IN THE MATTER OF AN APPLICATION BY ANTONIOS MOUSKOS FOR AN ORDER OF CERTIORARI

and

IN THE MATTER OF ACTION NO. 696/69 IN THE DISTRICT COURT OF LARNACA BETWEEN:
ANTONIOS MOUSKOS,

Plaintiff,

and

LARNACA BEACH HOUSE LTD., AND ANOTHER,

Defendants.

(*Civil Application No.* 3/71).

Certiorari—Allegation of breach of rules of natural justice—Oral evidence supplementing affidavit evidence—Admissibility—And oral evidence by witness who had not sworn affidavit—Whether receivable—Sections 48 and 2 (definition of "civil proceeding") of the Courts of Justice Law, 1960 (Law 14 of 1960). 5

Certiorari—Judge—Affidavit evidence by.

Certiorari—Natural justice—Right to be heard—Does include, in a proper case, the right to legal representation—Articles 12.5(c) and 30.3(d) of the Constitution—Settlement (consent judgment) declared in applicant's presence and that of his 10 *counsel and recorded by Court—Applicant alleging that he was no longer represented by his counsel and that settlement was declared without his consent—Delay in applying—No complaint by applicant about any misconduct of either his counsel or of the Judges concerned made to the Bar Council* 15 *or to the Supreme Court—Applicant's version not believed—Not a proper case in which an order of certiorari may be granted.*

Evidence—Affidavit evidence—Oral evidence—Certiorari proceedings. 20

Natural justice—Right to be heard.

The applicant in this case sought an order of *certiorari* to

quash the judgment given, by consent, by the District Court of Larnaca, in civil action 696/69, on March 31, 1971.

The subject-matter of the said action was a claim of the applicant (as plaintiff) for breach of contract regarding the payment of commission and was being tried by the President of the District Court of Larnaca and by a District Judge.

The consent judgment in question was given after the action was partly heard and in the presence of both the parties and their counsel.

Applicant alleged that there has taken place an infringement of the rule of natural justice which required a fair hearing of the particular civil action, at which he would have been represented by counsel of his own choice (as ordained, too, by Article 30 of the Constitution); and he complained*, in this respect, that on the date when the said judgment by consent was pronounced he had not been given enough time to find another advocate of his own choice, after he had disagreed, regarding the further conduct of the case, with counsel who was till then appearing for him. Applicant further contended that he never agreed to the settlement, on the basis of which the judgment by consent was given, or—in the alternative—that he never consented freely to such settlement, and that he was never given to understand by the trial court that he was free not to consent to such settlement.

Defendant 2 in the action and the District Judge concerned swore affidavits** denying the allegations of the applicant and the then advocate for the applicant stated that he adopted the contents of these affidavits.

In addition to the affidavit evidence the Court received oral evidence; and before dealing with the merits of the application it dealt with the procedural issue as to whether or not oral evidence was receivable on an application for *certiorari*.

Held, (I) on the procedural issue:

(1) That this Court has adopted the course of receiving oral evidence because it felt that it was necessary, in the interests of justice, to allow oral evidence to be heard in the present case, in view of its rather special circumstances; that the

* See his affidavit at pp. 107 - 110 *post*.

** See these affidavits at pp. 110 - 111 and 111 - 112 *post*, respectively.

main grievance of the applicant was that, allegedly, he was not allowed by the Larnaca District Court to have a full trial of an action, which he had brought against the respondents, but was, instead, forced to have it settled, and had this Court not allowed him to give oral evidence, by way of supplementing 5 his affidavit, his grievance, even mistaken, that he cannot get a fair hearing before the Courts would have been enhanced. (pp. 114 - 115 *post*).

(2) That as regards the three witnesses who were called by the applicant without having previously sworn affidavits for the 10 purpose of the present proceedings, their evidence was *prima facie* receivable in view of the wide powers which are possessed by, *inter alia,* this Court, under section 48 of the Courts of Justice Law, 1960 (Law 14/60) concerning the hearing of evidence in a civil proceeding and the present application is a 15 civil proceeding in the sense of the relevant definition in section 2 of Law 14/60.

(3) That as the issue as to whether or not oral evidence was receivable has not been argued before this Court so as to enable it to decide one way or the other, the course which has 20 adopted in these proceedings is not to be regarded as creating a precedent.

Held, (II) on the merits:

(1) That this Court does not believe at all the applicant's version that, then, a settlement was declared in his presence 25 and was recorded by two Judges in open Court, in the presence of two counsel, while the applicant was all the time protesting that he was not accepting such settlement; that it is possible that the applicant was thinking, according to his own assessment of the case, that the settlement was not as beneficial 30 an outcome of his action as he had thought that he was entitled to, and that, therefore, he felt upset to a certain degree, but this Court does not believe his version that, in the end, he did not agree, even though after some hesitation, to the proposed settlement. 35

(2) That it is, indeed, quite significant that though the said settlement was declared on March 31, 1971, the application for leave to apply for certiorari was made only on May 12, 1971: that if the applicant had left the Larnaca District Court on March 31, 1971, full of indignation because, as he alleges, 40 a settlement was declared notwithstanding his vociferous and

categorical refusal to accept it, he would have been expected to have come to the Supreme Court much earlier, as soon as he would have had time to instruct counsel for this purpose.

(3) That moreover, the applicant did not complain either to the Supreme Court or to the Bar Council about what, allegedly, happened on March 31, 1971; that the applicant did not complain about any misconduct of either his counsel or of the Judges concerned; and that it would, in the opinion of this Court, have been very wrong to declare and record a settlement in open Court, fully knowing, all the time, that one of the parties, the applicant, was no longer represented by the advocate who was declaring the settlement, and that such party wanted the case to be heard and determined and was refusing to consent to a settlement, as the applicant's version, which is not believed.

(4) That though an order of certiorari can be made when there has occurred a breach of the rules of natural justice; and that though the right to be heard does include in a proper case the right to legal representation, this Court has, in the light of all the foregoing, reached the conclusion that this is not a proper case in which to grant an order of certiorari for the purpose of removing to this Court and quashing the *sub judice* judgment by consent; and that, accordingly, this application will be dismissed.

Application dismissed.

Cases referred to:

R. v. Llanidloes Licensing Justices, Ex parte Davies [1957] 2 All E.R. 610;

Rex v. Northumberland Compensation Appeal Tribunal. Ex parte Shaw [1952] 1 K.B. 338 at pp. 352, 353;

R. v. Southampton Justices, ex parte Green [1975] 2 All E.R. 1073 at pp. 1078-1079;

R. v. Wandsworth J.J., Ex parte Read; [1942] 1 All E.R. 56 at p. 57;

Tourapis v. Pelides, Liquidator for the Liquidation of the Tseri Co-operative Society (1967) 1 C.L.R. 5;

General Council of Medical Education and Registration of the United Kingdom v. Spackman [1943] 2 All E.R. 337;

Regina v. Woking Justices, Ex parte Gossage [1973] 2 W.L.R. 529.

Application.

Application for an order of certiorari to remove into the Supreme Court and quash the judgment given, by consent, by the District Court of Larnaca, (Georghiou P.D.C. and Orphanides, D.J.) in civil action No. 696/69, on the 31st March, 1971. 5

M. Christophides, for the applicant.

G. Nicolaides, for the respondent.

Ph. Clerides, advocate, appears in person, as a party affected by the proceedings. 10

Cur. adv. vult.

The following judgment was delivered by:-

TRIANTAFYLLIDES, P.: In this case the applicant seeks an order of certiorari to quash the judgment given, by consent, by the District Court of Larnaca, in civil action 696/69, on March 31, 1971. 15

The relevant court record reads as follows:

"*31.3.1971.*

For plaintiff present, Mr. Ph. Clerides.

For defendants Mr. G. Nicolaides. 20

Defendant 2 present, in her personal capacity and as director of defendant 1.

AT THIS STAGE both counsel state that since last evening, they have discussed and reached a final settlement whereby the defendants will submit to judgment in the sum of £550.- with £100.- against costs, payable as follows:- 25

(a) The costs shall be paid within five days. Out of these, £50.- will be paid directly to Mr. Phivos Clerides in full settlement of his costs including a sum of £50.- which he had received from plaintiff. The balance of £50.- shall be paid to Mr. Achilles, the original advocate of the plaintiff. 30

(b) The sum of £550.- in two equal monthly instalments the first payable on the 30.4.1971 and the last on the 31.5.1971. 35

(c) Default of payment of any one instalment, will make the whole amount due and payable forthwith.

COURT: In the result, we enter judgment in favour of the plaintiff and against both defendants for £550.- with £100.- against costs, payable as follows:-

(a) £100.- within five days from to-day;
(b) £275.- on the 30th April, 1971;
(c) the balance of £275.- on the 31st May, 1971.

Provided that if defendants fail to pay on or before the 30.4.1971 the first instalment of £225.- then the whole amount of this judgment shall be due and payable and liable to execution on the 1.5.1971.

31st March, 1971

President, District Court.
(Sgd) G.M. Georghiou

I, J. Syrimi, Court Stenographer, 1st Grade, attached to the District Court of Larnaca, hereby certify that this is a complete and correct typewritten transcript of the shorthand notes taken by me to the best of my skill and ability in Act. No. 696/69.

29th April, 1971.

(Sgd) J. Syrimi,
Court Stenographer, 1st Grade".

The reason for which the applicant seeks an order of certiorari to quash the above judgment by consent is that there has taken place, allegedly, an infringement of the rule of natural justice which required a fair hearing of the particular civil action, at which he would have been represented by counsel of his own choice (as ordained, too, by Article 30 of the Constitution); the applicant complains, in this respect, that on the date when judgment by consent was pronounced in the action in question he had not been given enough time to find another advocate of his own choice, after he had disagreed, regarding the further conduct of the case, with counsel who was till then appearing for him; the applicant contends, further, that he never agreed to the settlement, on the basis of which the judg-

ment by consent was given, or—in the alternative—that he never consented freely to such settlement, and that he was never given to understand by the trial court that he was free not to consent to such settlement.

Another ground which was initially raised in support of the present application, that is that one of the two Judges of the Full District Court in Larnaca which gave the judgment by consent (namely the, at the time, President of the District Court of Larnaca) was related to a shareholder of a company which was defendant 1 in the action, was eventually abandoned and, therefore, it need not be dealt with in this judgment.

When this application was filed it was served, at the instance of the applicant, on the Attorney-General of the Republic and on the said President of the District Court of Larnaca, as being parties to the proceedings, but at the commencement of the hearing of the application counsel for the applicant stated that he did not propose to continue the proceedings in relation to them. As, however, in view of the nature of the case, very serious allegations were being made against both the two Judges involved in the pronouncement of judgment by consent in the action concerned, it was directed by the Court that both of them should be given notice of this application, and, furthermore, counsel who appeared for the applicant and declared the settlement of the said action on his behalf was allowed to take part in the proceedings for the protection of his own interests.

In support of the present application the applicant has sworn an affidavit dated May 12, 1971, and he has produced the whole record of the hearing of action No. 696/69, including the declaration of the settlement of such action on March 31, 1971. The subject-matter of the action was a claim of the applicant (as plaintiff) for breach of contract regarding the payment of commission.

As it appears from the said affidavit, the applicant was initially represented in the action by Mr. G. Achilles, an advocate from Larnaca, who had to withdraw from the proceedings for reasons of health, and then the applicant instructed Mr. Ph. Clerides, an advocate from Nicosia. The defendants in the action (and now the respondents to

this application) have been represented all along by Mr. G. Nicolaides, an advocate from Larnaca.

The action was being tried by the then President of the District Court of Larnaca, Mr. G. Georghiou, and by the then District Judge, and now Senior District Judge, Mr. T. Orphanides.

On March 30, 1971, there were heard three witnesses and the hearing was to be continued on the following day, when, eventually, the settlement, which led to the making of the disputed order by consent, was declared.

Paragraphs 4 to 10 of the applicant's aforementioned affidavit give as follows his version of what has happened on March 31, 1971:

"4. Τὴν 31.3.71 ἅμα τῇ ἐνάρξει τῆς διαδικασίας ὁ Πρόεδρος τοῦ Δικαστηρίου ἠρώτησε τοὺς δικηγόρους ἐὰν κατέληξαν εἰς οἱανδήποτε διευθέτησιν τῆς ὑποθέσεως. Ὁ δικηγόρος τῶν ἐναγομένων ἤρχισεν ὁμιλῶν περί τινος συμβιβασμοῦ τῆς ὑποθέσεως ὁ δὲ δικηγόρος μου ἤρχισε διαπραγματευόμενος.

5. Ἀκούων τὸν Δικηγόρον νὰ διαπραγματεύεται συμβιβασμὸν ἐπενέβην καὶ διεμαρτυρήθην πρὸς τὸν δικηγόρον μου καὶ εἶχον ἔντονον μετ' αὐτοῦ στιχομυθίαν εἰς ἐπήκοον τοῦ Δικαστηρίου τὸ δὲ Δικαστήριον μοῦ παρέσχε λόγῳ τούτου τὴν εὐκαιρίαν νὰ συζητήσω ἐπὶ δεκάλεπτον μετὰ τοῦ Δικηγόρου μου τὸ ὅλον θέμα κατ' ἰδίαν ἔξωθι τοῦ Δικαστηρίου.

6. Ἐδήλωσα ρητῶς εἰς τὸν Δικηγόρον μου ὅτι δὲν ἐπεθύμουν συμβιβασμόν. Ὁ δικηγόρος μου μὲ ἐπληροφόρησε ὅτι ἐὰν δὲν ἀποδεχόμην τὸν προτεινόμενον συμβιβασμὸν θὰ ἀπεσύρετο ἀπὸ τὴν ὑπόθεσιν, ἐγὼ δὲ συνέχισα ἐπιμένων μὴ ἀποδεχόμενος συμβιβασμόν. Εἶπον εἰς μίαν στιγμὴν εἰς τὸν Δικηγόρον μου ἐνώπιον τρίτων ὅτι θὰ ἦτο λιποτάκτης ἐὰν μὲ ἐγκατέλειπεν.

7. Ἐπανελθόντες εἰς τὴν αἴθουσαν τοῦ Δικαστηρίου καὶ ἀρξαμένης τῆς συνεδρίας, ὁ Δικηγόρος μου ἐγερθεὶς ἤρχισεν ὁμιλῶν ἀγγλιστί. Διεμαρτυρήθην, διότι μὴ γνωρίζων τὴν ἀγγλικὴν γλῶσσαν, δὲν ἀντελαμβανόμην τὶ ἔλεγε. Ὑποδείξει τοῦ Προέδρου τοῦ Δικαστηρίου ὡμίλησεν εἰς τὴν ἑλληνικὴν καὶ εἶπεν ὅτι παραιτεῖται ἀπὸ Δικηγόρος μου διότι δὲν ἠκολούθουν τὰς συμβουλάς του.

8. Ἀκολούθως ὁ Πρόεδρος τοῦ Δικαστηρίου μὲ ἠρώτησε: 'τὶ θὰ κάμης τώρα κ. Μοῦσκο;' Ἀπάντησα καὶ εἶπα. "Ἀφοῦ ὁ Δικηγόρος μου παρητήθη καὶ δὲν ἔχω δικηγόρον παρακαλῶ νὰ ἀναβληθῇ ἡ ὑπόθεσίς μου διὰ νὰ σκεφθῶ τὶ θὰ κάμω καὶ νὰ βάλω Δικηγόρον'· ὁ κ. Πρόεδρος μοῦ ἐτόνισεν ὅτι δὲν ἠδύνατο νὰ ἀναβάλη τὴν ὑπόθεσιν. Παρεκάλεσα ἐν συνεχείᾳ νὰ μοῦ δώσουν τοὐλάχιστον μιᾶς ὥρας ἀναβολὴν διὰ νὰ ἐξεύρω δικηγόρον καὶ μοῦ ἐδόθη ἀναβολὴ 30΄ τῆς ὥρας.

Ἔτρεξα ἀναζητῶν δικηγόρον πλὴν ὅμως δὲν ἠδυνήθην νὰ εὕρω Δικηγόρον τῆς ἀρεσκείας μου καὶ ἐπέστρεψα εἰς τὸ Δικαστήριον ἄπρακτος. Ἀρξαμένης τῆς συνεδρίας ὁ κ. Πρόεδρος μὲ ἠρώτησε τὶ ἔκαμα καὶ τοῦ ἀπήντησα ὅτι μὲ τὰ 30΄ τὰ ὁποῖα μοῦ ἔδωσε δὲν ἠδυνήθην νὰ κάμω τίποτε. Ἐπανέλαβον τὸ αἴτημά μου δι' ἀναβολὴν διὰ νὰ δυνηθῶ νὰ διορίσω δικηγόρον πλὴν ὅμως δὲν ἐγένετο δεκτόν. Ἔκαμα τὴν σκέψιν νὰ ἀποχωρήσω ἀπὸ τὸ Δικαστήριον ἀλλὰ ἐσκέφθην ὅτι θὰ ἦτο προσβολὴ *πρὸς τὸ Δικαστήριον καὶ ἔτσι παρέμεινα.*

9. Δικασταὶ καὶ Δικηγόροι ἤρχισαν ἀκολούθως συνομιλοῦντες ὁτὲ μὲν ἀγγλιστί, ὁτὲ δὲ ἑλληνιστί. Ἀντελήφθην νὰ ὁμιλοῦν διὰ τὰ δικηγορικὰ τῶν κ.κ. Κληρίδη καὶ κ. Ἀχίλλη.

10. Ἐν τέλει εἰς τὸ Δικαστήριον, παρουσία καὶ τοῦ κ. Φοίβου Κληρίδη, ὁ ὁποῖος δὲν εἶχεν εἰσέτι ἀπέλθει τῆς Αἰθούσης, ἐδηλώθη ὁ συμβιβασμὸς ὁ ὁποῖος ἐπισυνάπτεται ὡς τεκμήριον 1, ἄνευ τῆς συγκαταθέσεώς μου καὶ χωρὶς νὰ ἔχω συναινέσει εἰς τὸν τοιοῦτον συμβιβασμόν. Μὲ ἀπογοήτευσιν καὶ μὲ πικρίαν εἶπον εἰς τοὺς ἐντίμους Δικαστὰς ὅτι θεωρῶ τοῦτο ἀδικίαν καὶ ὅτι δὲν τὸ δέχομαι, ἐξελθὼν δὲ εὐθὺς ἀμέσως εἰς τὸ προαύλιον τοῦ Δικαστηρίου διεμαρτυρόμην μετ' ἀγανακτήσεως λέγων ἐνώπιον τρίτων 'ἐκάμαν ὅ,τι ἐθέλασι, ἐν νὰ κάμω ἔφεσιν'."

("4. On 31.3.71, when the proceedings commenced, the President of the Court asked counsel if they had reached a settlement of the case. Counsel for the defendants started talking about a settlement of the case, and my counsel began negotiating.

5. When I heard counsel negotiating about a settlement I intervened and protested to my counsel, and I had a heated exchange with him in the presence of the Court, which, as a result, afforded me an opportunity to discuss for ten minutes with my counsel the whole matter privately, outside the Court.

6. I stated expressly to my counsel that I did not desire a settlement. My counsel informed me that if I were not to accept the proposed settlement he would withdraw from the case, but I continued to insist that I would not accept a settlement. At some stage I told my counsel, in the presence of other persons, that if he left me he would be a deserter.

7. When we returned to the court room and the proceedings were resumed, my counsel stood up and began talking in English; I protested because, not knowing the English language, I could not understand what he was saying. On the suggestion of the President of the Court he spoke in Greek and said that he was ceasing to act as my counsel because I was not following his advice.

8. Then the President of the Court asked me: 'What are you going to do now Mr. Mouskos'. I said in reply: 'Since my counsel withdrew and I have no counsel I ask for an adjournment of my case in order to think about what I shall do and instruct counsel'; the President stressed to me that he could not adjourn the case. I then requested to be granted at least an adjournment for one hour in order to find a lawyer, and an adjournment for 30 minutes was granted to me.

I rushed in search of a lawyer but I was unable to find one of my choice and I returned to the Court emptyhanded. When the proceedings were resumed the President asked me what I had done and I replied that within the 30 minutes which he had given me I did not manage to do anything. I repeated my application for adjournment in order to be enabled to instruct

counsel, but it was not granted. I contemplated leaving the court room, but I thought that this would be an affront to the Court, and so I remained there.

9. Then the Judges and counsel began talking, sometimes in English, sometimes in Greek. I realized that they were talking about the remuneration of Mr. Clerides and Mr. Achilles. 5

10. Finally in Court, in the presence of Mr. Phoebus Clerides, who had not yet left the court room, the settlement which is attached hereto as exhibit 1 was declared, without my consent and without my having agreed to such settlement. With disappointment and bitterness I told the Honourable Judges that I regarded it as an injustice and that I did not accept it, and having immediately gone out, in the court yard, I was protesting with anger, saying, in front of others, 'they did what they wanted, I will file an appeal.' "). 10 15 20

Respondent Loulla Marcellou, who was defendant 2 in action No. 696/69, swore an affidavit for the purposes of the present proceedings, on January 20, 1972; the material parts of it are paragraphs 3 to 6 which read as follows:- 25

"3. Κατὰ τὴν 31.3.71 μετὰ τὴν δοθεῖσαν ἀναβολὴν ἥτις ἦτο διὰ 45 λεπτὰ δὲν ἐζητήθη ἄλλη ἀναβολὴ ὑπὸ τοῦ ἐνάγοντος, τοὐναντίον ὁ ἐνάγων ἐδήλωσε ὅτι δέχεται τὸν συμβιβασμόν.

4. Τελικῶς ὁ συμβιβασμὸς αὐτὸς κατεγράφη τῇ ὑπαγορεύσει τοῦ Δικαστηρίου, ἐδηλώθη δὲ Ἑλληνιστὶ ὑπὸ τοῦ δικηγόρου τοῦ ἐνάγοντος κ. Φοίβου Κληρίδη, ὅστις ἐνήργει ὡς δικηγόρος του καὶ τοῦ κ. Γ. Νικολαΐδη διὰ τοὺς ἐναγομένους, οὐδενὸς ἐνισταμένου. 30

5. Ὁ ἐνάγων οὐδόλως ἀνέφερε ὅτι δὲν δέχεται τὸν εἰρημένον συμβιβασμόν. 35

6. Ὁ ἐνάγων ἁπλῶς ἔλεγε ὅτι ἔκλεισε ὁ συμβιβασμὸς ὅτι ἀδικήθηκε ἀπὸ τὸν συμβιβασμὸν ἀλλὰ δὲν πειράζει. Ὡς πρὸς τὸ σημεῖον αὐτὸ καὶ ἐγὼ ἤμην τῆς γνώμης ὅτι ὁ γενόμενος συμβιβασμὸς δὲν συνέφερε εἰς ἡμᾶς 40

τοὺς ἐναγομένους, ἐὰν δὲ δὲν ἦτο ζήτημα ἀρχῆς δὲν θὰ εἶχα δυσκολίαν νὰ ἐκφράσω τὴν ἄποψιν ὅσον ἀφορᾶ ἐμέ, ὅπως ἀκυρωθῇ".

("3. On 31.3.71, after an adjournment was granted, which was for 45 minutes, no other adjournment was requested by the plaintiff; on the contrary the plaintiff declared that he accepted the settlement.

4. Finally this settlement was recorded, having been dictated by the Court, and it was declared in Greek by counsel for the plaintiff, Mr. Phoebus Clerides, who was acting as his counsel, and by Mr. G. Nicolaides on behalf of the defendants, without objection on the part of anyone.

5. The plaintiff did not state at all that he did not accept the said settlement.

6. The plaintiff was only saying, when the settlement had been reached, that the settlement was to his prejudice, but that it did not matter. Regarding this point, I was, also, of the view that the settlement was not beneficial for us, the defendants, and had this not been a matter of principle I would have no difficulty to express the view that, in so far as I am concerned, it should be set aside".).

Also, on February 26, 1972, Judge T. Orphanides swore an affidavit—after he had been served with notice of these proceedings—which reads as follows:-

" Ὁ ὑποφαινόμενος Τάκης Ὀρφανίδης, δικαστής, νῦν ἐκ Λάρνακος, ὁρκίζομαι καὶ λέγω τὰ ἑξῆς:

1. Εἶμαι ὁ Ἐπαρχιακὸς Δικαστὴς Λάρνακος ὁ ὁποῖος παρεκάθησα μετὰ τοῦ ἐντίμου προέδρου τῶν Δικαστηρίων Λάρνακος - Ἀμμοχώστου ἐν Λάρνακι κατὰ τὰς ἀκροάσεις τῆς ἀγωγῆς τοῦ Ε.Δ. Λάρνακος ὑπ' ἀρ. 696/69.

2. Κατὰ τὸ τελικὸν στάδιον τῆς ἀκροάσεως τῆς εἰρημένης ἀγωγῆς καὶ κατόπιν διαλείμματος ταύτης ἐπὶ χρονικόν τι διάστημα παρουσιάσθησαν εἰς τὸ Δικαστήριον ὁ ἐνάγων Ἀντώνιος Μοῦσκος μετὰ τοῦ δικηγόρου του κ. Φοίβου Κληρίδη καθὼς ἐπίσης καὶ οἱ ἐναγόμενοι μετὰ τοῦ δικηγόρου των ὁπότε καὶ ἐδηλώθη καὶ κατεγράφη ὁ συμβιβασμὸς ὁ παρουσιαζόμενος εἰς τὰ πρακτι-

κὰ τῆς ὡς ἄνω ἀγωγῆς, ἀφοῦ τὸ Δικαστήριον ἐβεβαιώθη παρὰ τοῦ ἐνάγοντος καὶ τῆς 2ας ἐναγομένης ὅτι ὁ συμβιβασμὸς αὐτὸς ἐτύγχανε τῆς ἐγκρίσεως των.

3. Οὐδόλως ἀνταποκρίνεται εἰς τὴν πραγματικότητα ὅτι ὁ ἐνάγων ἀνέφερε ὅ,τιδήποτε περὶ μὴ ἀποδοχῆς τοῦ εἰρημένου συμβιβασμοῦ". 5

("I the undersigned Takis Orphanides, a Judge now of Larnaca, swear and say as follows:-

1. I am the Larnaca District Judge who sat with the Honourable President of the Larnaca - Famagusta Courts in Larnaca for the hearing of action No. 696/69 before the Larnaca District Court. 10

2. At the final stage of the hearing of the said action, and after a break for a certain period of time, there appeared in Court the plaintiff, Antonios Mouskos, with his counsel, Mr. Phoebus Clerides, as well as the defendants with their counsel, and thereupon the settlement appearing in the file of the said action was declared and recorded, after the Court had been assured by the plaintiff and by defendant 2 that such settlement had their approval. 15 20

3. It does not at all correspond to the truth that the plaintiff stated anything about not accepting the said settlement".).

In my opinion Judge Orphanides was entitled, in view of the particular circumstances of the present case, to swear the above affidavit (see, *inter alia,* the Guide to Crown Office Practice by Griffits (1947), p. 83, and *R. v. Llanidloes Licensing Justices, Ex parte Davies,* [1957] 2 All E.R. 610). 25 30

Mr. Ph. Clerides stated in Court, during the hearing of this case before me, that he adopted the contents of the affidavits of Mrs. Marcellou and of Judge Orphanides, and that he was ready to give evidence on oath, if so required by me; I did not deem it fit, however, to make a direction to that effect. 35

During the hearing of the present application counsel for the applicant called his client as a witness, as well as three other witnesses, in order, as he has put it, to corro-

borate parts of the evidence of the applicant; also, counsel for the respondents called respondent 2, Mrs. Marcellou, as a witness.

Before allowing the said witnesses to be called I made the following Ruling: "Any oral evidence to be adduced in these proceedings is received subject to the Court deciding at the end whether or not, and to what extent, if any, such evidence is receivable".

Regarding the admission of evidence by affidavit in relation to an application for certiorari the following have been stated in *Rex v. Northumberland Compensation Appeal Tribunal. Ex parte Shaw,* [1952] 1 K.B. 338, by Denning L.J., as he then was (at pp. 352, 353):-

> "The next question which arises is whether affidavit evidence is admissible on an application for certiorari. When certiorari is granted on the ground of want of jurisdiction, or bias, or fraud, affidavit evidence is not only admissible, but it is, as a rule, necessary. When it is granted on the ground of error of law on the face of the record, affidavit evidence is not, as a rule, admissible, for the simple reason that the error must appear on the record itself: see *Rex v. Nat Bell Liquors Ld.*[1] Affidavits were, however, always admissible to show that the record was incomplete, as, for instance, that a conviction omitted the evidence of one of the witnesses (see Chitty's Practice, Vol. 2, at p. 222, note (d)), or did not set out the fact that the justices had refused to hear a competent witness for the defence (see *Rex v. Anon*[2]), whereupon the court would either order the record to be completed, or it might quash the conviction at once".

Lord Denning M.R. reiterated his above view in *R. v. Southampton Justices, ex parte Green,* [1975] 2 All E.R. 1073, where he said (at pp. 1078 - 1079):-

> "Finally, the question arose whether it was open to this court to make an order of certiorari. It was suggested that there was no error of law here on the face

(1) [1922] A.C. 123, 156.
(2) (1816) 2 Chit. 137.

of the record. The error only appears from the affidavits which have been produced to this court. Are they admissible to show the error? I think they are admissible on the ground that they go to show that the justices went outside their jurisdiction. In *R. v. Northumberland Compensation Appeal Tribunal, ex parte Shaw*[1], we considered whether affidavit evidence was admissible, I said[2]:- 5

'When certiorari is granted on the ground of want of jurisdiction, or bias, or fraud, affidavit evidence is not only admissible, but it is, as a rule, necessary'. 10

This case comes within the category of 'want of jurisdiction'."

In Halsbury's Laws of England, 4th ed., vol. 11, p. 818, para. 1559, there is to be found the following passage:- 15

"Where certiorari is sought on the ground of error of law on the face of the record, the court will not admit any extraneous evidence: the error must be apparent from the record itself. Where certiorari is sought on the ground of absence or excess of jurisdiction, bias by interest, fraud or breach of natural justice, extraneous evidence of these matters will be admissible, and indeed necessary, if they are not apparent on the face of the record". 20

At the hearing of the present application no authority was cited for or against the course of receiving oral evidence when grounds such as those relied on in support of this application are involved; nor was there any objection raised against the reception of oral evidence; thus, the issue as to whether or not oral evidence was receivable on an application for certiorari such as the present one has not been argued before me so as to enable me to decide it one way or the other; therefore, the course which I have adopted in these proceedings is not to be regarded as creating a precedent. 25 30 35

I have adopted such course because I felt that it was necessary, in the interests of justice, to allow oral evidence

(1) [1952] 1 K.B. 338.
(2) [1952] 1 K.B. at 352.

to be heard in the present case, in view of its rather special circumstances; I had before me an applicant whose main grievance was that, allegedly, he was not allowed by the Larnaca District Court to have a full trial of an action, which he had brought against the respondents, but was, instead, forced to have it settled, and I am of the view that had I not allowed him to give oral evidence, by way of supplementing his affidavit, his grievance, even if mistaken, that he cannot get a fair hearing before the courts would have been enhanced.

In any event, the applicant and respondent 2, Mrs. Marcellou, could have been ordered to attend the hearing of the present application for cross-examination, under rule 1 of Order 39 of the Civil Procedure Rules, and if one looks at the record of their evidence it becomes abundantly clear that what has happened, through their having been called as witnesses, is, in substance, much the same; each one of them referred to his, or her, already filed affidavit and adopted its contents, on oath once again, and was, then, cross-examined by the other side.

As regards the three witnesses who were called by the applicant without having previously sworn affidavits for the purposes of the present proceedings, namely his wife Christothea Mouskou, his son Christodoulos Mouskos and Mouskis HadjiMatheou, I am of the view that their evidence was *prima facie* receivable in view of the wide powers which are possessed by, *inter alia*, this Court, under section 48 of the Courts of Justice Law, 1960 (Law 14/60), concerning the hearing of evidence in a civil proceeding; and the present application is a civil proceeding in the sense of the relevant definition in section 2 of Law 14/60.

Before leaving this procedural aspect of the case I should point out that I have noticed in the report of *R. v. Wandsworth JJ., Ex parte Read*, [1942] 1 All E.R. 56, at p. 57, that in that case the court, in dealing with an application for certiorari, relied on a statement, made by counsel who was appearing for the magistrates concerned, to the effect that they did not dispute the applicant's contention that they had made an error, even though they had not said so in any affidavit filed by them; it does appear, therefore, that a court, in the exercise of the supervisory

jurisdiction of certiorari, may take into account, for the purpose of administering justice, everything that has been established before it.

I shall deal, next, with the merits of the present case:

It is well settled that an order of certiorari can be made when there has occurred a breach of the rules of natural justice; this view has been adopted by this Court in, *inter alia*, *Tourapis v. Pelides, Liquidator for the Liquidation of the Tseri Co-Operative Society,* (1967) 1 C.L.R. 5.

It is useful, also, to refer, in this respect, to some relevant case-law in England:

In the case of the *Wandsworth, JJ.*, supra, it was held that an order of certiorari quashing a conviction should be made because the facts showed that there had been a denial of natural justice.

In the case of the *General Council of Medical Education and Registration of the United Kingdom v. Spackman,* [1943] 2 All E.R. 337, it was held by the House of Lords, affirming a decision of the Court of Appeal (which had upheld as correct a dissenting opinion of Singleton J. in the Kings Bench Division); that a refusal to hear fresh evidence had resulted in the non-holding of a due inquiry, with the result that there had occurred a breach of the rules of natural justice and that an order of certiorari should be granted.

A breach of the rules of natural justice was treated as a ground for granting certiorari in *Regina v. Woking Justices, Ex parte Gossage,* [1973] 2 W.L.R. 529, even though in that case it was not established in the end that there had in fact taken place such a breach.

The basic rules of natural justice are "the right to be heard" (*audi alteram partem*) and that "no man shall be a judge in his own cause" (*nemo iudex in re sua*)—(see Marshall on Natural Justice (1959), p. 5, and Jackson on Natural Justice (1973), p. 1).

In the present instance we are concerned only with the first of the above two rules, to the extent to which it coincides with the right to a fair hearing before a court of law;

and this is a right which is, also, expressly safeguarded by Article 30 of our Constitution. Indeed, as pointed out by Jackson, *supra* (at p. 37) "that the rules of natural justice apply to proceedings in a court of law, for example, is 5 hardly open to question".

The right to be heard does include, in a proper case, the right to legal representation (see Jackson, *supra*, at pp. 16 et seq.); and this view is echoed in our Constitution, Articles 12.5 (c) and 30.3 (d) of which provide about the 10 right to be represented by counsel of a party's own choice.

For the purpose of deciding whether or not there exists, in the light of the foregoing, adequate grounds for making an order of certiorari in the present case I have to reach a conclusion as regards what has exactly happened on 15 March 31, 1971, in the District Court of Larnaca, when there was given the complained of judgment by consent.

In the process of doing so I am, of course, entitled to take into account the contents of all the affidavits which were filed in the present proceedings.

20 As on the basis of such affidavits only, and in the light of the relevant court record, I would not be prepared to hold that the applicant has substantiated his complaints in a manner entitling him to the applied for by him order of certiorari, I have decided, *ex abundanti cautela* and in an 25 effort to afford him every possible opportunity of fully presenting his case, to take into account too, to the extent to which this might work out in his favour and not against him, any relevant parts of the oral evidence that has been adduced.

30 Having looked at the material before me in the above described manner, I am of the view that there was, initially, some disagreement, in the morning of March 31, 1971, between the applicant and his counsel, Mr. Ph. Clerides, about the further conduct of the action in question and, 35 in particular, as to whether or not to settle it on certain terms; as a result the applicant—like many litigants who, not being legally trained, feel mistakenly that they can evaluate better than counsel of their own choice the prospects of their succeeding in particular court proceedings 40 —asked for, and was granted, an adjournment in order to go and find other counsel to represent him; but, he failed

to do so; eventually, after a half-hearted attempt to secure a further adjournment, which was refused in the exercise of the trial court's discretionary powers, the applicant did allow Mr. Clerides to continue appearing for him.

I do not believe at all the applicant's version that, then, a settlement was declared in his presence and was recorded by two Judges in open Court, in the presence of two counsel, while the applicant was all the time protesting that he was not accepting such settlement. It is possible that the applicant was thinking, according to his own assessment of the case, that the settlement was not as beneficial an outcome of his action as he had thought that he was entitled to, and that, therefore, he felt upset to a certain degree, but I do not believe that, in the end, he did not agree, even though after some hesitation, to the proposed settlement.

It is, indeed, quite significant that though the said settlement was declared on March 31, 1971, the application for leave to apply for certiorari was made only on May 12, 1971; if the applicant had left the Larnaca District Court on March 31, 1971, full of indignation because, as he alleges, a settlement was declared notwithstanding his vociferous and categorical refusal to accept it, I would have expected him to have come to the Supreme Court much earlier, as soon as he would have had time to instruct counsel for this purpose.

Moreover, the applicant did not complain either to the Supreme Court or to the Bar Council about what, allegedly, happened on March 31, 1971. It was stated by his counsel before me that the applicant did not report Mr. Ph. Clerides to the Bar Council because of certain legal advice which he had been given. I do not know what that advice was, but the fact remains that the applicant did not complain about any misconduct of either his counsel or of the Judges concerned; and it would, in my opinion, have been very wrong to declare and record a settlement in open Court, fully knowing, all the time, that one of the parties, the applicant, was no longer represented by the advocate who was declaring the settlement, and that such party wanted the case to be heard and determined and was refusing to consent to a settlement, as the applicant's version, which I do not believe, is.

In the light of all the foregoing I have reached the conclusion that this is not a proper case in which to grant an order of certiorari for the purpose of removing to this Court and quashing the *sub judice* judgment by consent. 5 Consequently, this application is dismissed.

I have decided, however, not to make any order as to costs against the applicant, because I do not want him to feel penalized for having invited this Court to examine what took place in the Larnaca District Court on March 10 31, 1971.

Application dismissed.
No order as to costs.