IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 41 OF 1991
(High Court Civil Action No. 676 of 1982)

BETWEEN:

THE ATTORNEY-GENERAL OF FIJI — APPELLANT

-and-

KANTA MANI — RESPONDENT

Mr. G. E. Leung for the Appellant
Mr. S. Sharma for the Respondent

R U L I N G

This is an appeal on quantum. A verdict for the respondent to the appeal, original plaintiff, for the sum of $42,100 was given at the conclusion of an action in the High Court. That was on 7th June 1991. The appellant, original defendant, appealed, alleging that the amount was excessive.

The appeal first came before this Court for hearing on 23rd November 1992. For reasons that are not relevant here, the appeal did not proceed. The Court made various orders and stood the proceedings over to 1st February 1993 to fix a fresh date for hearing. When the matter was mentioned on that date a hearing date was fixed for 14th May 1993. On that day the Court was informed of the possibility of settlement. At the request of the parties the matter was listed for mention on 21st May 1993.

When the matter was mentioned on that last-mentioned date the Court was informed that settlement had not occurred and the case was given a hearing date in August.

However, on 13th May 1993 a summons to file what is called a respondent's notice pursuant to rule 19(2) of the Court of Appeal rules was filed, returnable on 21st May, supported by an affidavit. In fact it sought leave to file such a notice out of time, but that is immaterial. The grant of any leave was opposed.

Rule 19(2) provides:-

> *"(2) A respondent who desires to contend on the appeal that the decision of the Court below should be affirmed on grounds other than those relied upon by that Court shall give notice to that effect specifying the grounds of that contention."*

The respondent's notice in this case was that the sum which the Judge had awarded by way of damages ($42,100) should be affirmed on the ground:-

> *"That the Estate of the deceased was entitled to a claim of Fiji National Provident Fund contributions which the deceased would have been entitled to if he was living."*

The matter was heard in the High Court by Sadal J on 30th October 1990. The Judge ordered written submissions from the

parties and heard no oral submissions. Those on behalf of the plaintiff were dated 7th November 1990, within the time limited by the Judge. There are no written submissions of the defendant in the appeal book; whether there were any filed, and, if so, within the time limited by the Judge I do not know.

The action was one brought under the Law Reform (Miscellaneous Provisions)(Death and Interest) Act (Cap 27) and the Compensation to Relatives Act (Cap 29) by a widow and administratrix of her husband's estate consequent upon his death. The problem here concerns contributions said to have been made by the deceased by way of deductions from his wages to the Fiji National Provident Fund (FNPF), and, because of this, some monies are claimed to have become due either to the widow in her capacity as such or as administratrix of the estate the deceased or both resulting from his death.

The statement of claim merely makes a general claim for damages under the two abovementioned Acts, plus a claim for $250 funeral expenses.

In evidence the fact that the deceased made contributions to the FNPF was mentioned and not disputed. In the written submissions filed on her behalf there was a heading "Loss of Fiji National Provident Fund Contribution" as one of the heads of damages. It contains these helpful particulars "..... the deceased Estate is entitle (sic) to contribution to Fiji National

Provident Fund lost through the death of the deceased. Hence, $4080.00 per annum x 14c x 16 = $9,139.20" (16 was the figure claimed in the submissions to be the correct multiplier to apply) (record pp 21, 20).

The Judge simply did not mention the FNPF claim in his judgment at all.

Now, it seems quite clear what has happened, although if what I surmise about this is not correct it will no doubt be put straight at the hearing of the appeal. The legal representatives tried to settle the matter. When those efforts finally failed, and the parties came to Court to get a hearing date, the legal advisers to the plaintiff, respondent to the appeal, realized that the claim for loss of FNPF contributions, however that claim may have been computed or could be raised, had not been included as a sum proper to be awarded as damages in the sum calculated by the Judge as the figure for damages. It was then decided to seek to include that figure by way of a respondent's notice as mentioned earlier.

The application came before me as a Judge sitting in Chambers. Quite clearly the respondent plaintiff applicant has made the application under the wrong provision in the rules. There is simply no question that the respondent is not seeking to contend that the Judge's decision should be affirmed on grounds other than those relied on by him. She is seeking to introduce

a new factor of damages that apparently had not been considered by the Judge in the hopes that if this Court should reduce the amount of the damages awarded by the Judge, this reduction can be offset, as it were, by adding an additional sum. On this basis the summons must fail.

However, rule 19(1) of the Court of Appeal rules provides:-

> *"(1) A respondent who, not having appealed from the decision of the Court below, desires to contend on the appeal that the decision of that Court shall be varied, either in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect, specifying the grounds of that contention and the precise form of the order which he proposes to ask the Court of Appeal to make, or to make in that event, as the case may be."*

It may be that the respondent can seek to amend the present summons by making reference to the correct rule or give a notice pursuant to it, whichever is the correct procedure. Having been given notice that the respondent wished to raise the FNPF matter, it may be that the appellant will have suffered no further prejudice by this switch, although that is a matter that may have to be decided. What is quite clear, however, is that there is no material before this Court at the moment that would enable it to decide any question as to whether this sum or any part of it or any other sum should have been included in the original award. There is no evidence as to what the sum referred to consists of or how it is made up; whether it refers to a sum that has become

payable or has been paid, whether pursuant to a nomination or otherwise; whether it represents a sum calculated as the amount lost because of premature death or otherwise, or any part if it does so, and if so how it has been calculated. We will refrain from saying anything about the absence of any evidence put before the Judge on these matters, of any submissions made to him about them, or, if not, how the widow has been served by her lawyers in the preparation and presentation of her case, until we hear further about them. It looks as though figures are available. If this matter is to be pursued on the appeal and if it is proper that this Court should allow it to be, then we will certainly expect the parties to have all figures available and be able to agree upon them. We would think that there could be no dispute about contributions made and the actual amount paid or payable upon death and to whom.

However, there could be another problem if this matter is to be pursued at the hearing of the appeal. The legislation under which the FNPF was set up, and later legislation, may well bear upon the question of whether there is any claim on this head available at all under either of the two Acts pursuant to which of these proceedings were brought. The Court, on the hearing of the appeal, will require submissions about this, together with reference to any local cases in which this matter has been raised or dealt with, if the Court decides it is proper to pursue the matter there.

The result is that the hearing of the summons will be stood over to the date of the appeal to be heard by the Judges constituting the Court on the hearing of the appeal. If any notice under rule 19(1) is to be dealt with that will likewise be dealt with then. The costs of the hearing of the summons on 21st May will also be dealt with then.

Order that the summons stand over until Tuesday 17th August 1993 at 11.30 a.m. or otherwise until Civil Appeal No. 41 of 1991 is heard to be dealt with by the Court hearing the appeal.

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Mr. Justice Michael M. Helsham
President Fiji Court of Appeal

AT SUVA

3rd June, 1993