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IN THE FIJI COURT OF APPEAL, FIJI ISLANDS AT SUVA

MISCELLANEOUS APPEAL NO. 8 OF 2007

BETWEEN : MEREADANI SERUKALOU *Applicant/Plaintiff*

AND : FIJI NATIONAL PROVIDENT FUND *Respondent/Defendant*

Before the Honourable Justice of Appeal Mr Justice John E Byrne

Counsel : J. Baledrokadroka for the Respondent
V. Daveta for the Applicant

Dates of Hearing & Submissions: 22nd October, 27th November 2007, 10th January 2008

Date of Ruling: 16th May 2008

RULING

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[1] The Applicant seeks leave to appeal out of time from a Judgment of the High Court dated the 17th of May 2005 in which the High Court dismissed a claim by the Applicant that following her husband's death, she was entitled to a joint and not a life pension from the Fiji National Provident Fund.

[2] When Aca Serukalou reached the age of 55 years on the 10th of September 1996 he was entitled to withdraw all sums standing to his credit with the Provident Fund under one or other of the schemes operated by the Fund. As a member, Mr Serukalou had to fill in a form called 9-OP Pension Withdrawal to indicate which of the various schemes he opted for.

[3] The Judge found as a fact that Mr Serukalou filled in a form and chose Option 4 for his type of pension.

[4] The Judge had before him two copies of this form - one was found by the Applicant with the records of her husband after his death. On it both words **"Life/Joint Pension"** appear. Nothing is crossed out. The second form was the one found with the Respondent and on it the word **"Joint"** is crossed out.

[5] There was no dispute that the deceased withdrew $17,554.00 as a lump sum on or about the 2nd of December 1996. The issue before the High Court was whether he elected to receive the balance of $38,400.00 standing to his credit during his life or during the joint lives of himself and his wife, the Applicant. If he elected to receive a pension during his life, payments would cease once he died. However if he chose to take a

pension during the joint lives of himself and his wife, then payments would cease when the latter of the two between husband and wife died.

[6] Aca Serukalou died on the 20th of May 1998 at the age of 57 years. The Applicant informed the Respondent of his death. The Respondent stopped payment of pension saying that the Applicant's husband had elected to receive a life pension and not a joint pension. The Applicant then sued. There was no dispute that after Form 9-OP was processed by the Respondent, Aca Serukalou continued to receive $800.00 pension every month until his death. The Applicant said this in her evidence. It was paid by cheque.

[7] The Judge found that there was no clear evidence as to who crossed out the word **"joint"** on the form. The only evidence was that either the deceased or an employee of the Respondent crossed out the word joint.

[8] The Applicant's case was based on records which she found after the death of her husband. She has no direct knowledge about the signing and delivery to the Respondent of Form 9. She did not accompany her husband to the Respondent's office. She said she found the Form with both the words **"life"** or **"joint"** intact. Her

husband had assured her that she was taken care of. Therefore she said his intention was to create a joint pension.

[9] The Judge heard evidence from two witnesses for the Respondent. The first was Atelaite McGoon who was the Customer Services officer with the Respondent. She had first-hand knowledge of the Form. She told the Court that she filled out the figures at Item 4 on the Form. She said that the deceased had opted for a lump sum payment plus a life pension. She further said it could not be a joint pension as on a balance of $38,400.00 he would not get $800.00 per month but much less if he chose a joint pension.

[10] The second witness for the Respondent explained this further. He said that in the case of a life pension the recipient receives 25% annually of the amount standing to his credit and in the case of a joint pension only 1/6 of the amount. In the present case, for a life pension it would be $800.00 and for a joint, it would be $533.33 per month.

[11] Both these officers told the Judge that in a case of a joint pension they asked for a marriage certificate so that they would know the details of the spouses' names. No

marriage certificate was provided in this case, which they said again pointed to an election by the deceased to take a life pension.

[12] The Judge accepted the evidence of these two officers because of their long experience as employees of the Respondent. The Judge also did not lose sight of the fact that the deceased continued to receive $800.00 per month until his death without protest. He worked for AUSAID and appeared to be a literate person. The Judge found that the language he used when he wrote to the Respondent on the 3rd of October 1996 was both clear and concise. On the balance of probability he concluded that the deceased had opted for a life pension only. He also considered one other fact as relevant, namely that the deceased had gone to Australia for treatment of cancer of the prostate gland. This suggested to the Judge that he was not in good health and therefore would be more inclined to provide for his wife.

[13] However a report from the CWM Hospital dated the 15th of October 1997 stated that in November 1996 and May 1997 the deceased's health had improved. The Judge therefore considered that in the light of that, the deceased may well have considered that he would survive more than 4 years to recover whatever balance he had left

at the fund. He therefore found that the deceased had elected to take a life pension and not a joint pension and dismissed the Applicant's claim.

[14] In my Judgment the learned trial Judge was entitled to find as he did on the evidence before him. The question before this Court is whether, after a delay of more than two years, the Applicant should be given leave to appeal to the full court of this Court.

[15] On the 6th of January 2006 the Applicant's former solicitors filed a Notice of Motion for leave to appeal out of time. This was supported by an affidavit of Peniana Salele, a lawyer, who appeared for the Applicant at the trial.

[16] Miss Salele deposed that she had received instructions from the Applicant to appeal the Judgment of the High Court on the 12th of July 2005.

[17] A summons for Security for Costs was filed on the 19th of July 2005.

[18] Miss Salele then deposed that when the Litigation Clerk responsible for finalising the Applicant's court record resumed work on the 7th of December 2005 she informed

Miss Salele that the Applicant's appeal had been abandoned on the 6th of October 2005 and the period in which to re-appeal had expired on the 27th of October 2005 so that leave of this Court would have to be sought to appeal out of time.

[19] The Applicant then consulted her present solicitors which seems not to have been until early in March 2007 when they filed the present motion for leave to appeal out of time and which was listed before me originally for the 6th of August 2007.

[20] During the next few months I gave certain procedural directions as to the filing of Affidavits and on the 27th of September 2007 in what is entitled **"Reply to Affidavit of Alvina Ali"** the Applicant purports to reply to the Affidavit of Alvina Ali, a legal officer of the Respondent, sworn on the 6th of September 2007.

[21] Two things must be noted about this so-called reply. First it is not permissible for a solicitor for any party to purport to reply to an Affidavit by another party in the name of their client. On the 7th of September 2007 I ordered that an Affidavit in reply by the Applicant be filed and served by the 28th of September 2007. This was not

done but no explanation has been forthcoming from the Applicant's new solicitors.

[22] The rules of this Court are clear and so too was my order of the 7th of September 2007. If new counsel for the Applicant does not know the rules of this Court or the rules governing affidavits and submissions then I suggest that he studies these rules immediately and does not seek again to evade an order of the Court in the way he has done here.

[23] I must wonder at the standard of legal education of such a lawyer who claims to represent a client in this, the second highest Court of Appeal in the country, and for practical purposes that in which most litigants finish appeals, that he should have even attempted to file such a reply. That it escaped the notice of the Court registry is another matter on which I intend to take action.

[24] Since my return to Fiji in April last year I regret to say that I am very disappointed with the standard of advocacy and submissions made by newly-admitted lawyers. The Court registry had no right to accept this **"reply"**. However for practical purposes it adds nothing to the Applicant's case.

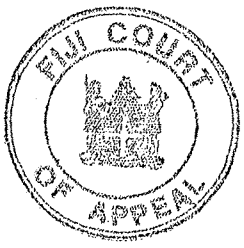
[25] On the 22nd of October 2007 I gave orders for the delivery of submissions. The submission filed on behalf of the Applicant leaves much to be desired both as to its knowledge of the law, particularly the rules of evidence. It is emotional and political and I would have thought that even the most inexperienced lawyer claiming the right to practise in any court, let alone the Court of Appeal, would have known better. The courts do not act on emotional or political evidence and, in this case, rank hearsay. Apparently the solicitor for the Applicant is unaware of this. If so then he must be taught now. He claims in the submission that the Applicant was treated badly by her former solicitors and alleges that the reason why they abandoned the appeal without informing her was that they are the solicitors also for the Respondent. If this be so then the solicitors on record Bale & Associates should have informed the Applicant that there could be a conflict of interest and that therefore they could not represent her in this matter.

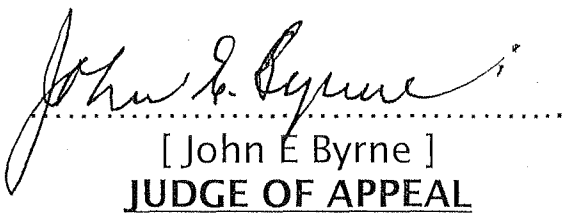
[26] But again there is no direct evidence of this, simply an allegation by the Applicant. It is possible that the Applicant has some cause for complaint against her former solicitors but this is something which she will have to consider in due course. Her solicitor then makes political and emotional claims about the Respondent, all

of which are hearsay and will not be considered by this Court. That such a submission should be made to this Court amazes me. In all my experience I have never seen one like it nor, I hope for the rest of my time here, will I ever see another.

[27] It has been said time and again by the High Court and this Court that the rules governing times for making submissions and filing of documents and appealing must be obeyed. No explanation has been offered by the Applicant for her delay in not seeking leave to appeal out of time sooner. In my Judgment, also the learned trial Judge was entitled to reach his decision on the grounds he gave in his Judgment. He had the benefit of seeing the witnesses and I consider his reasons for rejecting the Applicant's claim are good in law. In my view if the Applicant wishes to take this matter further she should perhaps look to her former solicitors for redress.

[28] Certainly in my view the Respondent cannot be held responsible for the acts of those solicitors. For these reasons I refuse leave to appeal and uphold the order of the trial Judge. There will be orders in these terms and no order for costs on this application.





[John E Byrne]
JUDGE OF APPEAL

At Suva
16th May 2008