

**PENIONI BULU v HOUSING AUTHORITY (CBV0011 of 2004S)**

SUPREME COURT — CIVIL JURISDICTION

5 HANDLEY, MASON and WEINGBERG JJ

6, 8 April 2005

10 **Practice and procedure — appeal — application for special leave to appeal from Court of Appeal decision — whether special leave proper — no matter of great general or public importance — no matter of substantial general interest to administration of civil justice — no ground for grant of special leave — Constitution ss 122(1), 122(2), 122(2)(a), 122(2)(b) — Supreme Court Act 1998 s 7(3).**

15 The Applicant alleged that he had arranged and paid for representation by a senior lawyer but was represented by a junior lawyer in the firm; that a material witness he wanted called had not been subpoenaed and was not available at the trial; and that his lawyer did not spend enough time with him in conference before the trial. These matters were not raised in the Court of Appeal. At issue was whether the special leave was proper in the circumstances. The Applicant sought special leave to appeal from a Court of Appeal  
20 decision dismissing his appeal from a judgment of the High Court. The Applicant was absent when the case was called but present when the Chief Justice fixed the hearing date.

**Held** — (1) There was no ground for the grant of special leave to appeal since there was:

- 25 (a) no question of law;  
(b) no matter of great general or public importance; and  
(c) no matter of substantial general interest to the administration of civil justice, as required by s 7(3) of the Supreme Court Act 1998.

(2) Allegations can only be tested properly at a trial in the exercise of original jurisdiction. It was no part of the duty and function of the court under the Constitution to  
30 exercise original jurisdiction. Its relevant duty and function under s 122(1) and (2) of the Constitution is limited to the exercise of appellate jurisdiction. Section 122(2)(b) of the Constitution provides, in cases where the Court of Appeal has not granted leave to appeal, that the court can only hear an appeal from the Court of Appeal if it grants special leave. The Constitution allows the Supreme Court to determine for itself whether a case was sufficiently “special” to warrant the grant of leave.

35 Application dismissed.

**Cases referred to**

*Disciplined Services Commission and Anor v Mere Tuisalolo Naiveli* Civ App CBV0001 of 2003; [2003] FJSC 14; *Peter Douglas Elsworth v Yanuca Island Ltd* Civ App CBV0008 of 2002S; [2003] FJSC 16, applied.

40 *Albright v Hydro-Electric Power Commission of Ontario* [1926] AC 167; *Daily Telegraph Newspaper Co Ltd v McLaughlin* (1904) 1 CLR 479; [1904] AC 776; *Henderson v Henderson* [1843–60] All ER Rep 378; (1843) 3 Hare 100; 67 ER 313; *Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy* [1946] AC 508; *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581; [1975] 2 WLR 690, cited.

45 No appearance for the Petitioner

*V. Maharaj* for the Respondent

50 [1] **Handley, Mason and Weingberg JJ.** The Petitioner seeks special leave to appeal from the decision of the Court of Appeal on 16 July 2004 which unanimously dismissed his appeal from a judgment of the High Court (Jiten

Singh J) Suva on 19 May 2003. He failed to appear when the case was called on although he had been present when the Chief Justice fixed the hearing date. The court thereupon dismissed the petition with costs and reserved its reasons. Although the court does not have to give reasons where the Petitioner fails to  
5 appear to support the petition, the court will do so because the petition was without merit and a brief statement of the grounds on which special leave is granted or refused may be prove useful.

[2] Five of the grounds in the petition relate to the merits of the decision of the  
10 Court of Appeal, the sixth is a complaint about his legal representation in the High Court.

[3] The Petitioner's complaints against his former lawyers in para 4 of the petition are that he had arranged and paid for representation by a senior lawyer but was represented by a junior lawyer in the firm, that a material witness he  
15 wanted called had not been subpoenaed and was not available at the trial and that his lawyer did not spend enough time with him in conference before the trial.

[4] These matters were not raised in the Court of Appeal and any attempt to do so would have faced considerable difficulties. An alleged deficiency in the performance of a legal adviser has not until now been accepted as an independent  
20 ground for setting aside a final judgment on the merits in civil proceedings. The Petitioner's allegations have never been tested in court and this could only be done properly at a trial in the exercise of original jurisdiction. It is no part of the duty and function of this court under the Constitution to exercise original  
25 jurisdiction. Its relevant duty and function under s 122(1) and (2) of the Constitution is limited to the exercise of appellate jurisdiction. This is further restricted by the requirement for the grant of special leave by this court under s 122(2)(b) or by the grant of leave by the Court of Appeal under s 122(2)(a) on a question of "significant public importance". This court has no power to grant  
30 special leave in respect of the Petitioner's allegations in para 4.

[5] The five grounds in para 3 of the petition alleged that the Court of Appeal erred "in fact and in law" in the matters alleged. These grounds, so far as they relate to questions of fact, have been the subject of concurrent findings in the  
35 Court of Appeal and the High Court.

[6] The appellate jurisdiction of the Privy Council in cases from Fiji and other jurisdictions was exercised in appeals as of right and by special leave. Even in appeals as of right the Privy Council would rarely disturb concurrent findings of fact. See *Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy* [1946] AC  
40 508. There is no appeal as of right to this court and a Petitioner seeking special leave to review concurrent findings of fact faces considerable difficulties.

[7] Reference is made to the case of *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581; [1975] 2 WLR 690. The first defendants argue that it is an abuse of process of the court to raise in subsequent proceedings matters  
45 which could and should have been litigated in earlier proceedings. They quote the following passage at 590 where Lord Kilbrandon says "but there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings". The locus classicus of that aspect of res  
50 *judicata* is the judgment of Wigram V C in *Henderson v Henderson* [1843–60] All ER Rep 378; (1843) 3 Hare 100; 67 ER 313 where the judge says:

[8] The only ground which involves the application of a legal standard is ground 3(d) which alleges error in finding that the Petitioner's conduct amounted to grave and serious misconduct justifying summary dismissal. A finding on this issue in a particular case will generally involve a mixed question of fact and law.

5 In the present case, there can be no doubt that the Petitioner was guilty of misconduct and the question whether it was sufficiently grave and serious raised a question of fact and degree.

[9] The decision in such a case will be fact specific and will establish no precedent for other cases. Section 122(2)(b) of the Constitution provides, in cases  
10 such as this, where the Court of Appeal has not granted leave to appeal, that this court can only hear an appeal from the Court of Appeal if it grants special leave. The Constitution allows the Supreme Court to determine for itself whether a case is sufficiently "special" to warrant the grant of leave.

[10] The requirements for a grant of special leave were worked out by the Privy  
15 Council over many years. The case had to be one "of gravity involving matter of public interest or some important question of law or affecting property of considerable amount and where the case is otherwise of some public importance or of a very substantial character": *Daily Telegraph Newspaper Co Ltd v McLaughlin* (1904) 1 CLR 479 at 481; [1904] AC 776 at 779 (*Daily Telegraph*).  
20 Even so special leave would be refused if the judgment sought to be appealed from was plainly right or not attended with sufficient doubt to justify the grant of special leave *Daily Telegraph* at CLR 481; AC 778–9. A decision on the facts of a particular case: *Daily Telegraph* at CLR 481; AC 779 or on the construction of a particular agreement did not warrant the grant of special leave: *Albright v Hydro-Electric Power Commission of Ontario* [1926] AC 167 at 169.

[11] This court has regularly applied these principles. See *Disciplined Services Commission and Anor v Mere Tuisalolo Naiveli* Civ App CBV0001 of 2003; [2003] FJSC 14 and *Peter Douglas Elsworth v Yanuca Island Ltd* Civ App  
30 CBV0008 of 2002S; [2003] FJSC 16.

[12] Section 7(3) of the Supreme Court Act 1998 provides in relation to a civil matter that:

... the Supreme Court must not grant special leave to appeal unless the case raises—

- 35 (a) a far-reaching question of law;  
(b) a matter of great general or public importance;  
(c) a matter that is otherwise of substantial general interest to the administration of civil justice.

[13] It can be seen that s 7(3) substantially codifies the principles developed by the Privy Council for the grant of special leave. This court may have to consider  
40 at some stage whether a miscarriage in a particular case falling outside s 7(3) could attract a grant of special leave. This would turn on whether the parliament could validly fetter the discretion of this court to grant special leave and on the scope of s 122(1) which provides that this court's jurisdiction is "subject to such requirements as the Parliament prescribes". No such question could possibly  
45 arise in this case.

[14] There is no ground for the grant of special leave in this case and there is no reason for doubting the correctness of the decision of the Court of Appeal. The petition should be dismissed with costs.