IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

CIVIL APPEAL N0. 29 OF 1994
(Judicial Review HBJ0014 of 1994)

BETWEEN:

SURESH SUSHIL CHANDRA CHARAN
ANURADHA CHARAN

Applicants

AND:

SYED M. SHAH

First Respondent

SUVA CITY COUNCIL

Second Respondent

ATTORNEY GENERAL OF FIJI

Third Respondent

1st Applicant in person.
Mr. S. S. C. Charan speaking for the Second Applicant as friend.
Mr D. Singh for First and Third Respondents.
Mr R. Gopal for Second Respondent.

Date and Place of Hearing : 11 May, 1995, Suva
Date of Delivery of Judgment : 19 May, 1995

JUDGMENT OF THE COURT

This is an application to set aside our judgment delivered on 8 March 1995 and to grant the applicants a rehearing. As far as we are aware this is the first application of its kind to the Court of Appeal to set aside its own judgment. Mr Charan has submitted that this Court has jurisdiction in *common law* to set aside its own judgment before formal orders are entered.

The Court of Appeal is established under s 101 (1) of the *Constitution.* Its jurisdiction is conferred by the *Constitution* (s 115) and by other existing

laws (s 116). The *Court of Appeal Act* (Cap 12) sets out the appellate jurisdiction of the Court and under s 3 (2) (b) of the *Act* the Court has "*all such powers and jurisdiction as are or may from time to time be vested in the Court under or by virtue of the Constitution, this Act or any other law for the time being in force.*" The principles of *common law* that may confer jurisdiction on the Court of Appeal would come within the meaning of "*other law for the time being in force*". The principles of *common law* which were in force as at 2 January 1875 are applicable in Fiji by virtue of s. 22 of the *High Court Act* (Cap 13). This Act and the laws adopted by it are still in force pursuant to s 168 of the *Constitution* (see also s 116).

For the relevant *common law* principles, Mr Charan relied on a High Court decision in Australia, *Autodesk Inc v Dyason (No. 2)* (1992-1993) 176 CLR 300. This decision is put forward on the basis that it accurately states and applies the relevant principles of *common law* in England at the relevant date which are applicable in Fiji. Counsel for the Respondents have not contested this submission. They conceded that this Court has jurisdiction to set aside or reopen its own judgment before entry of any formal orders. However, they submitted that the case now before us does not fall within the principles enunciated in the Australian High Court case.

What then are the principles set out in *Autodesk Inc v Dyason [No 2]* (supra)? The High of Australia had occasion to consider this issue in *State Rail Authority of NSW v Codelfa Construction Pty Ltd* [1982] 150 CLR 29 at 38 in the joint judgments of Mason J. and Wilson J. They said:

> *"Counsel for the Authority referred the Court to many cases to establish the jurisdiction of the Court to entertain the present application. We have no doubt that such a jurisdiction exists: Rajunder Narain Rae v Bijai Govind Sing ((1839) II Moo. Ind. App. 181; 18 E.R. 269). See also Vienkata Narasimba Appa Row v. Court of Wards ((1886) 11 App. Cas. 660); In re Harrison's Share Under a Settlement ([1955] Ch. 260). Nevertheless, it is power to be exercised with great caution. There may be little difficulty in a case where the orders have not been perfected and some mistake or misprision is disclosed. But in other cases it will be a case*

of weighing what would otherwise be irremediable injustice against the public interest in maintaining the finality of litigation. The circumstances that will justify a rehearing must be quite exceptional. In Rae's case, Lord Brougham said, in words which the Authority claims apposite to the present case ((1839) II Moo. Ind. App., at p. 220 [18 E.R., at p. 284]):

> *'It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremedial injustice being done by a Court of the last resort, where by some accident, without any blame, the party has not been heard, and an Order has been inadvertently made as if the party had been heard.'"*

In *Wentworth v. Woollahra Municipal Council* (1981-1982) 149 CLR 672 at p. 684 in the joint judgments of Mason ACJ, Wilson J and Brennan J they said:

> *"However as we had occasion to point out recently in State Rail Authority of New South Wales v. Codelfa Construction Pty Ltd ((1982) 150 CLR 28), the circumstances in which this Court will reopen a judgment which it has pronounced are extremely rare. The public interest in maintaining the finality of litigation necessarily means that the power to reopen to enable a rehearing must be exercised with great caution. Generally speaking, it will not be exercised unless the applicant can show that by accident without fault on his part he has not been heard."*

These principles were applied in *Autodesk Inc v. Dyason [No 2]* (supra). Mason CJ enlarged the scope of this jurisdiction when he said at p. 302:

> *"But these statements do not exclude the exercise of jurisdiction to reopen a judgment which has apparently miscarried for other reasons, at least when the orders pronounced have not been perfected by the taking out of formal orders. So much was acknowledged by Brennan, Dawson, Toohey and Gaudron JJ. in Smith v. NSW Bar Association when their Honours said: 'if reasons for judgment have been given, the power is only exercised if there is some matter calling for review.' It is sufficient to give three examples."*

His Honour then gave three different examples, *In re Harrison's Share Under a Settlement* [1955] Ch 260; *New South Wales Bar Association v. Smith* (Unreported, 4 July 1991) and *Pittalis v. Sherefettin* [1986] QB 868. He then continued:

> *"These examples indicate that the public interest in the finality of litigation will not preclude the exceptional step of reviewing or rehearing an issue when a court has good reason to*

consider that, in it's earlier judgment, it has proceeded on a misapprehension as to the facts or law. As this Court is a final court of appeal, there is no reason for it to confine the exercise of its jurisdiction in a way that would inhibit its capacity to rectify what it perceives to be an apparent error arising from some miscarriage in its judgment. However it must be emphasised that the jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered by the Court; nor is to be exercised simply because the party seeking a rehearing has failed to present the argument in all its respects or as well as it might have been put. What must emerge, in order to enliven the exercise of the jurisdiction, is that the Court has apparently proceeded according to some misapprehension of the facts or the relevant law and that this misapprehension cannot be attributed solely to the neglect or default of the party seeking the rehearing. The purpose of the jurisdiction is not to provide a backdoor method by which unsuccessful litigants can seek to re-argue their cases."

It is clear from old English authorities cited in these High Court cases that principles of *common law* at the relevant date granted jurisdiction to the courts to reopen judgments on grounds set out in these cases.

Before proceeding to apply these principles in Fiji, we need to make one more inquiry as to whether these *common law* principles are inconsistent with the *Constitution* or an Act of the Parliament (see s 2 of the *Constitution* and s 24 of *High Court Act* (Cap 13)). As far as we can see there are no provisions either in the *Constitution* or the *Court of Appeal Act* as well as the *Rules* which can be said to be inconsistent with these *common law* principles. We also find that there are no circumstances in Fiji which would render these principles inapplicable. We find that these principles are applicable in Fiji.

In order to determine whether the present case before us comes within these principles, it is necessary to set out the nature of the decision we delivered on 8 March 1995.

In 1994, the Applicants instituted two causes of action in respect of the same matter, one in the High Court and the other in the Magistrates' Court. The Magistrates' Court in Suva dismissed the matter before it with costs on the basis that it was an abuse of the process of the Court to pursue the same claim contemporaneously in two different courts.

The applicants applied to the High Court for leave to review the decision of the Magistrate under O 53 r 3 of the *High Court Rules* 1988 (as amended). The High Court refused to grant leave.

The applicants then by way of notice of motion applied for "*an order for leave of the Court of Appeal pursuant to the Order 53 Rule 3 (2) of the High Court Rules, 1988 to apply for judicial review.....by way of an appeal against the decision of Byrne J.*"

This application came before us for hearing on 1 November 1994. We delivered our judgment on 8 March 1995. In dealing with the application we said:

> *"The motion appears to assume that the procedure by which a person dissatisfied with refusal of leave to apply for judicial review is the same in Fiji as in England. In England the application for leave can be renewed before the Court of Appeal (O. 59 r. 14 (3) which may then grant or refuse leave. In Fiji this Court, as a creature of statute, has the powers conferred on it by statute. It is given no power to entertain a renewed application for leave. A person dissatisfied with refusal of leave by the High Court may appeal to this Court (Court of Appeal Act (Cap 12) section 12 (1)). But, by reason of section 12 (2) (f), such an appeal does not lie without the leave of this Court or of a judge of it, if the order refusing leave is an interlocutory order."*

We determined that the decision of Byrne J was an interlocutory order and therefore required an application for leave to appeal. The applicants had not filed an application for leave to appeal against this interlocutory order. Even if the order was in the nature of a final order there was no notice of appeal filed in the Court of Appeal. As there was no notice of appeal or no application for leave to appeal on foot, we could have dismissed the proceedings then before us and that would have been the end of the matter. However, we did not wish to close the door to a man who is not a lawyer and who did not have any legal representation. We "bent over backwards" so to speak and said:

"However, in view of the provisions of rule 6 of the Court of Appeal Rules, read together with O. 2 r. 1 of the High Court Rules, we permitted Mr Charan to apply to amend his notice of motion so as to make it an application for leave to appeal against Byrne J.'s order."

We then proceeded to consider whether we should allow the applicants to amend the notice of motion. In considering this we said:

"At the time when we heard Mr Charan's application to amend the applicants' motion, Byrne J. had not delivered his judgment in respect of their claim. We did not know whether he intended to deal with the whole of the claim, as they wanted, or only the part not concerned with the perishable goods, as Miss Jayatilleke was urging in April 1994. It appeared to us that, if he adopted the latter course, the applicants would be out of time to commence new proceedings in respect of the perishable goods in the Magistrates' Court and Miss Jayatilleke informed us that the second respondent would oppose an extension of time being granted for them to do so. In those circumstances we took the view that it would not be fair for us to decide whether or not to allow the applicants to amend their motion until we knew whether Byrne J. had dealt with the whole of their claim or not. We informed the parties that we would reserve our judgment until after Byrne J. had delivered his.

Subsequently His Lordship delivered his judgment and we were provided with a copy of it. He dealt with the part of the applicants' claim which related to the perishable goods and gave judgment in their favour in respect of them, although not for the amount to which they contended that they were entitled. The Magistrates' Court would, therefore, no longer be able to deal with the matter, it being res judicata. Even though when the learned Magistrate made his order that was not known to him, no useful purpose would be served now by a review of his order to strike out the applicant's action.

So far as the orders in respect of costs are concerned, we are unable to discern that there was any jurisdictional error; the learned Magistrate, having stated that he was striking out the action as an abuse of process, was asked by the parties to award costs. He clearly had power to do so. He set a date when he would hear submissions and the parties were aware of that. We can discern no evidence of any breach of natural justice. Nor can we see any error of law on the face of the record which might justify any application for judicial review.

His Honour may possibly have erred on the merits in making the orders which he did in respect of costs. But any such error would not afford grounds for judicial review. It might have afforded grounds for an appeal against those orders; but the applicants did not give notice of an intention to appeal against them.

We have come to the conclusion, therefore, that, if we permitted Mr Charan to amend the applicants' notice of motion so as to make it an application for leave to appeal against Byrne J.'s order refusing leave to apply for judicial review, no useful purpose would be served thereby. For the reasons we have stated above the applicants could not succeed in obtaining such leave."

The essence of our decision was that the application by the applicants to the Court of Appeal "*for an order for leave of the Court of Appeal pursuant to*

the Order 53 Rule 3 (2) of the High Court Rules, to apply for judicial review..." was completely misconceived. That left the applicants with no proper proceedings (either by way of an appeal or an application for leave to appeal) before the Court of Appeal.

We attempted to help the applicants by suggesting to them that they should be permitted to amend their (misconceived) application to an application for leave to appeal against the interlocutory order of Byrne J. We subsequently concluded that we should not grant leave in view of the fact that the proceedings in the High Court had been decided in their favour and no useful purpose would be served in restoring the action in the Magistrates' Court in respect of the same cause of action.

Mr Charan has not pointed to any misapprehension on our part in relation to any fact or law in the subject matter which we have decided. Nor has he pointed to any error on our part in not giving him any opportunity to be heard on the matters we have decided. Mr Charan has raised numerous matters in his written submissions. It is not necessary for us to set them out here except to say that they are not relevant to the matters we decided in our judgment delivered on 8 March 1995. However, we should refer to one matter raised by Mr Charan. It relates to the costs awarded by the Magistrates' Court. We observed in our judgment of 8 March 1995 that this is not matter for which a judicial review may be granted. The applicants could have appealed to the High Court on this issue and they did not.

We would dismiss the application for the reasons we have stated above.

The applicants claimed, in the alternative, that they should be granted leave to appeal against our decision delivered on 8 March 1995 to the Supreme

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Court. The parties agreed not to deal with this part of the motion and we simply adjourn it.

The application for a rehearing is dismissed with costs.

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(Sir Mari Kapi)
Judge of Appeal

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(Mr Justice Ian R. Thompson)
Judge of Appeal

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(Mr Justice Peter Hillyer)
Judge of Appeal