sic] v Commissioner of Prisons* [1997] 43 FLR 245, the Appellant's Counsel submitted that "the Court said ... 'an acceptable excuse such as illness will prompt a more sympathetic response to the application'".
- [23] In fact, Pathik J in *Waqaitanoa v Commissioner of Prisons* [1997] FJHC 141 at page 251; (Paclii: <http://www.paclii.org/fj/cases/FJHC/1997/141.html>, 26 September 1997); did not say what was attributed to him in the Appellant's submissions, rather he was citing the *Supreme Court Practice* (to which we will also refer again later in this judgment).
- [24] At the hearing of the Application for Leave, the Appellant's Counsel apart from summarising his written submissions, also tendered a "Chronology of Events" explaining the delay in proceeding with the Appeal as well as arguing "chances of success on appeal" and why "all of them likely to succeed".
- [25] Counsel for the First Respondent and Counsel for the Second and Third Respondents were not called upon to add to their written submissions other than to clarify that neither had received any notification from the Appellant's Solicitors between January 2006 and October 2006 as to their client's illness or seeking their agreement in the circumstances to agree to an extension of time.
- [26] In their respective written submissions, Counsel for the Respondents each highlighted the significant gaps in time and details in the Affidavit of the Appellant sworn on 22 October 2007, and that because the Appellant was represented in the Appeal, the attempted explanation of his medical condition to explain an eight month delay by his Solicitors on the record was irrelevant.

## THE LAW

- [26] Section 20 of the *Court of Appeal Act* [Cap 12] states:

"20. The powers of the Court under this Part: -

- (a) to give leave to appeal;
- (b) to extend the time within which a notice of appeal or an application for leave to appeal may be given or within which any other matter or thing may be done;
- (c) to give leave to amend a notice of appeal or respondent's notice;
- (d) to give directions as to service;
- (e) to admit a person to appeal in forma pauperis;
- (f) to stay execution or make any interim order to prevent prejudice to the claims of any party pending an appeal;
- (g) generally, to hear any application, make any order, or give any direction incidental to an appeal or intended appeal, not involving the decision of the appeal,

may be exercised by any judge of the Court in the same manner as they may be exercised by the Court and subject to the same provisions; but, if the judge refuses an application to exercise any such power or if any party is aggrieved by the exercise of such power, the applicant or party aggrieved shall be entitled to have the matter determined by the Court as duly constituted for the hearing and determining of appeals under this Act."

- [27] In relation to the Rules, Shameem JA noted in *Ports Authority of Fiji v C&T Marketing Limited* (supra) at page 6:

"Rule 18 of the Court of Appeal Rules, as amended by the 1999 Amendment Rules provides that **the primary responsibility for the preparation of the transcript, rests, with the appellant.** Rule 18(2) provides for the contents of the appeal record, and provides a timetable for the certification, and lodgment [sic] of the case record. Rule 18(10) provides -

'If any provision of this Rule is not complied with, paragraphs (2) and (3) of Rule 17 apply as if the non-compliance were non-compliance with sub-rule(1) of that Rule.'

- [28] Paragraphs (2) and (3) of Rule 17 state:

'(2) If paragraph (1) is not complied with, the appeal is deemed to be abandoned, but a fresh notice of appeal may be filed before the expiration of -

- (a) in the case of an appeal from an interlocutory order - 21 days;  
or
- (b) in any other case - 42 days  
calculated from the date the appeal is deemed to be abandoned.

(3) Except with the leave of the Court of Appeal, no appeal may be filed after the expiration of time specified in paragraph (2)."

[29] Thus in *Ports Authority of Fiji v C&T Marketing Limited* (supra), Shameem JA was examining the requirement of compliance with the Rules not "special circumstances" as referred to by the Appellant's Counsel in his submissions. Indeed, as Shameem JA concluded her judgment (page 6 Paclii):

*"Although as counsel for the Applicant argued, rules usually mean what they say, **it is also helpful to look at the Rules together, and to interpret them in a purposive way.** The Court of Appeal (Amendment) Rules made significant changes to the rules of the Court. **They placed the responsibility for the preparation of the record on the appellant, and they imposed a strict timetable for the preparation of the record, the payment of security for costs, and the lodging and serving of documents at the Registry and on the Respondents.** The purpose of the Rules, was obviously to expedite the appellate process and to make it more efficient. **The provision that failure to follow the rules, leads to an automatic abandonment of the appeal, is intended to operate as a sanction against delay.** If the rules are not followed, the Appellant loses his right to appeal. Reinstatement of the appeal has a timetable, and it is only with the leave of the Court that reinstatement after the time limit, is permitted.*

*To allow appellants to file appeal after appeal, for failure to follow the statutory steps, and **to allow the appellant, either inadvertently or deliberately, to delay the appellate process for months or years, would clearly violate the purpose of the Rules.***

*In *Ponsami -v- Dharam Lingam Reddy* Civil appeal No. CBU001 of 1996, the Supreme Court said as much in respect of the Supreme Court Rules, referring to its earlier decision in *Venkatamma -v- Ferrier-Watson* Civil appeal No. CBU0002/92. **Non-compliance with the rules of the court may be fatal to an appeal, especially in the absence of any special circumstances.**" (Our emphasis)*



[30] In relation to illness being a “special circumstance”, despite Pathik J in Waqaitanoa [sic] v Commissioner of Prisons (supra) being referred to by the Appellant’s Counsel in his submissions for this proposition, in fact, Pathik J did not say what was attributed to him in the Appellant’s submissions, rather he was citing the *Supreme Court Practice* as follows:

“Even if Order 3 r4 were to be applied **the approach and the principles stated below in the Supreme Court Practice under Order 3 r.5 is relevant but this does not assist the Applicant on the facts before me:**

*‘The R.S.C. as to time have to be observed, and if substantial delay occurs without any explanation being offered, the Court is entitled, in the exercise of its discretion, to refuse the extension of time, e.g. to serve a notice of appeal from the master to the Judge in Chambers, even though the delay could be compensated for by costs and no injustice would be done to the other party (Revisi v. Prentice Hall Inc. [1969] 1 W.L.R. 157) ... ord.3, r.5 is not to be used merely as an escape route where practitioners have not been prompt in dealing with cases (Smith v. Secretary of State for the Environment, The Times, July 6, 1987, C.A.).*

*Moreover an acceptable explanation required more than a mere statement that the person in charge of the action forgot about it or was too busy to get on with it. An acceptable excuse such as illness will prompt a more sympathetic response to the application than if the omission is caused by neglect.”*

[31] In addition, Pathik J in Waqaitanoa v Commissioner of Prisons refused an application for extension of time to late filing of a motion for judicial review. In that case, leave to apply for judicial review had been granted on 20 February 1996. A motion was not filed within 14 days as required by the Rules and eventually a Summons seeking an order for an extension of time was filed on 16 September 1996. As Pathik J noted at page 246:

*“The reason given for this failure was that the clerk in the employ of Fa & Company, ‘due to inadvertence and oversight omitted to inform’ the firm’s solicitors nor Ms Asenaca Uluiviti who had the personal conduct of this matter.”*

[32] In considering this explanation from the Applicant's Solicitor, Pathik J noted at pages 247-248:

*"It had taken the applicant about seven months to wake up from his slumber for the reasons given by his counsel. I find no merit whatsoever in any of the arguments. Mr. Fa asks why should the applicant suffer for his counsel's fault or inadvertence. First of all, Court is not concerned with the manner in which counsel runs his practice, but he does owe a duty to his client to act diligently and not come up with the type of reasons advanced and expect the Court to grant him an indulgence. The applicant is himself at fault too. Why did he not check with his counsel as to the progress of his case.*

*For the Applicant to succeed he has to give a good reason to enable the Court to exercise its discretion in his favour as stated below in the judgment of the Privy Council in Ratnam v Cumarasamy [1964] 3 All E.R 933 at 935:*

*'The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation' (underlining mine for emphasis)'"*

## FINDINGS

[33] In the Appeal before this Court, the Appellant's Counsel conceded in his written submissions:

- (a) That it was his firm's responsibility as the Solicitors on the Record for the Appellant who had *"the responsibilities to prepare the Court Record and in this case the Appellant does accept the responsibilities for further prosecution of the appeal towards final hearing of the appeal"*;
- (b) That *"the Appellant and Solicitor do accept that procedure dictates that the overall responsibility is on the Appellant to compile the Record"*.

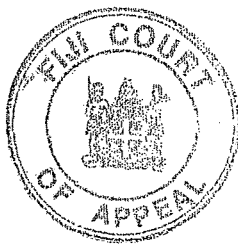
[34] In view of the above, the Court makes the following findings:


1. That it was the responsibility of the Appellant's Solicitors as the Solicitors on the Record for the Appellant to pursue the Appeal in accordance with the Rules;
2. That there are significant gaps both in time and detail in the eight months during which the Appeal was not pursued which do not explain the delay;
3. That there are no special circumstances to justify leave being granted to pursue the Appeal.
4. That the Court will expect adherence to the Rules save in the absence of special circumstances.
5. That as the Appellant has not satisfied the Court as to why leave should be granted, there is no need to consider the merits of the actual grounds of Appeal.

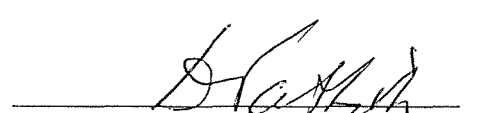
### ORDERS

[35] Accordingly, the Court makes the following Orders:

1. That the Application for Leave to Appeal is refused.
2. That the Appellant is to pay the Respondent's costs of the Appeal as agreed or taxed within 28 days.



  
Byrne, JA

  
Pathik, JA

  
Hickie, JA

**Solicitors:**

Maharaj Chandra & Associates, Suva, for the Appellant  
 Munro Leys, Suva, for the 1<sup>st</sup> Respondent  
 Office of the Solicitor-General, for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents