Michaelmas Term
[2017] UKPC 33
Privy Council Appeal No 0037 of 2016

JUDGMENT

Hurnam (Appellant) *v* The Attorney General and others (Respondents) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Mance
Lord Kerr
Lord Wilson
Lord Carnwath
Lord Hughes

JUDGMENT GIVEN ON

30 October 2017

Heard on 27 June 2017

Appellant

Dev Hurnam

(In person)

Respondent (The Attorney General)
Aidan Casey QC

(Instructed by Royds Withy King)

Amici Curiae
Aileen McColgan
Kirsten Sjøvoll
(Advocates to the Board)

THE FOLLOWING JUDGMENT OF THE BOARD WAS DRAFTED BY LORD WILSON:

1. Mr Hurnam, the appellant, appeals against the order of the Supreme Court of Mauritius (Domah and Teelock JJ) dated 24 February 2014, by which it set aside his motion dated 30 May 2011.

2. There were eight respondents to the appellant's motion dated 30 May 2011, namely the Attorney General, the State of Mauritius and six of the judges of its Supreme Court. According to the appellant himself, he has been bringing various proceedings against judges ever since 1995; but he has never been declared a vexatious litigant.

3. When granting permission for the appeal to proceed, the Board invited the Attorney General to appear, or be represented, at the hearing of it. The Attorney General duly instructed Mr Casey QC to appear before it; and at the hearing on 27 June 2017 he made valuable and conspicuously fair submissions to it. At the same time the Board indicated that it did not expect any of the other respondents to appear before it; and they did not do so.

4. The basis of the Supreme Court's decision to set aside the motion was that it had not been endorsed by an attorney and was therefore invalid; instead the appellant had signed it as an applicant in person.

5. There is no doubt that, before the Board, litigants are permitted to institute appeals in person and otherwise to appear in person. But appearances in person are rare; and the Board is well aware that some litigants in person, however self-confident, lack the ability to present their arguments to their best advantage. Thus it was that, having noted that the appellant had, as on his motion, signed the Notice of Appeal as a litigant in person, the Board, when granting permission, informed him by letter that, in case he were to find it helpful, it had located experienced London counsel who had offered to represent him free of charge. The appellant, however, rejected the offer and appeared in person at the hearing before the Board.

6. Shortly before the hearing, concerned that as a result of the appellant's rejection of counsel's offer, all the issues raised by the appeal, in particular the arguments in support of it, might not properly be presented, the Board appointed Ms McColgan and Ms Sjøvoll, of counsel, to appear as advocates to the Board pursuant to Rule 36(1) of the Judicial Committee (Appellate Jurisdiction) Rules 2009. At short notice they

produced extremely helpful written submissions, upon which Ms McColgan enlarged briefly at the hearing. The Board is indebted to them both.

7. The Board is constrained to say that the appellant's presentation of his case both in his Notice of Appeal with its 62-page annexe, in his 67-page case, in his case by way of reply and in his oral submissions at the hearing has been confused, repetitious and discursive; and it has strayed improperly from the issues raised by the appeal. The appellant, who over 40 years ago was called to the Bar by Lincoln's Inn, is, with all due respect to him, unwise to consider that, at any rate in relation to claims brought by himself, he is a better exponent than a dispassionate professional advocate. In the event, however, his decision to continue to represent himself before the Board has not prejudiced his appeal. For, as a result, in significant part, of the contribution of Ms McColgan and Ms Sjøvoll, the Board is satisfied that it is now able to determine the appeal correctly.

8. In 2003 the appellant, who, following his call to the Bar of England and Wales, had been called to the Bar of Mauritius, was convicted of conspiring to do an unlawful act, namely to hinder the police by fabricating a false alibi for one of his clients. He was sentenced to a term of imprisonment of six months. The Supreme Court upheld his appeal against the conviction but in 2007, by a judgment reported at [2007] 1 WLR 1582, the Board restored it; and the appellant became constrained to serve the term of imprisonment. In 2008 consequential disciplinary proceedings against him resulted in his being struck off the Roll of Law Practitioners.

9. In February 2011 the appellant filed in the Supreme Court a motion for an order for the re-opening of the criminal proceedings which had resulted in his conviction. No attorney endorsed his motion: the appellant signed it for himself and he sought leave to conduct his case in person.

10. By the motion filed by him, again as a litigant in person, in the present proceedings, namely that dated 30 May 2011, the appellant sought an order for the re-opening of the disciplinary proceedings which had resulted in his being struck off the Roll of Law Practitioners. At the first hearing of the motion, which took place on 20 June 2011, the court decided to adjourn it pending the decision of a five-judge court in relation to the motion which had been filed in February 2011, namely whether the appellant was entitled to institute it in the absence of endorsement of it by an attorney.

11. On 1 July 2011, by a judgment delivered by Balancy J on behalf of all five members of the court and reported as *Hurnam v The Director of Public Prosecutions and others* [2011] SCJ 219, the Supreme Court set aside the motion which the appellant had filed in February 2011. The court held that, under the Supreme Court Rules 2000 ("the 2000 Rules"), a motion, like a plaint with summons, had to be endorsed by an

attorney before it could validly be filed in the Supreme Court and that, although the court had a residual discretion in exceptional circumstances to allow a litigant to institute such proceedings in person, the appellant had failed to show such circumstances. The court held that, since the proceedings brought by the appellant had not properly been instituted, it had no need to proceed to consider a second issue, namely whether, presumably under section 12(a) of the Courts Act, to grant leave to the appellant to "conduct his case in person", ie to address the court on his own behalf. On 15 December 2011 the Board refused to grant the appellant leave to appeal against the order dated 1 July 2011; but its refusal would in no way preclude the Board today from holding, if it thought fit, that the decision of that date was wrong.

12. Meanwhile on 14 July 2011, in express response to the decision dated 1 July, an attorney, namely Maître Moutia, filed a "Notice of Appointment" in the proceedings now before the Board. By the notice, the attorney stated:

> "I am henceforth instructed to appear for Applicant in the above and he will not retain services of Counsel but will move for leave to appear in person … I have now certified the Motion paper, the Notice of Motion and the affidavit attached thereto as being true copies of all the originals."

13. On 13 January 2012, in the proceedings now before the Board, the Supreme Court heard argument on the preliminary issue referable to the validity of the appellant's motion. As his attorney had anticipated, the appellant presented his case in person. The official transcript of the proceedings in court that day seems to the Board to indicate another confusing presentation of his argument. Towards the end of it, however, the court helpfully sought to encapsulate it within four points, which the Board reorders and explains as follows.

14. The conclusion of the court on 1 July 2011 had been that the requirement for proceedings in the Supreme Court to be instituted through an attorney save in exceptional circumstances had been introduced by the 2000 Rules. The court had proceeded to observe that since 2000 the new requirement had not always been observed but that it should "henceforth" be applied with due rigour. The appellant's first argument was that the new requirement did not therefore apply to proceedings instituted prior to 1 July 2011.

15. His second argument was that, if the new requirement applied to his motion, the appointment of Me Moutia had validated it.

16. His third argument was that, if the attorney's appointment had not validated it, there were exceptional circumstances of which he would wish to give evidence, namely

that (in his own words) "no Attorney is willing to sign my documents because of the averments … against the Judge[s]".

17. His fourth argument was constructed upon a draft of new rules proposed to be made by the Chief Justice under section 198 of the Courts Act. The draft does not appear to have been before the court which had delivered judgment on 1 July 2011. The draft rules, to be entitled "Legal Fees and Costs Rules 2011" and intended to replace similarly entitled rules made in 2000, provided, in Rule 2, that specified fees for litigating in the Supreme Court should be paid "by the attorney of the party concerned or by the defending litigant as the case may be". The Board will make no further reference to draft Rule 2 because rules in accordance with the draft have apparently never been made.

18. Although it had heard the argument on 13 January 2012, the court delivered judgment on the preliminary issue only on 24 February 2014. Meanwhile, in August 2012, Me Moutia had died; and it is clear that, by one means or another, the court had become acquainted with that fact. It did not refer to his death in its judgment. But on the date of its delivery the senior of the two judges, namely Domah J (who, so the appellant says, retired from the Bench on that very day) delivered judgment in two other actions brought by the appellant, namely *Hurnam v Hurrangee* [2014] SCJ 66 and *Hurnam v Ramgoolam and another* [2014] SCJ 67; and in both those judgments Domah J noted that Me Moutia had died. Indeed his death was the basis of the judge's conclusions in those two actions. In the former Me Moutia had replaced another attorney who had endorsed the appellant's plaint with summons and in the latter he had himself endorsed it; following his death, however, the appellant had declined to appoint another attorney to replace him. Domah J set aside both actions on the basis that the attorney was "not a mere ignition key designed to merely kick-start the process from its cold position and, thereafter, slip into hibernation" (para 5 of the *Ramgoolam* case) and that the appellant's refusal, in the absence of exceptional circumstances, to appoint another attorney to replace Me Moutia rendered it unlawful for him to continue the actions.

19. The Board must however focus on the court's judgment of 24 February 2014 in the present proceedings. It comprised nine short paragraphs spread over one and a half pages. In effect it said no more than that the facts were identical to those in the action determined on 1 July 2011, namely that the appellant had signed the motion on his own behalf and that there were no exceptional circumstances which had justified his failure to have caused it to be endorsed by an attorney.

20. It follows that there was no reference in the judgment in the present proceedings to any of the four arguments which the court had identified at the hearing two years earlier. Irrespective of the validity of the arguments, the Board finds it impossible to defend the court's omission to refer to them. The Board must make allowance for the

long systemic delays which, despite massive efforts, continue to becalm the justice system on the island. Nevertheless the unexplained delay in this case, when coupled with the poverty of the judgment which ultimately eventuated, is unacceptable, even though (as will become clear) it cannot be said either to have vitiated the decision or to have prejudiced the appellant.

21. In all the appellant's various submissions to it, the Board discerns *five* main lines of argument. It does not, with respect to him, propose to address any of his other points in the light of its conclusion that they are either irrelevant or not within the grounds of appeal or otherwise hopelessly insubstantial.

22. *First*, the appellant makes a submission which he could not have made to the court below, namely that its earlier determination dated 1 July 2011 was wrong.

23. The court's determination dated 1 July 2011 was reached by reference to two main features of the 2000 Rules. The first is Rule 3(3) which provides:

> "Every plaint with summons shall be endorsed with the full name, office address and stamp of the plaintiff's attorney which shall be the elected domicile of the plaintiff."

The second is the omission from the 2000 Rules of any provision analogous to Rule 60 of the Rules of the Supreme Court 1903, which the 2000 Rules replaced. Rule 60 had provided:

> "Any party may make application to the Court …, praying leave to prosecute, or defend, a suit in his own proper person; and the Court … may, on sufficient cause shown …, make order that such party may sue, or defend, as the case may be, in such Court, in person, without the assistance of an attorney, subject to such conditions as the said Court … may think fit … to impose on such party."

The court concluded from the conjunction of Rule 3(3) with the omission of a provision analogous to the former Rule 60 that no action, whether brought by plaint with summons (under Rule 2(1) of the 2000 Rules) or by motion (under Rule 2(2) thereof), could normally be instituted otherwise than through an attorney. It added, however, that the court retained a residual discretion to allow departure in exceptional circumstances from that normal requirement.

24. The appellant contends that on 1 July 2011 the court placed the wrong construction on the omission of a provision analogous to the former Rule 60. The effect of the omission, so he contends, was to make it easier, not more difficult, for a litigant to institute an action otherwise than through an attorney. From 2000 onwards, so his argument proceeds, a litigant had a right to do so and no longer needed to seek permission to do so, still less to show sufficient cause in order to secure it. The appellant contends that his construction is supported by two rules. Rule 3 of the Legal Fees and Costs Rules 2000 provides:

> "There shall be paid into the Consolidated Fund, by the attorney of the party concerned or, where no attorney is employed, by the party, the fees specified in Part A of the Schedule …"

Rule 2 of the Supreme Court (Preparation of Briefs) Rules 2009 provides:

> "In any action entered before the Supreme Court …, the attorney of the party initiating the action shall be responsible for providing to the Court and to the attorney of any other party to the action and, in the case of any other party not legally represented, to the party himself, a duly indexed copy of all documents and records of proceedings contained in the Court file."

25. The difficulty for this part of the appellant's argument is that Rule 2 of the 2009 Rules envisages that defendants/respondents, to whom different considerations may apply, rather than plaintiffs/applicants, may be acting in person; and that Rule 3 of the 2000 (Fees) Rules is not inconsistent with the additional conclusion of the court on 1 July 2011 that there remained a residual discretion to permit the institution of an action otherwise than through an attorney. In order to escape this latter difficulty, the appellant suggests that the court had no right to infer any such residual discretion. But the appellant has himself referred the Board to the ancient decision of the Supreme Court in *Quesnel v Dorelle* (1867) MR 61 that in exceptional circumstances, namely when required so as not to defeat the ends of substantial justice nor to cause "irremediable injury" to a party, the island's procedural rules may not necessarily be enforced against him.

26. The appellant proceeds to contend that, even if the court's determination dated 1 July 2011 lawfully analysed the requirements of the institution of an action by plaint with summons, there was no ground for the extension of its reasoning to institution by motion. He points out, obviously, that Rule 3(3) of the 2000 Rules refers only to a plaint with summons. On the other hand, Rule 5(2) of the 2000 Rules provides that "any process" shall be drawn up and signed by the party's attorney; and, analogously, Rule 5(4) provides that any answer to the process may be addressed "to the attorney who has

caused the process to be issued". But the validity of the court's decision to extend its reasoning to motions is, in the Board's view, put beyond doubt by Rule 22, which provides that:

> "These rules shall apply to any proceedings initiated before the Court by way of motion …"

In *Piganiol v Smegh (Île Maurice) Ltee* [2014] UKPC 1, at para 16, the Board relied on Rule 22 to support a conclusion that the affidavit in support of a motion had to refer to the matters to which the rules required reference in any plaint with summons and its accompanying notice.

27. The Board therefore has no doubt but that the Supreme Court's determination dated 1 July 2011 was correct.

28. *Second*, on that basis, the appellant nevertheless asks the Board to construe that determination as being in his favour. He relies, as he did in the Supreme Court, on the passage in which the court observed that, on several occasions since the change in the rules in 2000, actions instituted by litigants in person had wrongly been allowed to proceed in the absence of exceptional circumstances; and in which it then added:

> "This is probably the result of an oversight but, in our view, the new regime … should henceforth be applied with due rigour."

The word "henceforth", says the appellant, shows that the new regime was not to be applied to actions instituted prior to the date of the judgment. But it would be contrary to principle for a court's interpretation of long-existing law not to be applied across the board from then onwards, irrespective of the date of an action's institution. Indeed, as Lord Mance observed in the course of the argument, the appellant's construction of what the court meant is inconsistent with its setting aside of the motion in the proceedings before it; and so the construction cannot stand.

29. *Third*, the appellant argues, as he did in the Supreme Court, that the notice signed by Me Moutia on 14 July 2011 validated the motion. It is particularly unfortunate that the Board should find itself unable to consider any treatment by the Supreme Court of this part of the appellant's argument. In principle two questions might arise. Can any late arrival of an attorney cure the original defect in the motion? And is it relevant that, since the death of Me Moutia, the appellant has taken no step to replace him with another attorney, in particular since the action has never reached the stage of being *en état* (in shape to be heard)? The Board considers, however, that it has no need to answer those questions. For there is an over-arching difficulty about Me Moutia's notice: it is

that he did no more than to certify that three documents referable to the motion were true copies of the originals. The purpose of such a certificate is not obvious to the Board. In any event, however, what Me Moutia did not do, and may well have been careful not to do, was to associate himself with the motion by anything equivalent to the endorsement required by Rule 3(3) of the 2000 Rules.

30. *Fourth*, the appellant argues, as he did in the Supreme Court, that there are exceptional circumstances of which he would wish to give evidence and which should lead the court to declare the action to be valid notwithstanding any institution of it otherwise than through an attorney. He continues to suggest that the circumstances relate to his inability to locate an attorney prepared to associate himself with the motion. The suggestion again raises an issue which the Board does not need to resolve. Why, if it be the case, would no attorney be prepared to associate himself with the motion? The most likely answer may lie in para 20(a) of the Code of Ethics for Attorneys, which requires an attorney to withdraw from a retainer "where the client insists upon his presenting a claim or defence that he cannot conscientiously advance". Were such to be the answer, the issue would become: can circumstances which consist of the appellant's wish to bring an action which no attorney could conscientiously advance amount to such circumstances as should lead the court, exceptionally, to permit its institution otherwise than through an attorney? The issue, however, does not need to be resolved because, as the appellant recognises, he has never filed evidence relating to these - or other - allegedly exceptional circumstances. There were six months between issue of the judgment on 1 July 2011 and the hearing in the present proceedings: this was the period in which, most obviously, the appellant could have filed evidence of exceptional circumstances. No doubt, however, he might even have sought leave to do so during the two years which then elapsed prior to judgment. It is too late for him to complain to the Board that he has a good case in relation to exceptional circumstances; for he has not taken the opportunity to lay the ground for the argument in any evidence.

31. *Fifth* and finally, the appellant argues that the setting aside of his motion for want of its institution through an attorney infringed his constitutional rights, in particular his right under section 10(8) of the Constitution for his case to be "given a fair hearing". He did not argue before the Supreme Court that an order to set it aside would infringe his constitutional rights; and it is both with reluctance and with concern about the lack of local analysis of it, but in the light of some encouragement on the part of the advocates to the Board, that it briefly addresses the argument. There are good grounds for considering that, although alien to the common law tradition, a requirement for actions to be instituted (and indeed thereafter conducted) through an attorney serves the ends of justice. At a conference in Astana in October 2016 Dr Kilian, of the University of Cologne, delivered a paper entitled "Representation in Court Proceedings - Comparative Aspects and Empirical Findings" http://europeanlawyersfoundation.eu/wp-content/uploads/2016/10/Kilian_Representation-In-Courts.pdf. He explained that "jurisdictions built on the Roman Law System consider a mandatory legal representation in court as a prerequisite for effective court proceedings, the individual's success in litigation and thus ultimately, for justice"; that "court proceedings can be slowed down

and stalled by parties who are not familiar with procedural rules"; and, as one of his examples highly relevant for present purposes, that in actions brought in a French Regional Court the parties must generally be represented by an advocate. Indeed (the Board adds) they are also generally required to be represented before the Conseil d'Etat and the requirement does not infringe their right to a fair trial: see the decision of the European Court of Human Rights in *GL and SL v France* Reports of Judgments and Decisions 2003-III, p 325. Dr Kilian concluded as follows:

> "Although mandatory representation in court proceedings is restricting one's self-determination, positive effects of representation by lawyers as proven by empirical research outweigh those restrictions.
>
> Empirical research from across the globe shows that representation in court …
>
> - has a positive impact on case outcomes
> - guarantees a better quality of adjuration
> - allows the courts to operate more effectively by speeding up case disposal …"

32. The decision under appeal relates only to the institution of proceedings; and Rule 3(3) of the 2000 Rules, on which it was principally based, addresses only that initial stage in the life of an action. In its judgment dated 1 July 2011 the Supreme Court declined to consider whether, if his motion had been validly instituted through an attorney, the appellant might have secured leave to address the court on his own behalf. So the scope of the decision under appeal is limited; and its effect is substantially softened by the court's recognition, following its decision on 1 July 2011, of a power to depart in exceptional circumstances from the general requirement of institution through an attorney. Obviously, however, that requirement does not apply to defendants/respondents; and the Supreme Court had no need to consider whether any step which they might wish to take in an action is required to be taken through an attorney. If the law does not make any such requirement of them, then, submits the appellant, there is no equality of arms between plaintiffs/applicants on the one hand and defendants/respondents on the other and thus, again, no "fair hearing". The Board has no need to address this hypothetical submission but observes that, in relation to the need for the discipline of an attorney, there may well be a valid distinction between the position of the party who opts to bring a claim before the court and that of the party who has no option but to address it.

33. So the Board dismisses the appeal. The Supreme Court was right to set aside the appellant's motion and correctly saw no need to address its merits, including whether it amounted to an abuse of the process of the court for the purposes of Rule 15(3)(b) of the 2000 Rules.