IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 0042 OF 2010S
(High Court Civil Action No. HBC 84 of 2009)

BETWEEN	:	**SACHIDA NAND MUDALIAR**
		Appellant
AND	:	**THE FIJI MEDICAL COUNCIL**
		Respondent
Coram	:	**Basnayake JA** **Suresh Chandra JA** **Mutunayagam JA**
Counsel	:	**Mr. R.K. Naidu for the Appellant** **Mr. J. Udit and Ms. Nabalarua for the Respondent**
Date of Hearing	:	**18 February 2013**
Date of Judgment	:	**05 December 2013**

JUDGMENT

Basnayake JA

1. This is an appeal filed by the defendant-appellant (defendant) to have the order dated 19 August 2010 of the learned High Court Judge set aside. By this decision the learned High Court Judge had ordered to strike out the counterclaim and to pay the plaintiff costs on a party party basis to be agreed out if no agreement to be taxed.

2. The defendant was a registered medical practitioner under the Medical and Dental Practitioner's Act (Cap 255). On 17 May 2006 the defendant was convicted for the offence of performance of an illegal abortion and manslaughter and was sentenced to a term of 3 years imprisonment. The plaintiff respondent (plaintiff) at a meeting held on 22 June 2006 ordered the name of the defendant be removed from the register of Medical Practitioners pursuant to section 27 (1) of the Act. Although this decision was communicated to the defendant, no appeal was lodged.

3. On 17 October 2008, the Supreme Court quashed the conviction and set aside the sentence with the option of filing a fresh case left with the Director of Public Prosecutions. No such case was instituted. On 23 February, 2009 the defendant had commenced practice as a medical practitioner. On 12 March 2009, the plaintiff instituted these proceedings by originating summons. By this the plaintiff claimed *inter alia* a declaration that the action of the defendant in practising medicine without being registered as a medical practitioner in accordance with the Medical and Dental Practitioners Act is unlawful.

4. On 25 March 2009 the defendant filed a counterclaim seeking a declaration *inter alia* that the plaintiff's decision to remove the defendant's name from the register of Medical Practitioners is unlawful and invalid. The defendant averred in an affidavit that he received no notice of a meeting held on 22 June 2006. The defendant complained that a decision to remove his name from the register of Medical Practitioners was taken without affording him a hearing. The defendant moved for a dismissal of the plaintiff's application and an order in favour of the defendant in terms of the counterclaim.

5. On 14 August 2009 the plaintiff made an application pursuant to Order 21 Rule 3 of the High Court Rules to withdraw the proceedings. This application was opposed by the defendant on 9 September 2009. The learned High Court Judge by order dated 9 November 2009 granted leave to discontinue proceedings with costs. It appears that thereafter the defendant had moved to take up the counterclaim. The plaintiff opposed the counterclaim in an affidavit filed on 27 March 2009 (Tab 13 of the High Court Record) and 25 February 2010 (Tab 15). During the course of submissions the learned

counsel for the plaintiff appears to have taken a preliminary objection with regard to the use of the counterclaim.

The Judgment dated 19 August 2010

6. The learned Judge held that the decision of the plaintiff in striking off the defendant's name from the Medical Register was challenged on the grounds of procedural fairness and absence of bias. *"Procedural fairness and absence of bias of course are two components of natural justice and any complaint in respect of a breach thereof is an accepted ground for an application for judicial review"*. The learned Judge further held that "a counterclaim is a cross action and a claim and a counterclaim are two independent actions (Supreme Court Practice 1991 Vol. 1). The learned Judge then posed the question, whether as a separate action the court has jurisdiction to entertain a counterclaim in this case. The plaintiff submits that it does not, as the issues can only be determined by an application for judicial review under order 53 of the High Court Rules (The State v Fiji Medical Council and Others Exparte Mario Nagales Padua and Another (2000) 1 FLR 98).

7. Order 53 rule 2 of the High Court Rules 1988 is as follows:

> *"[2] **An application for a declaration or an injunction may be made by way of an application for judicial review, and on such an application the court may grant the declaration or injunction claimed if it considers that having regard to (a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari; (b) the nature of the persons and bodies against whom relief may be granted by way of such an order, and (c) all the circumstances of the case, it would be just and convenient for the declaration for injunction to be granted on an application for judicial review.**"*

8. *"Now that all remedies for infringement of rights protected by public law can be obtained upon an application for judicial review, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of court, to*

permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by those means to evade the provisions of Order 53 for the protection of such authorities" (Lord Diplock in O'Reilly and Others v Mackman and Others [1983] 2 AC 237 at 285).

9. The learned Judge held that the plaintiff was performing a public duty when it made its decision on 22 June 2006. Therefore an application for judicial review was available to challenge that decision. The existence of order 53 as the procedure for commencing an application for judicial review precludes the defendant from proceeding by way of a counterclaim commenced by summons...The proceedings commenced by summons amounts to an abuse of the process of the court (Prasad v Attorney General (Civil Appeal No. 58 of 1997 delivered on 27 August 1997). Thus the counterclaim was ordered to be struck off.

The grounds of Appeal

10. The gist of the grounds are as follows:-

The learned Judge failed to consider that :-

- The objections with regard to the filing of a counterclaim were not taken at the commencement or within a reasonable time.
- The validity of the counterclaim was not challenged through a formal applcation.
- The plaintiff had waived the irregularity.
- The counterclaim was filed with the leave of court.
- The learned Judge erred by stating that the only way to challenge the decision of the plaintiff dated 22 June 2006 was by way of judicial review.
- The learned Judge erred in law in awarding costs against the plaintiff on a party party basis and not on indemnity basis.

Submissions of the learned counsel for the defendant

11. Under Order 2 rule 2 (1) of the High Court Rules, an application to set aside for irregularity, any proceedings must be made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity. Following the commencement of the proceedings, the defendant with leave of court filed summons in the form of counterclaim on 26 March 2009. The plaintiff filed an application seeking leave to discontinue proceedings on 9 November 2009. Leave was granted. The counterclaim was heard on 29 June 2010. At this hearing the plaintiff raised the objection with regard to procedural irregularity which was upheld and the order to strike out the counterclaim was made. The learned counsel submitted that the learned Judge should not have entertained this objection on account of the delay (Mohammed Shameem and Mohammed Saiyeed v Toyota Isusho (S.S) Ltd) Civil Appeal No. ABU 0042 of 2003 (16 July 2003).

12. The learned counsel submitted that irregularity does not as a rule nullify the proceedings (Order 2 Rule (1) of the High Court Rules 1988, Adebayo & Ors v Chief Shonowo & Ors (1969) 1 All Nigerian L.R. 176 at 190). In terms of Rule 2 (2) the validity of the counterclaim could have been challenged by way of summons or motion. In this case no such summons or motion was filed. The learned counsel submitted that the counterclaim was filed in terms of Order 28 Rule 8 of the High Court Rules 1988. Rule 8 (3) makes provision for the plaintiff to object to a counterclaim. No such objection was made.

13. The learned counsel submitted that a defendant may in his defence challenge a public authority's decision instead of filing a separate judicial review proceedings where such defence is based on existing actionable rights (Wandsworth London Borough Council v Winder [1984] 3 WLR 1254, Boddington v British Transport Police [1998] 2 WLR 639, Pawlowski (Collector of Taxes) v Dunnington [1999] EWCA Civil 3020, Rhondda Cynon Taff County Borough Council v Watkins [2003] EWCA Civil 129, [2003] 1 WLR 1864, Dwr Cymru Cyfyngedig v Corus UK Ltd [2006] EWHC 1183 (Ch), Roy v Kensington and Chelsea and Westminister Family Practitioner Committee [1992] 1 AC 624, Mercury Communications Ltd v Director General of

Telecommunications [1996] 1 WLR 48, Trustees of the Dennis Rye Pension Fund v Sheffield City Council [1998] 1 WLR 840 (CA)).

14. The learned counsel also made submissions with regard to violations of the rules of natural justice by the plaintiff. Those matters are not in dispute in this case. The learned Judge himself in his decision made on 9 November 2009 on the application for withdrawal of the plaint observed that "*it is quite apparent from the material before the court that not only was there no due inquiry, there was a total denial of procedural fairness when the plaintiff concluded that the defendant was guilty of professional misconduct. He was not given notice that this matter was to be considered, he was not given the opportunity to be heard and he was not given the opportunity to cross-examine any witnesses.*"

15. There is no dispute that in terms of Order 53, the only way a person could challenge a decision of a public authority is through judicial review. The dispute is when a public authority sues a private citizen, whether the private citizen is able to challenge the authority in his defence and make a counterclaim in the same action.

Submissions of the learned counsel for the plaintiff

16. The learned counsel for the plaintiff in a supplementary written submissions raised an interesting point. He said that a number of changes have taken place since. The Medical and Dental Practitioners Act has been repealed and replaced by the Medical and Dental Practitioners Decree 2010. The defendant has since applied for and has been granted registration and a practising certificate under the decree. One of the reliefs sought by the defendant was to declare the decision of the plaintiff null and void. The plaintiff (Medical Council) established under the Medical and Dental Practitioners Act is now repealed and the Council does not exist. The learned counsel submitted that the plaintiff cannot re-issue the registration or reinstate the defendant to the same position as he was prior to the decision. Hence the court cannot declare the decision null and void and to refer the matter back to the Council which has been abolished.

17. The learned counsel submitted that the whole issue with regard to the counterclaim filed in 2009 to declare the decision made on 22 June 2006 null and void, is now redundant after tne new Decree came into force. Due to the change in the statutory law and the fact that the defendant has complied with the statutory requirement and presently holds a medical practicing certificate to practice, these proceedings have become a moot. The courts exist to resolve disputes which has some practical implication. Decisions are not made for only academic interest. Decisions are made on behalf of parties for resolution of disputes (Sun Life Assurance Co of Canada v Jervis [1944] AC 111 at 113-114. *"It has always been a fundermental feature of our judicial system that the courts decide disputes between the parties before them. ; they do not pronounce on abstract questions of law when there is no dispute to be resolved."* (Lord Bridge in Ainsbury v Millington [1987] 1 WLR 379 at 381, Railumu v Commander, Republic of Fiji Military Force [2006] FJCA 7 ABU 0066 of 2004 (24 March 2006) unreported).

18. The learned counsel for the defendant while addressing court confined himself to a single relief. That was to set aside the decision to remove the name of the defendant from the register. By this time the defendant had been admitted and was functioning as a medical practitioner. At the time of filing the counterclaim the defendant's name had been removed from the medical practitioners' register. This situation no longer exists.

19. We are still at the stage of pleadings. The setting aside of the decision dated 22 June 2006 was important at the time of filing the counterclaim. At that time the defendant wanted to regularise his medical practice. That has already been done now. I am in agreement with the learned counsel for the plaintiff that this case has now become a moot. Therefore this appeal is dismissed. In the light of the facts I am of the view that parties should bear their costs.

Suresh Chandra JA

20. I agree with the reasons and the conclusions of Basnayake JA

Mutunayagam JA

21. I too agree with the reasons and the conclusions of Basnayake JA

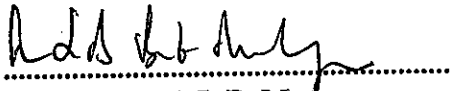
22. **The Orders of the Court are:**

1. The appeal stands dismissed.

2. Parties to bear their own costs.

Hon. Justice Eric Basnayake
JUSTICE OF APPEAL

Hon. Justice Suresh Chandra
JUSTICE OF APPEAL



Hon. Justice A.L.B. Mutunayagam
JUSTICE OF APPEAL