

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**CIVIL JURISDICTION**

***CIVIL ACTION NO: 442 OF 2003***

**BETWEEN: BDO AUCKLAND TRUSTEE COMPANY LIMITED**

***PLAINTIFF***

**AND: NATIVE LAND TRUST BOARD**

***FIRST DEFENDANT***

**LAKO MAI ISLAND RESORT LIMITED**

***SECOND DEFENDANT***

**INTERVAL HOLIDAYS (FIJI) LIMITED**

***THIRD DEFENDANT***

**LAKO RESORT DEVELOPMENT LIMITED**

***FOURTH DEFENDED***

**TOUCHDOWN PRODUCTION LIMITED**

***FIFTH DEFENDANT***

**Mr. R. Smith for Plaintiff  
Mr. D. Sharma with  
Mr. R. Naidu for Defendants**

## **JUDGMENT**

These contempt proceedings arise out of two orders made first by Justice Scott and later extended by the Chief Justice on 12 February 2004.

The Order made by Justice Scott on 6<sup>th</sup> February 2004 read:

***“The sum of \$1,900,000.00, paid or to be paid into the trust account of Jamnadas and Associates in Suva for the credit of the third and fourth defendant in terms of the memorandum of council dated 30<sup>th</sup> October 2003 and filed herein, remain in that trust account undisbursed until mid-day Thursday the 12<sup>th</sup> of February 2004.”***

On the 12<sup>th</sup> February 2004 the Chief Justice after hearing the parties extended the orders made by justice Scott. The relevant part of order reads:

***“The interim injunction granted herein by the Honourable Mr Justice Scott on the 6<sup>th</sup> day of February 2004 be extended until the Court of Appeal has heard and determined the appeal lodged by the Plaintiff against the judgement of the Honourable Mr Justice Scott delivered on the said 6<sup>th</sup> day of February 2004.”***

The two contemnors in these proceedings are barristers and solicitors namely Dilip K. Jamnadas and Renee D.S. Lal who are partners in the firm Jamnadas and Associates.

The first issue is whether the appeal had been heard and determined by the Court of Appeal. On 2<sup>nd</sup> March 2004 the plaintiff had filed an appeal against the order by Justice Scott. A motion to fix security for costs was fixed for 25<sup>th</sup> March 2004. There was no appearance by the plaintiff and the motion was struck out. The solicitors for the third and fourth defendants Messrs Jamnadas and Associates took the view that since the motion of security for costs was struck out, the appeal was deemed to be abandoned un Rule 17(1) and (2) of the Court of Appeal Rules. This view was later upheld by the President of the Fiji Court of Appeal in ruling delivered on 9<sup>th</sup> July 2004 (page 4 of the ruling) Messrs Jamnadas and Associates conveyed their view to Messrs Munro Leys and said they would disburse funds from the trust account. They did disburse funds the exact amount is not told.

Mr Sloan in his evidence suggested that even if appeal was deemed to be abandoned his view was the orders made by the Chief Justice remained on foot and could only be discharged on application made to the Court. He said the duty is higher in cases made to legal practitioners.

In view of the ruling made by Justice Gordon Ward, the only conclusion I can reach is that there was no appeal on foot made to the Court of Appeal. There was nothing before the Court of Appeal to hear and determine. Hence the order made by the Chief Justice automatically came to an end and Jamnadas and Associates were released from the obligations under the order. There were no injunction binding on them when they dispersed the funds. The order made in the present case was self discharging on happening of an event so Hadkinson v. Hadkinson (1952) 2 ALL ER 567 principles would not apply. Accordingly on this view alone, I could dismiss the application. However there are two more issues need to be discussed briefly in view of counsel's submissions on them.

#### **PENAL NOTICE:**

Mr Smith made the concession that the order served on Messrs Jamnadas & Associates bore no penal notice. Order 45 Rule 6(4) requires an endorsement with of an order with a penal notice. The purpose of the penal notice is to direct the attention of the person ordered the consequences of disobedience. Simply because the alleged contemnors a barrister and solicitor does not mean that the requirements of penal notice can be dispensed with. The rule applies without exception. Its omission is fatal as held by Justice Pathik Shalini v Subhashni Prasad – HBC 36 of 1999 and by Justice Fatiaki (as he then was) in Postulka v. Postulka – 34 FLR 829.

#### **NOTICE OF MOTION – ADEQUATE PARTICULARS:**

The notice of motion seeks amongst others following two orders:

- (a) An order that Dilip K. Jamnadas, a legal practitioner and officer of the High Court of Fiji of 12 Allardyce Road, Domain, Suva and partner in Jamnadas and Associates a law firm located at Level 6, FNPF Place, Victoria Parade, Suva be committed to prison for his contempt of Court upon the grounds set out in the copy statement served herewith and used in the application for leave to issue this Notice of Motion;

- (b) An Order that Renee D.S. Lal, a legal practitioner and Officer of the High Court of Fiji Of Navurevure Road, Tamavua, Suva and partner in Jamnadas and Associates a law firm located at Level 6, FNPF Place, Victoria Parade, Suva be committed to prison for her contempt of Court upon the grounds set out in the copy statement served herewith and used on the application for leave to issue this Notice of Motion.

The High Court Rules (Order 52) do not say what particulars the notice of motion must contain. However since the liberty of a subject is at issue and the nature of committal proceedings is quasi criminal, I am of the view that adequate particulars must be given on the notice so the respondent is able to understand the exact nature of allegations against him/her.

Nicholls L J in Harmsworth v Harmsworth – 1987 3 ALL ER 816 at page 820 B states:

***“A person whose liberty was in jeopardy was entitled to know the precise charges made against him. It should be apparent on the face of the summons whether or not there were breach of the undertakings.”***

Later on page 821 he states:

***“So the test is, does the notice give the person alleged to be in contempt enough information to enable him to meet the charge? In satisfying this test it is clear that in a suitable if lengthy particulars are needed, they may be included in a schedule or other addendum either at the foot of the notice or attached to the notice so as to form part of the notice rather than being set out in the body of the notice itself. But a reference of the notice to a wholly separate document for particulars that ought to be in the notice seems to be a quite different matter. I do not see how such a reference can cure what otherwise would be deficiency in the notice. As I read the rules of the court and as I understand the decision in the Chiltern case the rules require that the notice itself must contain certain basic information. That information is required to be available to the respondent of the application from within the four corners of the notice itself. From the notice itself the person alleged to be in contempt should know with sufficient particularity what are the breaches alleged. A fortiori, in my view, where the document***

*referred to is an affidavit, which does not set out particulars in an itemised form, but which leaves the respondent to the committal application to extract and cull for himself from an historical narrative in the affidavit relevant dates and times and so forth, and to work out for himself the precise number of breaches being alleged and the occasions on which they took place.”*

The notice in the present case does not specify date or dates and does not state what is the act which is being complained against. It is too general. Those who embark on committal proceedings must strictly comply with Rules and requirements of the law. The notice here is quite inadequate. The applicant could have rectified the defect by seeking to amend it but that was not done.

For reasons I have given above, the motion is dismissed. I award the respondents costs which I summarily fix in the sum of \$1,000.00.

[Jiten Singh]  
JUDGE

At Suva  
22<sup>nd</sup> October 2004

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**NO. 993 OF 1982**

**BETWEEN : THE COMMISSIONER OF INLAND REVENUE**

**PLAINTIFF**

**AND : ARTHUR EVANS**

**DEFENDANT**

Mr R M Raza Counsel for the Prosecution.

Mr A Patel Counsel for the Accused.

### **J U D G M E N T**

The Accused Arthur Evans is charged on two counts under Section 50(1) of the Income Tax Act Cap. 201. On the First count he is charged with “Failing to Deliver Returns of Income as required by the Commissioner of Inland Revenue contrary to Section 50(1) and 96(1) of the Income Tax Act”. On the Second Count he is charged with “Failing to Deliver Assets and Liabilities required 50(1) and 96(1) of the Income Tax Act”.

As far as Count 2 is concerned, it is apparent that the Statement of Offence is incorrect since no one is required to deliver his “assets and liabilities’ to the Commissioner of Inland Revenue under Section 50(1) of the Income Tax Act. Unfortunately this appears to have been overlooked by all concerned. However, in view of the reasons that I shall give on another issue this does not matter. But it demonstrates the need for greater care to be taken by people who draft charges. It is not really the duty of a Magistrate to see that the charges properly framed. In any event because of the number of charges that come before a Magistrate he can hardly be expected to check all of them.

Be that as it may, the Prosecution did not adduce any oral evidence in this case. It said that it was relying on an affidavit of one Abdul Sattar sworn on 23<sup>rd</sup> day of February, 1983 and closed its case. This Affidavit was already in the

Court file when the trial commenced on the 25<sup>th</sup> April 1983. No submission was made on behalf of the accused at the end of the prosecution case. The Accused elected to remain silent and legal submissions were then made by Mr A Patel, the Defence Counsel. I have since wondered whether proper procedure was adopted by the Prosecution in adducing evidence in the manner that it did. Whilst the Defence Counsel did not raise any objection or make any submission in this regard, so that I have been deprived of any assistance that I may have had from both the Counsel, the issue is an important one and I would be failing in my duty if I did not consider and rule upon it.

The Accused in the instant case pleaded ‘Not Guilty’. Section 209 of the Criminal Procedure Code provides for the procedure to be followed when a plea of Not Guilty is entered. The relevant parts read:

***“209. If the Accused person does not admit the truth of the charge, the Court shall proceed to hear the witnesses for the prosecution and other evidence (if any).***

***The Accused person or his barrister and solicitor may put questions to each witness produced against him.***

.....”

***It has been said that in criminal cases:***

***“..... whenever there is a plea of not guilty, everything is in issue, and the prosecution has to prove the whole of their case, including the identity of the Accused, the nature of the act and the existence of any necessary knowledge or intent .....” R v Sims (1946) 1 All ER 667 at 701 per Lord Goddard CJ.***

In the present case no witness was called on behalf of the prosecution who could be cross-examined by the Defence. The Prosecution relied on the Affidavit referred to hereinbefore under the provisions of Section 50(1) of the Income Tax Act C.p 201, the material part of which reads:

***“50(1) ..... For the purpose of any proceedings taken under this Act the facts necessary to establish compliance on the part of the Commissioner with the provisions of this section as well as default thereunder shall be sufficiently proved in any court of law by the Affidavit of the Commissioner or any other responsible officer of the Department of Inland Revenue. Such Affidavit shall have attached thereto as an exhibit a copy or duplicate of the said letter or notice (underlining mine)”.***

It is worth noting at this stage that Section 50(1) is not a new provision in the Income Tax Act Cap. 201. Section 61(1) of the Income Tax Ordinance Cap. 176 and Section 60(i) of the Income Tax Ordinance 1964 (No. 34) had exactly the same provision.

As I understand it, Section 50(1) of the Income Tax Act is a procedural provision providing for the admissibility of an Affidavit before a Court when it comes to hear a case and deal with the evidence. Such an Affidavit, under normal circumstance would be inadmissible. It does not conflict with or exclude either expressly or by implication the obligatory provisions of Section 209 of the CPC when a plea of not guilty is entered. It merely makes the task of the prosecution witness from the Department of Inland Revenue somewhat easier in that, inter-alia, he does not have to bring all the records from the Department with him. The two sections must be read together and not in isolation in order to ascertain the intention of Section 50(1). Section 50(1) does not dispense with the necessity of calling a witness to give oral evidence. The Accused must 'hear' something from a witness in open Court so that he has some idea as to what the case against him is all about as required by Section 209 of the CPC. And it does not take away the right of an accused person or his barrister and solicitor from cross-examining such a witness. The Affidavit relied on by the Commissioner is not, and can not be regarded as a 'Statement' under Section 192 of the CPC. In arriving at my decision I have not overlooked the provision of Section 144 of the CPC. Perhaps the most important feature of a criminal trial in the Magistrate's Court in Fiji is its 'orality'. In my view the Affidavit relied on by the prosecution should have been produced by the witness and opportunity should have been available to the Defence to cross-examine him if it so wished. A case which is not directly on point but which gives some support to the view I have taken is Commissioner of Inland Revenue v West Walker (195L) NZLR 191 where the Court of Appeal held that Section 163 of the Land and Income Tax Act 1923 requiring 'every person' to furnish information in writing and produce necessary books or documents for income tax purposes did not abrogate a solicitor's privilege to decline to produce them without the authority of his client. It is the reasons given in West-Walker's case which is really important as some of them can apply with a equal force in interpreting Section 50(1) in the way that I have done.

Furthermore, it had been the practice in the past for a witness to be called to give oral evidence in prosecutions such as the present one. This is borne out by the case of Ram Kirpal Hira v R 13 FLR 176 where the Accused had been charged under Section 60(1) of the income Tax Ordinance 1964 (which was in the same terms as the present Sector – the Section under which the Accused is charged). At page 177 it is said, "Mr KcKean, a Senior Assessor, produced an Affidavit to prove the demand and failure, as is permissible under Section 60(1), exhibiting thereto a copy of the demand. He was cross-examined to the effect that .....". So why the departure in the procedure in this case? As the matter stands now although I have heard counsel for the Prosecution and counsel for the Accused make submission, I have not 'heard' any witness(es) and evidence on behalf of the prosecution as required by Section 209 and 215 of the CPC .

In the result, for the reasons stated I have come to the conclusion that because of non-compliance with the proper procedure in adducing evidence by the prosecution – and this non-compliance is of a fundamental nature – the charge against the Accused must be dismissed on these grounds.

As regards the submissions made by Counsel for the Defence, I must say that after having given full and careful consideration to them and perused the authorities referred to by him and also considered other cases on the issues not cited by him, I have come to the conclusion that his submissions do not have much merit. I am satisfied that the charges are not bad for duplicity. I am also not convinced by the submission that there is no evidence that the Commissioner made the demand and I reject this submission. As far as the submission that the charges “fail to disclose an offence” and that an “*essential ingredient is missing*” is concerned, I must say that the charges could have been better drafted. But in my view the words “to enable him to make an assessment as contained in his letter” is no an essential ingredient of the offence. Whilst it may have been better to include these words, it is obvious that the Defence has in no way been misled, prejudiced or embarrassed by their omission. In fact the Defence Counsel concede this. It was of course open to the Defence Counsel to ask for particulars and had the prosecution refused to supply the particulars, then it may have been another matter: *Vijay Singh v R* 13 FLR 27.

It follows from what I have said that the Accused is found not guilty and is acquitted on both Count 1 and Count 2.

**S ANAND**  
**RESIDENT MAGISTRATE**  
**6.5.83**