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IN THE FIJI COURT OF APPEAL
Appellate Jurisdiction
Civil Appeal No. 26 of 1985.

Between :

HARAKH NARAYAN

Appellant

v.

CHOTU BHAI PATEL

Respondent

Mr. H. K. Nagin and V. Kapadia for the Appellant.
Mr. M. B. Patel for the Respondent.

Date of Hearing : 15th July, 1985

Delivery of Judgment : 20th July, 1985

JUDGMENT OF THE COURT

SPEIGHT, VP

This appeal is against an order for possession given in the Supreme Court of Fiji on the 2nd of April, 1985 by Mr. Justice Rooney. Proceedings had been taken in a summary way pursuant to Section 169 of the Land Transfer Act Cap. 131. As is of course well known to practitioners in Fiji, an originating summons may be issued under the Land Transfer Act claiming possession of land in certain circumstances including cases where the term of the lease has expired or a notice to quit has been given. The operative procedure is governed

by Sections 171 and 172 which for present relevance read as follows:

> "171. On the day appointed for the hearing of the Summons, if the person summoned does not appear, then upon proof to the satisfaction of the Judge of the due service of such summons and upon proof of the title by the proprietor or lessor and, if any consent is necessary, by the production and proof of such consent, the judge may order immediate possession to be given to the plaintiff, which order shall have the effect of and may be enforced as a judgment in ejectment.
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> 172. If the person summoned appears he may show cause why he refuses to give possession of such land and, if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit."

In the present case the record shows that the summons had been issued on the 8th of March and served promptly, with the date of hearing being the 2nd of April which allowed the appropriate sixteen days before return, as required by Section 170. The summons had been supported by an affidavit from the present respondent who was the landlord. In this he deposed that :

(a) The present appellant had had a lease of business premises in Labasa which had expired on the 31st October, 1984;

(b) That on the 30th of January, 1985 one month's notice to quit had been served;

(c) That he had the written consent of the Ministry of Lands to take eviction proceedings; and

(d) The defendants (now the appellants) had failed to vacate.

The record also shows that on the 2nd of April in Chambers Mr. M. B. Patel had appeared for the appellant and Mr. V. Kapadia for the defendant. The operative part of the Judge's notes reads :

"Order as prayed. Adjournment refused."

From this decision the former tenants now appeal. The record both in the Supreme Court and in this Court is entirely lacking in any note of what material the appellant could have relied upon, or can now rely upon, to show cause why possession should not be given. The complaint which is now made is that counsel for appellant had asked that the matter be adjourned for 14 days - or even 7 days - so that some steps could be taken. There was a difference of opinion at the bar before this court as to whether this was in order to "file an affidavit" or "to obtain instructions".

It was submitted that it is the invariable practice in such matters for the Supreme Court to grant an adjournment

on request if counsel appears. We have listened to this submission and made enquiries as to recent practice. It certainly could not be the case that counsel could obtain an adjournment as of right by merely appearing for Section 172 indicates that if the person summoned appears, he may "show cause". It is accepted that in many cases counsel will not have had time to get complete instructions or to file any formal documents and it is not the case, as we understand, that Judges have a fixed rule that an affidavit must be filed before the hearing date. Indeed there will be some cases where a defendant not knowledgeable in the law will appear in person, and we are confident that in either case counsel or defendant in person will be given a sympathetic hearing if he can indicate that there is an arguable defence available.

But it must be understood that this is a summary proceeding designed to avoid delay. It is not like a first call, or a day-for-mention, when a number of lengthy and defended cases are put into the list purely to make fixtures for a future hearing. The Act is to be administered sympathetically but having due regard to the purposes for which the procedure was devised. One must pay regard to the phrase "the defendant may show cause". In the present instance not only was nothing of any substance apparently put before the Judge to indicate that adjournment would serve some bona fide purpose, but that situation still exists at this stage, many months later. Nothing has been put in front of us to indicate that there could have

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been an arguable defence. In other cases we have received an affidavit or some material explaining some misunderstanding and demonstrating a possible defence of merit.

At best we have been told from the bar that there is a claim that there was an arrangement for a renewal of the tenancy. It was said that "there had been receipts given" but counsel was not armed with any such document nor able to tell us what they might disclose. In ordinary adjournment cases of writs of summons with properly structured defences a judge will doubtless note the reason for refusing an adjournment, and these matters are always appealable. But the decision especially in summary proceedings is a matter of discretion and it has not been shown here that the discretion was exercised on a wrong principle. Indeed we have looked in vain for any wisp of evidence put forward to show cause. Counsel should be alert to the fact that in this procedure they should, if they are appearing on the first day, be able to put some matter of weight forward to persuade the Judge that an order should not be made, or at least that something will be forthcoming so that adjournment is called for.

Appeal is dismissed.

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Vice-President

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Judge of Appeal

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Judge of Appeal