# FOWZIE AND OTHERS
# v
# VEHICLES LANKA (PVT) LTD.

SUPREME COURT
BANDARANAYAKE, J.
DISSANAYAKE, J.
BALAPATABENDI, J.
SC SPL LA 286/2007
CA 944/2006
JANUARY 8, 28, 2008
FEBRUARY 5, 6, 2008

*Applicability of SC Rules 1990 – Rule 8 (3) – Rule 8 (5) – Rule 40 – Tendering the relevant number of notices along with the application for service on respondents in time – Variation or extension of time permitted with permission of Court – Does non compliance with Rule 8 (3) result in the dismissal of the application?*

The respondent contended that the petitioners had not complied with Rule 8 (3) of the SC Rules 1990 and sought the dismissal of the application, in limine.

**Held**

(1) A careful examination of Rule 8 (3) clearly indicates that the purpose of it is to ensure that the respondents have received the notices of the petitioners' application lodged in this Court and in the event that the

said notice not been received by the respondents, to make provision for the Registrar to dispatch fresh notice by registered notice.

(2) The SC Rules 9 of 1990 makes provision for the petitioner to file an application for a variation or an extension of time, if and when the need arises (Rule 40).

(3) There is non compliance with Rule 8 (9) of SC Rule 1990 and the petitioners also had not taken steps to make an application (Rule 40) for variation or an extension of time in tendering notices as required by Rule 8 (3).

**APPLICATION** for Special leave to appeal from a judgment of the Court of Appeal on a preliminary objection raised.

**Cases referred to:**

(1) *Samantha Niroshana* v *Senarath Abeyruwan* – SC Spl LA 145/2006 – SCM 2.8.07.
(2) *Kiriwante and another* v *Navaratne and another* – 1990 - 2 Sri LR 393
(3) *Rasheed Ali* v *Mohamed Ali and others* – 1981 – 2 Sri LR 29
(4) *Soong CheFoo* v *H. K. de Silva* – SC Spl LA 184/2003 – SCM 25. 11. 03 K.M.
(5) *Gangodagedara* v *Mercantile Credit Ltd* – 1988 – 2 Sri LR 253
(6) *Jayawardena, Someswaran and Manthri & Company* v *Jinadasa* – 1994 – 3 Sri LR 185
(7) *Samarawickrema* v *Attorney General* – 1983 2 Sri LR 162
(8) *Shanmugavadivu* v *Kulatilaka* – 2003 – 1 Sri LR
(9) *Annamalie Chettiar* v *Manjula Karunasinghe and another* – SC 69/2003 – SCM 6.6.05
(10) *Wickramatilaka* v *Marikkar* – (1895) 2 NLR 9
(11) *Re Chenwel* – 8 Ch D 506
(12) *Sadlar* v *Whiteman*
(13) *Reg* v *Skeen* – (1910) 1 KB 868 at 892
(14) *K. Reaindran* v *K. Velusomasundaram* – SC Spl LA 298/99 – SCM 7.2.00
(15) *N. A. Premadasa* v *People's Bank* – SC Spl LA 212/99 – SCM 24.2.00
(16) *Hameed* v *Majibdeen and and others* – SC Spl LA 38/01 – SCM 23.7.01
(17) *R. M. Samarasinghe* v *R. M. D. Rathnayake and others* – SC Spl LA 51/2001 – SCM 27.7.01
(18) *C. A. Haroon* v *S. K. Muzoor and another* – SC Spl LA 158/ 2006 – SCM 24.11.2006

*Sanjay Rajaratnam* DSG for respondents-petitioners
*Faiz Musthapha* PC with *Thushani Machado* for petitioner-respondent

*Cur.adv.vult*

July 8, 2008

**SHIRANI BANDARANAYAKE, J.**

This is an application for Special Leave to Appeal from the judgment of the Court of Appeal date 10. 09. 2007. By that judgment the Court of Appeal issued a *writ of certiorari* quashing Regulation 2(3) and Regulation (b) made by the 1st respondent-petitioner and published in Gazette No. 1446/31 dated 25.05.2006 prayed by the petitioner-respondent (hereinafter referred to as the respondent). The respondents-petitioners (hereinafter referred to as petitioners) had thereafter preferred an application for Special Leave to Appeal to this Court.

When that application of the petitioners for Special Leave to Appeal came up for support for the consideration of the grant of Special Leave, learned president's Counsel for the respondent took up a preliminary objection that the petitioners had not complied with the requirement in Rules 8(3) and 40 of the Supreme Court Rules 1990 and therefore submitted that the application for Special Leave to appeal should be dismissed in *limine*.

The facts relevant to the preliminary objection raised by the learned President's Counsel for the respondent, as presented by him, *albeit* brief, are as follows:

The petitioners had filed the application for Special Leave to Appeal on 22.10.2007, but the notices were not tendered on that date. The respondent had received a copy of a motion along with the petition and affidavit filed and in the said motion it was stated that the registered Attorney for the petitioners had sought three (3) dates for the learned Deputy Solicitor General to support the application for Special Leave. However, according to the learned President's Counsel for the respondent, there was no notice sent to the respondent from or through the Registry of the Supreme Court.

When the connected application No.1492/2006 came up for hearing before the Court of Appeal on 30.10.2007, the State Counsel appearing for the respondents in that application had moved that the hearing of that case in the Court of Appeal be deferred in view of the pendency of this application before the Supreme Court. Thereafter, the registered Attorney-at-Law for the respondent had perused the Record and had observed that the petitioners had failed to tender notices for service on the respondent along with the application for Special Leave as required by Rule 8(3) of the Supreme Court Rules of 1990.

On 30.10.2007, the Attorney-at-Law for the respondent filed a motion and moved this Court to reject the application for Special Leave, for the reason that the petitioners had not complied with Rule 8(3) of the Supreme Court Rules of 1990. Thereafter on 31.10.2007 notices and the annexures were tendered by the petitioners at the Registry without a motion.

Accordingly learned President's Counsel for the respondent contended that the petitioners had not complied with Rule 8(3) of the Supreme Court Rules 1990 and relying on the decision of this Court in *Samantha Niroshana* v *Senarath Abeyruwan*[1] submitted that the petitioners cannot now invoke the Courts discretion in terms of Rule 40 to obtain an extension of time to comply with Rule 8(3) of the Supreme Court Rules 1990. Accordingly respondent the learned President's Counsel for the respondent contended that the said preliminary objection be upheld and the application for Special Leave to Appeal be dismissed *in limine*.

Learned Deputy Solicitor General for the petitioners conceded that the notices were tendered to the Registry of the Supreme Court, 7 (seven) working days after the Special Leave to Appeal application was filed. Learned Deputy Solicitor General further conceded that the decision in which the learned President's Counsel for the respondent was relying on, viz, *Samantha Niroshana* v *Senarath Abeyruwan (supra)* was correct in deciding to uphold the preliminary objection of the respondent as the petitioners in that case had not acted reasonably and efficiently upon discovery of the defect in their

application for Special Leave to Appeal and the respondents had not received notice of the Special Leave to Appeal application. The position taken by the learned Deputy Solicitor General for the petitioners therefore was that, in the circumstances of the present case, the petitioners have discharged the requirements of Rule 8(3) and thereby had fulfilled the objective of the said Rule 8(3), even though such execution may not have been in strict compliance of Rule 8(3) of the Supreme Court Rules of 1990. Learned Deputy Solicitor General submitted that he is relying on the decisions of *Kiriwanthe and another* v *Navaratne and another*[2] and *Rasheed Ali* v *Mohamed Ali and others*[3].

Having stated the submissions of the learned President's Counsel for the respondent and the learned Deputy Solicitor General for the petitioners, let me now turn to consider the factual position of the objection raised by the learned President's Counsel for the respondent with reference to the provisions contained in Rules 8(3) and 40 of the Supreme Court Rules of 1990 and the decided cases.

As the Record of the Special Leave to Appeal application reveals, on 22.10.2007, the petitioners had lodged an application in the Supreme Court and sought for Special Leave to Appeal from the judgment of the Court of Appeal dated 10. 09. 2007. A motion had been filed by the Attorney-at-Law for the petitioners, which stated thus:

> "a) My appointment as Attorney-at-Law for the 1st – 3rd respondents-petitioners above named,
>
> b) Petition together with the affidavit of the 2nd respondent-petitioner and documents marked A1 – A11 and move that Your Lordships' Court be pleased to accept the same.
>
> .....
>
> Copy of this motion together with copies of petition, affidavit and documents mentioned above were sent to the petitioner-respondent by registered post and the registered postal article receipt bearing No. 5109 date

22.10.2007 is annexed hereto.

Colombo on this 22nd day of October 2007.

Attorney-at-Law for the 1st to 3rd respondents-petitioners."

On 30.10.2007, Attorney-at-Law for the respondent filed the proxy on behalf of the respondent and also filed a motion moving Court to reject the Special Leave to Appeal application as the petitioners had not complied with Rule 8(3) of the Supreme Court Rules 1990.

Thereafter on 01.11.2007 petitioners had tendered the notices and the annexures without a motion and on the same date, the Registry of the Supreme Court had dispatched the said notices along with the documents by registered post to the respondent.

Having considered the factual position pertaining to the preliminary objection, let me now turn to examine the provisions pertaining to Rule 8(3) of the Supreme Court 1990. Rule 8, which is contained in Part I of the Supreme Court Rules 1990, deals with Special Leave to Appeal and is in the following terms:

> "The petitioner shall tender with his application such number of notices as is required for service on the respondents and himself together with such number of copies of the documents referred to in sub-rule (1) of this rule as is required for service on the respondents. The petitioner shall enter in such notices the names and addresses of the parties, and the name, address for service and telephone number of his instructing Attorney-at-Law, if any, and the name, address and telephone number, if any, of the Attorney-at-Law, if any, who has been retained to appear for him at the hearing of the application, and shall tender the required number of stamped addressed envelopes for the service of notice on the respondents by registered post. The petitioner shall forthwith notify the Registrar of any change in such particulars."

An examination of Rule 8(3) clearly specifies the necessity to tender the relevant number of notices along with the application for service on the respondents. The said Rule, not only specifies the need to tender notices but also describes the steps that have to be taken in tendering such notices. It is also to be borne in mind that in terms of Rule 8(3), tendering of such number of notices for service has to be done, at the time the petitioner hands over his application and it appears that the said requirement is mandatory. The purpose of Rule 8(3) is to ensure that, the respondents are notified that a Special Leave to Appeal application is lodged in the Supreme Court. The Rule clearly stipulates that such notice should be given along with the filing of the application. The need for serving notice on the respondents, is further emphasized in Rule 8(5), where it is stated that,

> "The petitioner shall, not less than two weeks and not more than three weeks after the application has been lodged, attend at the Registry in order to verify that such notice has not been returned undelivered. If such notice has been returned undelivered, the petitioner shall furnish the correct address for the service of notice on such respondent. The Registrar shall thereupon dispatch a fresh notice by registered post and may in addition dispatch another notice with or without copies of the annexure, by ordinary post...."

A careful examination of this Rule quite clearly indicates that the purpose of it is to ensure that the respondents have received the notices of petitioners application lodged in this Court and in the event that the said notice not been received by the respondents, to make provision for the Registrar to dispatch fresh notice by registered post.

Referring to Rule 8(3) of the Supreme Court Rules of 1990, learned Deputy Solicitor General for the petitioners, submitted that the objective of Rule 8(3) is to ensure that the respondent is given notice by way of registered post, prior to the Special Leave to Appeal application is supported. Learned Deputy Solicitor General also referred to the decision in *Soong Che Foo* v *H.K. de Silva*[4]

where S. N. Silva, C. J. referring to Rule 8(3) had observed that,

> "The rules are so designed that the respondents would have adequate notice of the application. A non-compliance with rules may even result in the matter being considered in the absence of the respondents."

Learned Deputy Solicitor General had also referred to the observation made by Bandaranayake, J. in *Samantha Niroshana* v *Senarath Abeyruwan (supra)*, where it was stated that,

> ". . . the purpose of the Supreme Court Rules is to ensure that all necessary parties are properly notified in order to give a hearing to all parties and Rule 8 specifically deals with this objective."

Learned Deputy Solicitor General for the petitioners accordingly contended that considering the circumstances in *Samantha Niroshana (supra)*, this Court was correct in upholding the preliminary objection of the respondent as the petitioners in that case had not acted reasonably and efficiently upon discovering the defect in their application for Special Leave to Appeal and the respondent had received no notice of the Special Leave to Appeal application. The position taken up by the Deputy Solicitor General for the petitioners therefore was that, considering the circumstances of the present case, the petitioners have fulfilled the objective and discharged the requirements of Rule 8(3), *although it may not have been in strict compliance of Rule 8(3) of the Supreme Court Rules 1990.*

Accordingly, learned Deputy Solicitor General contended that in the event an applicant, 'fails to strictly, but manages to substantiately comply with a Rule, and in so doing causes no prejudice to the respondent, this Court could examine the circumstances surrounding such default and adopt a reasonable view of the matter, in order to prevent an automatic dismissal of the application.' In support of his contention learned Deputy Solicitor General referred to the judgment to Mark Fernando, J. in *Kiriwanthe and another* v *Navaratne and another (supra)*, and also to the

decisions of *Rasheed Ali* v *Mohamed Ali and others (supra), Gangodagedara* v *Mercantile Credit Ltd.*(5) *Jayawickrama, Someswaram and Manthri and Company v Jinadasa*(6) and *Samarawickrama v Attorney General.*(7)

It is to be noted that, all the aforementioned decisions had considered the effect of non-compliance of a Rule or Rules of the Supreme Court Rules of 1978 and not of the Supreme Court Rules of 1990. Also, as admitted by the learned Deputy Solicitor General, in most of the decisions, the provisions of the Rules were regarded as imperative in nature. For instance, in *Gangodagedara* v *Mercantile Credit Ltd., (supra)* Wijetunga, J. had held that,

> " . . . I am of the view that the provisions of Rules 49 are imperative in nature and call for strict compliance. Failure to comply with such a mandatory requirement is fatal to the application."

Moreover in *Rasheed Ali (supra)* Soza, J. had held that,

> ". . . the provisions of Rule 46 are imperative and should be complied with by a party who seeks to invoke the revisionary powers of this Court."

*Kiriwanthe* v *Navaratne (supra)* decided in1990 considered the need to comply with the requirements of Supreme Court Rules of 1978. The rationale of its decision, as clearly examined and stated in *Samantha Niroshana* v *Senarath Abeyruwan (supra)*, was that in certain instances, taking into consideration the surrounding circumstances, the Court could exercise its discretion either to excuse the non-compliance or to impose a sanction. Notwithstanding the above position, it is to be borne in mind that in the decision of *Kiriwanthe* v *Navaratne (supra)* this Court had not suggested automatic exercise of its discretion to excuse the non-compliance of Supreme Court Rules. The procedure that has to be followed in considering the exercise of discretion was clearly examined by Mark Fernando, J. where it was stated that,

> . . . I am content to hold that the requirements of Rule 46 must be complied with, but that strict or absolute

compliance is not essential, it is sufficient if there is compliance which is 'substantial' – this being judged in the light of the object and purpose of the Rule. It is not to be mechanically applied, as in the case now before us; the Court should first have determined where the default had been satisfactorily explained, or cured subsequently without unreasonable delay, and then have exercised a judicial discretion either to excuse the non-compliance, or to impose a sanction . . ."

It is thus apparent that the Supreme Court did not hold that the discretion of the Court would always be exercised to excuse a non-compliance of the Supreme Court Rules. What the Court stated was that instead of mechanically applying its discretion, the Court would have to consider certain aspects with regard to the non-compliance in question. These steps included the following:-

a) the Court should first have determined whether the default had been satisfactorily explained and/or;

b) the default had been cured subsequently without unreasonable delay.

If the said requirements were fulfilled, the Court could exercise its discretion either to excuse the non-compliance or to impose a sanction.

Thus it is obvious that it would be necessary to evaluate the provisions of the relevant Rule/Rules before considering the effect of any non-compliance. For this purpose it is essential that the relevant Rule/Rules be carefully examined and it is on that basis that I had stated in *Shanmugavadivu* v *Kulathilake*[8] and *Samantha Niroshana* v *Senarath Abeyruwan (supra)* that *Kiriwanthe's* case was decided on 18.07.1990 on the basis of the Supreme Court Rules of 1978 and on 13.11.1990 the amended Supreme Court Rules of 1990 had come into effect.

The Supreme Court Rules of 1990 applicable to those cases had indicated the objectivity of exercising judicial discretion, and such discretion had to be exercised in terms of those provisions.

This position was further strengthened in the decision of *Annamalie Chettier* v *Mangala Karunasinghe and another*,[9] where the preliminary objection on non-compliance with Rules 30(1) and 30(6) of the Supreme Court Rules of 1990 was sustained by this Court. In these circumstances, it is evident that the issue in question has to be considered only in terms of Supreme Court Rules of 1990.

Rule 8(3) of the Supreme Court Rules of 1990, as stated earlier, clearly states that,

> *"The petitioner shall tender with his application such number of notices as is required for service on the respondents and himself. . ."*

As referred to earlier, the petitioner has filed the petition, affidavit and documents marked A1 – A11 on 22.10.2007. The motion does not refer to the notices being tendered to the Registry. Instead it stated thus:

> " Copy of this motion together with copies of petition, affidavit and documents mentioned above were sent to the petitioner-respondent by registered post and the registered postal article receipt bearing No. 5109 dated 22.10.2007 is annexed hereto."

It is therefore apparent that the petitioners had not tendered with the application the required number of notices to the Registry in terms of Rule 8(3) of the Supreme Court Rules 1990, but had sent copies of the motion, petition, affidavit and the documents by registered post to the respondent. As stated earlier, on 31.10.2007, the Attorney-at-Law for the respondent filed a motion moving to reject the petitioners' application and on 01.11.2007, the petitioners had tendered notices and annexure without a motion.

Learned Deputy Solicitor General for the petitioners relied on the decisions based on Supreme Court Rules of 1978, and even in terms of the provisions under the said Supreme Court Rules of 1978 the said Rules were imperative in nature and needed strict compliance and further Court required at least an explanation regarding the petitioners' failure to comply with the said Rules.

It is to be noted that the Supreme Court Rules of 1990, makes provision for a petitioner to file an application for a variation or an extension of time, if and when the need arises. In fact Rule 40 of the Supreme Court Rules of 1990 refers to Rule 8(3) and states that,

> " An application for a variation or an extension of time, in respect of the following matters shall not be entertained by the Registrar, but shall be submitted by him to a single judge, nominated by the Chief Justice, in chambers:
>
> a) tendering notices as required by rules 8(3) and 25(2); . . ."

It is therefore quite clear that in terms of Rule 8(3) the petitioners should have tendered notices on the day they filed the petition, viz., 22.10.2007 to the Registry for the Registrar to act in terms of Rule 8(1) to give notice forthwith to each of the respondents, by registered post. In the normal course of events, the petitioners should have complied with Rule 8(5) to verify by Attorney at the Registry that notice has not been returned undelivered and this has to be done not less than two weeks and not more than three weeks after the application had been lodged. In this application however, it is to be noted that, on 31. 10. 2007, the respondent had filed a motion moving to reject the application of the petitioners as they have not complied with Rule 8(3) of the Supreme Court Rules 1990. By that time, not only there was non-compliance with Rule 8(3) of the Supreme Court Rules of 1990, but the petitioners also had not taken steps to make an application in terms of Rule 40 for variation or an extension of time in tendering notices as required by Rule 8(3).

It is not disputed that the petitioners had not taken any of the aforementioned steps and it is also apparent that there is clear non-compliance with Rules 8(3) and 40 of the Supreme Court Rules of 1990.

As I had stated in *Samantha Niroshana* v *Senarath Abeyruwan (supra)* I am quite mindful of the fact that mere technicalities should

not be thrown in the way of the administration of justice and accordingly I am in respectful agreement with the observations made by Bonser, C.J., in *Wickramathilaka* v *Marikar*[10] referring to Jessel M.R., in *Re Chenwell*.[11]

> "It is not the duty of a Judge to throw technical difficulties in the way of the administration of Justice, but when he sees that he is prevented receiving material or available evidence merely by reason of a technical objection, he ought to remove the technical objection out of the way upon proper terms as to costs and otherwise."

It has also to be noted that the purpose and the objective of Rule 8 of the Supreme Court Rules of 1990, is to ensure that all parties are properly notified in order to give a hearing to all parties. The procedure laid down in Rule 8 of the Supreme Court Rules, 1990 clearly stipulates the process in which action be taken by the Registrar from the time an application is lodged at the Registry of the Supreme Court. It is in order to follow the said procedure that it is imperative for a petitioner to comply with Rule 8 of the Supreme Court Rules 1990 and in the event that there is a need for a variation or an extension of time the petitioner could make an application in terms of Rule 40 of the Supreme Court Rules of 1990. Accordingly as I had states in *Annamalai Chettiar Muthappan Chettiar (supra)* and *Samantha Niroshana* v *Senarath Abeyruwan (supra)*, an objection raised on the basis of non-compliance with a mandatory Rule such as Rule 8 of the Supreme Court Rules of 1990 cannot be considered as a mere technical objection.

It is also to be noted that, there was no dispute over the language used in Rules 8(3) and 40 of the Supreme Court Rules of 1990 and that there was no ambiguity of its construction. In such instances it is clear that when there is only one construction that could be given to a particular provision it would be necessary to enforce such construction. Referring to instances, where clear and unequivocal language had been used Farwell, L.J. in *Sadler* v *Whiteman*[12] referring to Lord Campbell in *Reg.* v *Skeen*[13] at 892 stated that,

"Where by the use of clear and unequivocal language capable only of one construction, anything is enacted by the Legislature, we must enforce it, although, in our opinion, it may be absurd or mischievous."

Accordingly where there has been non-compliance with a mandatory Rule such as Rule 8(3), serious consideration should be given for such non-compliance as that kind of non-compliance by a party would lead to serious erosion of well established Court procedure in our Courts, maintain throughout several decades.

Having said that, the question that has to be answered is whether the non-compliance with Rule 8(3) would result in the dismissal of the application. This question was considered in *Samantha Niroshan* v *Senarath Abeyruwan (supra)*, where reference was made to a long line of cases of this Court, *K. Reaindran* v *K. Velusomasunderam,*(14) *N.A. Premadasa* v *The People's Bank,*(15) *Hameed* v *Majibdeen and others,*(16) *K.M. Samarasinghe* v *R.M.D. Rathnayake and others,*(17) *Soong Che Foo* v *Harosh K. de Silva and others (supra), C.A. Haroon* v *S.K. Muzoor and others*(18) that had decided that non-compliance with Rule 8(3) would result in the dismissal of the application.

In the circumstances, for the reasons aforementioned, I uphold the preliminary objection raised by the learned President's Counsel for the respondent and dismiss the petitioners application for Special Leave to appeal, for non-compliance with the Rules of the Supreme Court, 1990.

I make no order as to costs.

**DISSANAYAKE, J.** - I agree.

**BALAPATABENDI, J.** - I agree.

*Preliminary objection upheld.*

*Application dismissed.*