

IN THE COURT OF APPEAL
FIJI ISLANDS AT SUVA

[Civil Appeal No. ABU 0030 of 2008]
(Civil Action No. 155/2002L)

BETWEEN : TOTA RAM SHARMA
(APPELLANT/APPLICANT)

AND : AKHIL PROJECTS LIMITED
(RESPONDENT)

CORAM : BYRNE, AP
CALANCHINI, JA
ANJALA WATI, JA

COUNSEL : H. A. SHAH for the APPELLANT
: K. L. RAMRAKHA for the RESPONDENT

DATE OF HEARING : 16th April 2010

DATE OF JUDGMENT : 5th July 2010

JUDGMENT OF THE COURT

- [1] On the 18th of February 2010 this Court constituted by Byrne, AP and Pathik, JA and Goundar, JA dismissed an appeal by the applicant from a judgment of Phillips, J delivered on the 9th of May 2008.

- [2] The appellant/applicant had made a claim in the High Court against the respondent for damages of \$514,324.39, Special damages, general damages, judgment for future losses or future profits and other ancillary orders including costs against the respondent on an indemnity basis.
- [3] Although the action was premised on three agreements for the sale of land between the appellant/applicant and the respondent, the applicant sought damages only and not specific performance of the agreements. This Court agreed with the learned judge who said that this was significant in the light of her findings in favour of the respondent and her dismissal of the applicant's claim.
- [4] On the 11th of March 2010 the applicant issued a summons for two orders:
- (a) that the decision of the Honourable Madam Justice Phillips on the 9th of May 2008 and of this Court of 18th of February 2010 be stayed pending the hearing and determination of the appellant's appeal to the Supreme Court of Fiji.
 - (b) that the costs of the action be in the cause.
- [5] On the 12th day of March 2010 the applicant issued a Notice of Motion in which an application was made on behalf of the applicant that leave be granted to the applicant to appeal to the Supreme Court of Fiji pursuant to Part IV, Rule 65 (1) of the Court of Appeal Rules on the ground that the application involved an issue of significant public importance that ought to be submitted to the Supreme Court for determination of the following matters:
- 1) Whether the onus of proof shifts to the Plaintiff to prove that the Mareva Injunction should not be discharged?

- 2) Whether the written acknowledgements did constitute proof of payments when in fact the plain and simple meaning of the said written documents such as agreements and receipts did acknowledge that the purchase monies has been paid?
- 3) Whether parole or extrinsic evidence is admissible to vary or contradict the terms of a valid and effective contract?
- 4) Whether a receipt of money contained in an instrument under seal is conclusive that money has been in fact paid?
- 5) Whether the written acknowledgement of money by receipts could be rejected without any allegation or evidence of fraud?
- 6) Whether the High Court has jurisdiction to set aside indefeasibility of registered title duly made by the Respondent on its accord without any allegation of fraud or fraud by the Plaintiff and/or order the Appellant to re-convey the property when it was voluntarily transferred by the Respondent for the money received by him?
- 7) Whether the Respondent is entitled for costs against the Plaintiff for both his Counsel in the said matter on Indemnity basis?
- 8) Whether the conduct of the Learned Trial Judge amounts to bias and or that whether the Fiji Court of Appeal was correct in law to comment against the Appellant and his legal advisers without giving them the right to be heard in respect of this issue.

[6] In the judgment of this Court of the 18th of February 2010, it was stated at paragraph 53 that the trial judge rejected the claim for special damages amounting to \$514,324.39 made by the applicant/plaintiff. She said the applicant failed to produce the requisite evidence to prove this part of his claim and said this in paragraph 49 of her judgment.

"I am left with the distinct impression that all this claim represents is a blatant attempt to extort monies from the defendant by making fictitious and exaggerated claims when the plaintiff and his legal advisers would have been well aware from the outset that he stood no chance of proving his claim once the case was heard. All this exaggerated claim for special damages has succeeded in doing is fortify my conclusion that the plaintiff embarked upon an elaborate scheme using the litigation process to procure a substantial financial benefit from the defendant when it became apparent to him that the most valuable portion of the defendant's property containing the spring water sources was excluded from the agreements between him and the defendant".

[7] This court agreed with her Ladyship's comments and had no hesitation in dismissing the appeal.

[8] The question of whether leave should be granted to appeal to the Supreme Court is governed by the Common Law and Section 8 of the Administration of Justice Decree 2009.

[9] Sub-section 2 of Section 8 states so far as relevant that an appeal may not be brought from a final judgment of the Court of Appeal unless:

- (a) the Court of Appeal gives leave to appeal on a question certified by it to be of significant public importance; or
- (b) the Supreme Court gives special leave to appeal.

[10] In *Penioni Bulu vs. Housing Authority, Civil Appeal No. CBV 0011 of 2004* in a judgment delivered on the 8th of April 2005, the Supreme Court said in paragraphs 10 and 11 of the judgment:

"[10] The requirements for a grant of special leave were worked out the Privy Council over many years. The case had to be "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 Company vs. McLaughlin [1904] AC 776, 779. 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 Ibid-778-9. A decision of the facts of a particular case: Ibid 779, or on the construction of a particular agreement did not warrant the grant of special leave: Albright v. Hydro - Electric Power Commission [1926] AC 167, 169.

[11] This Court has regularly applied these principles. See Disciplined Services Commission and Anor v. Naiveli (S/C CBU 001 of 2000, 24th October 2003) and Elsworth v. Yanuca Island Limited (S/C No. 8 of 2002, 24 October 2003)."

[11] Mr. Shah who appeared for the applicant made comprehensive submissions as to why leave should be granted to the applicant. It is unnecessary to refer to these in any detail because they constitute an amplification of the matters which it is submitted should be referred to the Supreme Court.

[12] We intend no disrespect to Mr. Shah when we say that the case in the High Court was in our judgment a pedestrian run-of the mill case involving an agreement for the sale of land and was confined to the two parties. No matters of any national importance or any new area of the law were involved.

[13] In the Court of Appeal's judgment of the 18th of February it noted that the applicant had failed to challenge the main grounds of the judgment of Phillips, J namely :

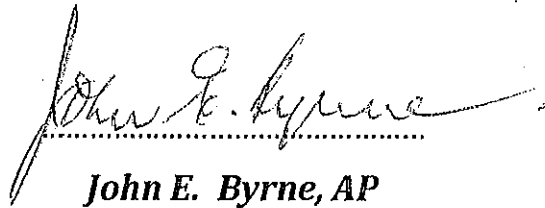
- (i) that the applicant had failed to give Notice to Complete and thus bring matters to a head but instead preferred to repudiate the three agreements involved without having any grounds for so doing;
- (ii) the applicant failed to prove any damages at all; and
- (iii) the award of indemnity costs by Phillips, J.

[14] No doubt the applicant considers that the proposed issues for determination by the Supreme Court are of significant public importance but this Court does not share that view.


[15] It is clear that the learned judge in the High Court simply did not believe the applicant's evidence and in our view as in that of the Court in its judgment of the 18th of February, she was fully justified in so doing.

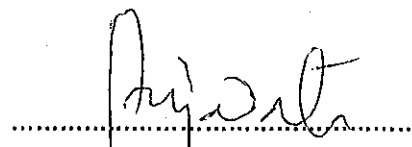
[16] Accordingly this Court is not prepared to certify that the matters proposed by the applicant are of any significant public importance. The application is therefore dismissed and we order the applicant to pay the respondent's costs which we fix at \$5,000.00

Dated at Suva this 5th day of July 2010.


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John E. Byrne, AP




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William D. Calanchini, JA


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Anjala Wati, JA