

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0008 OF 1995S

IN CHAMBERS

BEFORE THE HON MR JUSTICE IAN THOMPSON  
MONDAY THE 20TH DAY OF FEBRUARY 1995 AT 2.15PM

BETWEEN

FIJI ELECTRICITY AUTHORITY

APPELLANT

-and-

PRAVEEN PRAKASH PALANI  
FIJI ELECTRICITY AUTHORITY EXECUTIVE  
OFFICERS ASSOCIATION

RESPONDENTS

Mr R.A. Smith for the Appellant  
Mr M.S. Sahu Khan for the Respondents

DECISION  
(Chamber Application)

The respondents obtained leave in the High Court under O.53r.3 to apply for judicial review. The appellant is seeking leave to appeal against the order granting that leave. Leave is required to appeal against an interlocutory order. In my view the "application test" explained in White v Brunton [1984] Q.B. 270 is the test to be applied to determine whether an order is final or interlocutory. An order is a final order only if the application as a result of which it is made is one where whatever order might have been made would necessarily have brought the proceedings to a conclusion. When that test is applied, an order granting leave to apply for judicial review is very obviously an interlocutory order. In this case, even if the "decision test" were applied, the order would be an interlocutory order as, leave to apply for judicial review being granted, it did not bring the proceedings to an end.

The judicial review desired by the respondents was by way of an order of certiorari to quash a decision of the Board of the appellant by which it had suspended the first respondent from his

employment by the appellant, a declaration that that decision was ultra vires, null and void and also unreasonable, capricious and arbitrary and an order prohibiting continuation of the suspension.

The respondents filed in support of their application an affidavit sworn by the first respondent. In it he stated the circumstances of his suspension from his employment as the appellant's Management Information Systems Manager. One of the allegations made in it was, in effect, that the Board of the appellant acted *mala fide* in deciding to suspend him; he said that that was because two of its members bore him personal animosity.

Mr Smith submitted that the only issues raised were ones of private rights and that there were no issues of public law. Consequently, he said, the first respondent should have proceeded by writ of summons and leave to apply for judicial review ought not to have been granted. He referred to the English Court of Appeal decision in R. v East Berkshire Authority, Ex parte Walsh [1985] 1 Q.B. 152 and the series of decisions of English courts which have followed it. In that case Walsh was an employee of a statutory authority and had been dismissed. The Court of Appeal observed at page 179 that for a remedy to be available under Order 53 "there must be something more than a mere private contractual right upon which the court's supervisory functions can be focused". Mr Smith submitted that in the present case the facts asserted by the first respondent in his affidavit did not disclose anything more than a mere private contractual right.

However, in Manunivavalagi Dalituicama Korovulavula v Public Service Commission (Civil Appeal No. 6 of 1994: decided on 23 August 1994), where the respondent had terminated the appellant's contract of employment in accordance with its terms, the Court said at pages 20 and 21 of the judgment:-

*"Mr Ahmadu had submitted that the relationship of the appellant and the Commission was wholly a matter of*

contract. The learned trial Judge accepted this submission for he held that the applicant's employment as Controller of Road Transport was wholly governed by his Agreement of Service.

In our view it is necessary to go further than the express words of the contract in determining whether what was done here by the Commission was proper. We accept that there was no breach of contract; the Commission acted directly in accord with the terms of the contract and in our view the appellant has no grounds for complaint about that. However, it must be recognised that the Commission had a discretionary power to decide whether it would exercise the rights it had in terms of Clause 6 of the contract to terminate the appointment. Likewise, in the same way the appellant had a discretionary power to decide whether he would exercise the rights he had in terms of Clause 7 of the contract to terminate it. But while the appellant, as a private individual, had the right to decide to exercise those rights for any reason whatsoever, the respondent, being a statutory body created for public purposes, to carry out public functions and to ensure the carrying out of public functions by the Public Service, was required to exercise its rights under the contract in good faith in accord with the general purpose of the statute for the public good."

What is alleged in the first respondent's affidavit in the present case is the existence of a situation substantially similar to that which existed in Korovulavula's case. In light of this Court's decision in that case a question of public law is raised by the first respondent's affidavit, not only questions of private rights. Prima facie, therefore, it is very doubtful whether there are any grounds for challenging the grant of leave to apply for judicial review.

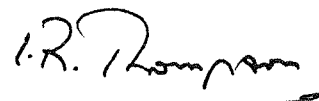
However, Mr Smith submitted that it would be in the interest of justice for the Court of Appeal to consider now whether it should amplify or limit what it said in Korovulavula's case which, he asserted, was not entirely in line with the position taken by the courts in England. He referred in that regard to Buckle v Holmes [1926] 2 K.B.125 where at p.127 where Bankes L.J. said :-

*"We gave leave to appeal in this case, not because we thought there was any real doubt about the law, but because the question was one of general importance and one upon which further argument and a decision of this Court would be to the public advantage."*

It may well be that in the near future this Court should consider whether what it has said in Korovulavula's case needs to be amplified or restricted; however, the matter is, in my view, not one of such urgency that leave should be granted to appeal against the interlocutory order giving leave to apply for judicial review instead of leaving the parties to complete the proceedings in the High Court and to appeal against the decision there if they think fit. Generally leave ought not to be given to appeal against an interlocutory order unless there are compelling reasons for doing so. The matter here is, in my view, not one of urgency. The saving of costs, if any, is unlikely to be so substantial as to constitute a compelling reason. I have come to the conclusion, therefore, that leave to appeal should not be granted. The appellant must pay the respondents' costs of the proceedings in respect of its application for leave to appeal.

Order

Leave to appeal against the order granting leave to apply for judicial review is dismissed with costs.



Mr Justice I.R. Thompson  
Judge of Appeal

Suva 28th February, 1995