

AMBIKA NAND AND SAKUNTALA DEVI v MOHAMED FAROUK ALI AND AIR TERMINAL SERVICES EMPLOYEES TRUST (CBV0020 of 2008S)

5 SUPREME COURT — CIVIL JURISDICTION

MARSOOF, HETTIGE, SUNDARAM JJ

26 April, 8 May 2012

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Practice and procedure — appeal — special leave to appeal — withdrawal of counsel — reinstatement of counsel sought — right to legal representation — far reaching question of law — High Court Rules O 67 rr 1, 6 — International Code of Ethics rr 6, 10 — Code of Ethics — Supreme Court Act s 7(3).

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The petitioners applied for special leave to appeal against the decision of the Court of Appeal. The petitioners had appealed to the Court of Appeal on the basis that the trial judge had erred in law in not allowing the petitioners' counsel to be reinstated as counsel and thereby deprived the petitioners of their fundamental right to legal representation. The petitioners' counsel had informed the trial judge that he had no instructions from the

20 petitioners, and the High Court granted the solicitor leave to withdraw from the matter. The solicitor subsequently sought reinstatement and an adjournment, which was refused by the High Court.

Held –

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(1) The order of the trial Judge, permitting the withdrawal of the counsel for the petitioners, had never been challenged by the petitioners' counsel at any stage thereafter. The trial Judge's order is well within his jurisdiction and remains in force.

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(2) The petitioners' counsel, having obtained an order for withdrawal from the petitioners and moving to be re-instated as solicitors without following the procedure laid down in O 67 of the High Court Rules, seems to have attempted to abuse the process of court. The petitioners' counsel cannot rely on the failure on their part by not following the procedure for withdrawal as solicitors, and claim subsequently that the withdrawal was irregular and move for adjournment of the hearing.

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(3) A lawyer should take his decision to withdraw from a case with great caution as the withdrawal from the case which has already been set down for hearing may jeopardize the interests of the clients.

Appeal dismissed.

Case referred to

Goldwest Enterprises Ltd v Timoci Pautogo ABU0038 of 2005, applied.

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Dr Gasnesh Chand v Fiji Times Ltd FJSC CBV0005 of 2011; *Harris v Osbourn* 2 C and M 629; *Matalulu v DPP* 2003 4 LRC 712; *Penioni Bulu v Housing Authority* 2005 FJSC 1 CBV0052 of 2003; *Underwood Son & Piper v Lewis* [1894] 2 QB 306, cited.

GSA Industries P/L NT Gas Ltd 1990 24 NSWLR 710, followed.

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Mishra Prakash & Associates for the Petitioners.

Respondents absent and unrepresented.

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[1] **Marsoof, Hettige, Sundaram JJ.** This is an application for Special Leave to Appeal against the decision of the Court of Appeal dated 13th August 2008 on the basis that the appellants had been deprived of their right to legal representation in the trial court and thereby the Rules of natural justice have been

violated when the trial Judge refused their counsel to be re-instated back on the court record and that there are far reaching questions of law or matters of substantial general interest to the administration of civil justice to be considered by this court.

5 [2] The petitioners also seek Leave to file petition for special leave to appeal out of time and that time for filing the petition be extended.

[3] The petitioners also seek that the appeal against the decision of the Fiji Court of Appeal be allowed and the decisions of the Court of Appeal and the High
10 Court be set aside with costs and the petitioners be at liberty to appear by counsel and have solicitors on record. Petitioners further seek that the matter be set down for trial within two months (however the counsel for the petitioners moved that trial be set down within four months at the time of hearing).

[4] When this matter was taken up for hearing on 26th April 2012 the
15 respondents were absent and unrepresented.

[5] On perusal of the original court record at the time of hearing, it transpired that this petition against the Judgment of the Court of Appeal dated 13th October 2008 has been filed on 22nd December 2008 and Solicitors Messrs Sahu Khan and Sahu Khan had appeared for the respondents on several days after an affidavit
20 dated 16th February 2011 had been filed by one Prem Chand, a clerk who was responsible for all court matters on behalf of the respondents' Solicitors objecting to this application.

[6] It also transpired that thereafter this matter passed 5 call overs and 6
25 mention dates as at 01/03 2012 and all the attempts to locate the first respondent have been unsuccessful. It also appears on perusal of the court record that Summons for withdrawal of solicitors (for withdrawal of Solicitors for 1st and 2nd respondents) had been issued and notice to advertise had been published requiring the 1st respondent Mohamed Farouk Ali as the executor and trustee of the Estate of Mohamed Ali and Air Terminal Services Employees Trust to attend
30 Supreme Court in Suva on 25th November 2011.

[7] The court, in view of the circumstances, accordingly was inclined to proceed to hear the petitioner's counsel and determine this matter for expediency and ends of justice to avoid any further delay of this matter.

35 [8] The basis of the Appeal to the Fiji Court of Appeal against the decision of the High Court was that the learned trial Judge erred in law in not allowing the petitioner's counsel to be re-instated as counsel and thereby deprived the petitioners of their fundamental right to legal representation.

[9] The trial Judge had, after hearing the plaintiffs' (the respondents in this
40 application) witness and considering the plaintiffs' documents produced as exhibits had come to conclusion that the 1st petitioner in this application was indebted to the 1st respondent a sum F\$ 171,819.59 including twelve percent simple interest per annum as provided in the Bills of Sale and accordingly gave the judgment in favour of the respondents.

45 The learned High Court Judge stated in the judgment dated 18/05/2005 as follows.

*'Counsel for the defendants had at an earlier hearing (28 April 2005) been given leave to withdraw for want of instructions. At this hearing Counsel appeared again, to
50 continue representing them. Mr Kumar on behalf of Mr Narayan put before court copies of correspondence in that regard and made application to be re-instated as counsel. After considering the submissions and the correspondence I considered the defendant's*

position to be without merit on the issue of representation and I refused the application. The matter then proceeded by way of formal proof.'

5 [10] Trial Judge also ordered that the petitioners do deliver the possession of the motor vehicles registered number CH508 and BA690 and the tractor Registered Number AN50 to the Agent of the respondents.

[11] It appears on a reading of the material placed before this court that first petitioner had borrowed money from the second respondent on securities under Bills of Sale and promissory Notes and it was alleged that the petitioners have 10 failed and neglected to pay the total amount owing under the said securities though demanded and the action filed by the respondents in the High Court, Lautoka, for recovery of the debt borrowed by the first petitioner had been pending from April 1996.

15 [12] The Court of Appeal had observed that there had been a gap of nine years thereafter until 20th of April 2005 when this matter had come up before Finnigan J in Lautoka High Court. It is stated in paragraph 20 of the Court of Appeal Judgment that counsel had appeared for the petitioners (defendants in the trial Court) and informed the Judge that he had no instructions from the petitioners 20 who had left Fiji. It appears that thereafter the trial Judge had adjourned for another mention date until 28th April 2005.

[13] On 28 April 2008 Mr MS Sahu Khan had appeared for the respondents (plaintiffs) and Mr Sadhakar had appeared for the petitioners (defendants) Mr Sahu Khan had moved for a half hour hearing on 18th May 2005. It is to be noted 25 that an application had been made on 28th April 2005 verbally by the lawyers for the petitioners to withdraw for defendants (petitioners) and the court has recorded on page 51 of the Court Record that:

30 'Hearing – 18 May 2005 A K Lawyers granted leave to withdraw for defendants' However, the Petitioners' had contended in the Court of Appeal that '*the record does not even show that an application to withdraw was made verbally*'

[14] The contention of the petitioners advanced in this appeal is that the petitioners were left without legal representation at the trial on 18th May 2005 35 and a judgment entered against them after formal proof.

[15] The grounds of appeal of the petitioners are that:

40 (i) The Fiji Court of Appeal erred in law in not applying the legal principle that it is a fundamental principle that a person be given a reasonable opportunity in presenting his case through legal representation and not holding that in most cases a party is best prepared to present his case through lawyers.

(ii) The Fiji Court of Appeal erred in law in not taking into account that in this case the petitioner wanted to be represented by a counsel and his counsel asked to be allowed to appear and further failed to take into account that the petitioners had a right to be represented by Counsel even if the adjournment was to be refused.

45 (iii) The Fiji Court of Appeal erred in law in not taking into account that the right to appear by counsel is something which any court must strive to allow and enable and the right was denied in this case and denied the petitioners of natural justice and thus committed an error which goes to jurisdiction.

50 (iv) The Fiji Court of Appeal erred in law in not providing reasons as to why the Judge of the High Court was correct in not allowing representation by counsel by the petitioners in the Court when it held that Counsel was on record until an order for withdrawal was served under O 67 r 1.

(v) The argument was that the petitioners' lawyers did not make any formal application by summons as provided by O 67 r 6 of the High Court Rules or serving the petitioners with any notice sought leave to withdraw

5 [16] It was submitted that there are far reaching questions of law to be considered by this court which would satisfy the threshold criteria contained in s 7 (3) of the Supreme Court Act 1998. Section 7 (3) of the Supreme Court Act provides as follows:

10 '..... in relation to a civil matter (including a matter involving a constitutional question) the Supreme Court must not grant Special Leave to Appeal unless the case raises.

a) A far reaching question of law

b) A matter of great general public importance;

15 c) A matter otherwise of substantial general interest to the administration of civil justice.'

[17] The threshold criteria stipulated in s 7(3) of the Supreme Court Act namely what constitutes a serious question of law and matter of great general or public importance was examined and applied by the Supreme Court in number of decisions.

20 *In Penioni Bulu v Housing Authority* 2005 FJSC 1 CBV0052 of 2003S *Dr Ganshesh Chand v Fiji Times Ltd* FJSC CBV0005 of 2011 the Supreme Court cited the decision in *Penioni Bulu* case and followed the principles for granting of Special Leave.

In *Penioni Bulu* case The Supreme Court stated that:

25 '*the requirement for a grant of a Special Leave were worked out by the Privy Council over many years. The Case has 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 otherwise of some public importance or of a very substantial character (Daily Telegraph Newspaper Co Ltd v McLaughlin (. [1904] AC 776, 779*

30 It can be seen from the above decisions of the Supreme Court in Fiji that Special Leave to Appeal is not granted as a matter of course. The Court has to be satisfied that the case has to be one of gravity involving matters of public importance and some important questions of law.

35 [18] It should be noted that in order to satisfy the threshold criteria contained in s 7 (3) of the Supreme Court Act 1998 the court held in the case of *Matalulu v DPP* 2003 4 LRC 712 *that the parties should frame the questions with great care.*

40 [19] Having carefully examined the grounds of appeal of the petitioners this court is inclined to grant leave on the far reaching question of law pertaining to Right of a person to legal representation.

[20] Petitioners' counsel urged that the Fiji Court of Appeal erred in not providing reasons as to why the trial Judge failed to give reasons as to why the trial was correct in not allowing representation by counsel when it held that counsel was on record until an Order for withdrawal was served under O 67 r 1.

45 [21] Order 67 (Rule 1) (1) of the High Court Rules governs procedure regarding change of solicitors which provides as follows:

50 '*A party to any cause or matter who sues or defends by a Barrister and Solicitor may change his barrister and solicitor without an order for that purpose but, unless and until notice of the change is filed and copies of the notice are served in accordance with this rule, the former barrister and solicitor, shall subject to r 5 and 6 be considered the*

barrister and solicitor of the party until the final conclusion of the cause or matter, whether in the High Court or Court of Appeal.'

Rule 1 (2) provides that ' Notice of change of Barrister and Solicitor must be filed in the Register'

5 *Rule 1 (3) provides that*

'The party giving the notice must serve on every other party to the cause matter (not being a party in default as to acknowledgement of Service) and former barrister and solicitor a copy of the notice indorsed with a memorandum stating that the notice has been duly filed.'

10 [22] It was submitted that the petitioner's counsel did not make an application for withdrawal of counsel in terms of the procedure laid down in the above provisions of the Rule. No notice of change of solicitors was filed as required by O 67 r (1). In paragraph 7 of the written submissions filed by the petitioners it is stated very clearly that petitioners lawyers without making a formal
15 application by summons as provided by O 67 (Rule 6) of the High Court Rules or serving the petitioners with any notice sought leave to withdraw. Leave was granted by Justice Finnigan and the matter was set down for hearing on the 18th May 2005.

[23] It is clearly stated in the court record on 28th April 2005 that '*AK Lawyers granted leave to withdraw for defendants.*' It is to be noted that the solicitor who had appeared on 28th April 2005 on behalf of the petitioners (defendants) had sought leave to withdraw and court accordingly made order granting leave to withdraw for the defendants (petitioners).

25 [24] It is an admitted fact that trial Judge has made order permitting the withdrawal of the counsel for petitioners and that the said order made by the trial Judge has never been challenged by the petitioners' counsel at any stage thereafter. Therefore the trial Judge's order is well within his jurisdiction and remains in force.

30 [25] It was contended by the petitioners' counsel that as there was no order filed or served by AK Lawyers referred to by the Fiji Court of Appeal the petitioners ought to have been allowed representation by their lawyers and the refusal of such a legal representation is a denial of natural justice.

[26] The counsel for the petitioners cited several judgments in support of his argument that the petitioners were not given a reasonable opportunity in
35 appearing and presenting their case

[27] Now we proceed to consider whether in fact the petitioners were not given a reasonable opportunity to present their case by their lawyer.

40 [28] It is a general and accepted rule that a lawyer is required to act for a client to the end of an action and to take all necessary steps to bring that action to a conclusion. In the present case before us it is to be noted that petitioners had been represented by a counsel from 1996 up to a certain stage until the lawyer withdrew with leave of court on 28th April 2005 due to a good cause (due to failure on the part of the petitioners to give instructions).

45 [29] It should be noted that the petitioners' counsel having obtained an Order for withdrawal for petitioners and moving to be re-instated as solicitors without following the procedure laid down in the O 67 seems to have attempted to abuse the process of court. It appears that the petitioners' lawyers did not come to court with clean hands. The petitioners counsel cannot rely on the failure on their part
50 by not following the procedure for withdrawal as solicitors and claim subsequently that the withdrawal was irregular and move for adjournment of the

hearing. The court was not satisfied with submission of the counsel and refused the application for adjournment. It should be noted that in fact that the counsel had no status to appear on 18 May 2005 as the procedure inO 67 of the High Court Rules had not been followed by the petitioners' lawyers.

5 [30] In the present case before the High Court on 28 of April 2005 on which date the counsel appeared and withdrew with leave of court. The counsel knew that the case was set down hearing on 18.05 2005. On the hearing date being 18
10 May 2005 the petitioner's solicitors through their agent Mr Kamala Kumar appeared again for the petitioners and moved to be re-instated as solicitors for the petitioners. Mr Kumar also sought for an adjournment of the matter on behalf of Mr A.K. Narayan. The court refused adjournment and proceeded without further delay to formal judgment.

[31] The court had served Notice of Adjournment Hearing (NOAH) on both parties. It appears from material available before this court after receiving the
15 NOAH the petitioners had wanted on 5th may 2005 to retain Mr Narayan who appears to have withdrawn as solicitors due to non payment of fees, to act for the petitioners.

[32] The next question this court must consider is that whether as the
20 petitioners have alleged whether the trial Judge has carefully considered the legal position when refusing the application for adjournment of the hearing.

[33] Having perused the written submissions in reply of the respondents filed in the Court of Appeal, Court Record of the proceedings on pages 51 to 52 seem to be relevant in this regard.

25 'Before Hon. Justice Finnigan Wednesday 18th May, 2005 at 9.00
Mr M.S. Sahu Khan & M.S Sahu Khan for the defendants.
COURT: Hearing of substantive action (1/2 hour) K.Kumar: fax today from Mr Narayan. Client has
30 Asked Mr Narayan to continue acting and will payfees.
14 April sent client NOAH for 20 April 2005.
5 May client wrote back asking AK Narayan to act.
AK Aryan seeks adjournment 3 weeks for client's response
COURT: Originally - long course of delays-
Appropriate to adjourning.
35 Now - letters and history.
Proceed without further delays to formal judgment
Whatever that might be ...'

[34] It should be noted that on perusal of the above court record proceedings
40 that the trial judge has considered the fact that the case had been pending from 1996 without being concluded and the petitioners were aware that by 5th May 2005 that the case was set down for hearing on 18th May 2005. We observe that no steps had been taken by the petitioners to be prepared for the hearing of the matter. The AK Solicitors had ample time to get ready for the hearing on 18th May 2005.

45 [35] It may be useful, at this stage to cite the Fiji Court of Appeal case of GOLDENWEST ENTERPRISES LTD v TIMOCI PAUTOGO ABU0038 of 2005 decided on 3rd March 2008 on the issue of trial Judge's discretion in regard to adjournment of cases.

50 [36] In that case Counsel for Goldenwest had said that in the interests of justice, and in accordance with principles of fairness and extending to Goldenwest the right to be heard and grant an adjournment.

The Court of Appeal at paragraph 29 at page 8 of the Judgment said as follows:

5 *'It is a principle, universally applied, that the power to adjourn or refuse to adjourn a proceeding within the discretion of the court hearing the matter. It is universally accepted that an Appeals Court should be loath to overturn the trial court's exercise of discretion as to the grant of an adjournment or its refusal, except upon good reason.....'*

[37] In present case the question arises as to whether the application of the petitioner for adjournment on the basis that the A.K Lawyers were not prepared for the hearing whereas the solicitors and the petitioners were fully aware of the hearing date well in advance, can be considered in favour of the petitioners.

[38] It should be noted that as it has been held in number of cases in Fiji and other jurisdictions, we observe that the principle as to the discretion of the Court's adjourning a matter extends similarly to the discretion of the court's refusing an adjournment.

[39] We have considered the contention of the petitioner's counsel that his case may not be the refusal of the application for adjournment of the hearing but it is the petitioners' right to legal representation. We are very much conscious of the fact that the petitioner's complaint is that refusal of right of the petitioners to legal representation and refusal to adjourn on that basis constituted a miscarriage of justice and the discretion of the trial Judge was wrongly exercised and thereby caused a breach of natural justice.

[40] It can be seen from the decided cases in Fiji and other jurisdictions that our courts are reluctant and very slow to interfere with any such order or Judgment of any lower courts.

In the case of *GSA Industries Pty Ltd v NT Gas Ltd* (1990) 24 NSWLR 710 at 713 Samuel JA said:

30 *'The refusal to grant an adjournment is a classic exercise of judicial discretion. Hence it is only in rare circumstances that it is amenable to review by an appellate court'*

[41] Rule 6.10 of the International Code of Ethics (as amended) in Mexico City 1964 has been incorporated in the Fiji Law Society Code of Ethics by the Amendment of the Fiji Code of Ethics in 1984 which reads as follows:

'A Lawyer should only withdraw from a case during its course for good cause, and if possible in such manner that the client's interests are not adversely affected.'

40 [42] It is to be noted that a lawyer should take his decision to withdraw from a case with great caution as the withdrawal from the case which has already been set down for hearing may jeopardize the interests of the clients. See

[43] This is a case that AK Lawyers had been appearing and acting for the petitioners since 1996 and therefore necessary arrangements should have been made to look after the interests of the petitioners on 18th May 2005.

45 [44] It is pertinent to note that Mr Justice Anthony Gates in his article on *'Withdrawing from civil Proceedings'* at page 8 paragraph 21 refers to the Judgment of Lord Esher MR at 311, relying on Lord Lyndhurst in *Harris v Osbourn* 2 C and M 629, *Underwood Son & Piper v Lewis* [1894] 2 QB 306 where the court held that *'a solicitor may not withdraw from acting for his client unless he gives reasonable notice of intention.'*

[45] Having carefully considered the oral submissions and other material placed before this court we do not think that the petitioners have satisfied the threshold criteria contemplated in s 7 (3) of the Supreme Court Act 1998 on the far reaching question of law and as such the petitioners appeal should be
5 dismissed.

[46] Accordingly we dismiss the appeal of the petitioners and affirm the Judgment of the Court of Appeal dated 13th October 2008. In the circumstances of the case we are not inclined to grant any costs. We also make Order that a copy
10 of this Judgment be delivered/served on the respondents and their lawyers.

Appeal dismissed.

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