IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 52 OF 1991
(High Court Civil Jurisdiction No. 282 of 1989)

BETWEEN

DR PATRICK MUMA — APPELLANT

and

THE UNIVERSITY OF THE SOUTH PACIFIC
DR WARDEN NARSEY
MRS ASINATE MATANGI KIDIDROMO — RESPONDENTS

Mr T. Fa for the Appellant
Mr F.G. Keil for the 1st and 2nd Respondents
3rd Respondent not present, unrepresented

Date and Place of Hearing : 17th May, 1995, Suva
Date of Delivery of Judgment : 22nd May, 1995

JUDGMENT OF THE COURT

In August 1989 the appellant caused a writ of summons to be issued out of the High Court registry. The Statement of Claim with which the writ was indorsed contained 16 paragraphs. The remedies claimed were a declaration that the first appellant ("the University") had contravened either or both of Articles 3 and 22 of its Constitution or, in the alternative, a declaration that the admission of the second respondent and five other persons as members of the University were "not conducive or actually promoted the object of [the first appellant]" as contained in Article 3 of the royal charter by which it was established. The plaintiff also sought general damages and costs; the remedy of damages was apparently sought for defamation alleged in the Statement of Claim. Some paragraphs of the Statement of Claim related to the declarations sought and some to the alleged defamation.

On 23 April 1990 a judge of the High Court heard an application by the first and second respondents to strike out the

appellant's Statement of Claim. On 15 April 1990 he struck out paragraphs 4 to 11 of it, those being the paragraphs related to the declarations sought. He declined to strike out the paragraphs which related to the alleged defamation but ordered that the second respondent be dismissed from the action unless within 14 days the appellant filed and served particulars showing how the second respondent caused publication and circulation of a letter referred to in one of those paragraphs. The appeal in these proceedings is against the order striking out paragraphs 4 to 11. The appellant did not appeal against the order dismissing the second respondent from the action. The order striking out paragraphs 4 and 11 was not sought by the third respondent; the facts stated in them did not relate to her. She should not have been made a party to the appeal; however, as she has not attended the hearing of the appeal or been represented, there is no evidence that she has incurred any costs as a result of having been wrongly included.

The judge gave three reasons for striking out paragraphs 4 to 11. The first was that at the time when the matter came before him the appellant had ceased to have standing to seek the declarations. The second reason was that the appellant, as a member of the University when he commenced the action, should have sought his remedy from the University's Visitor and that because of that, his claim was not justiciable in the courts. The third reason was that the paragraphs struck out disclosed no cause of action, being "totally devoid of particularity" and failing "to show how this matter is put".

The five grounds of appeal as originally set out in the notice of appeal were reduced to three by Mr Fa at the hearing. Those three grounds, as set out in writing by him, were:

> "1. *That the learned judge erred in law in holding that the Appellant had no standing to bring the claim against the first and second Respondents.*

2. *That the learned judge erred in law in holding that the subject matter of claim contained in paragraph 4-11 was not justiciable.*

3. *That the learned judge erred in law in holding that paragraphs 9,10 and 11 of the Statement of Claim are so framed as to disclose any cause of action, is devoid of particularity and fail to show how the matter is being put and that it would be impossible to plead to those paragraphs."*

In the Statement of Claim the appellant asserted that at the time of the issue of the writ he was a Lecturer in Economics employed by the University. It is not in dispute that that was so. The University was established in February 1970 by royal charter. A schedule to the charter contained the first Statutes of the University. By virtue of Statute 2 the members of the University's academic staff are members of the University. The appellant was, therefore, a member of the University when his writ of summons was issued.

Articles 3 and 22 of the charter, which gives the University its constitution, are as follows:-

"3. The objects of the University shall be the maintenance, advancement and dissemination of knowledge by teaching, consultancy and research and otherwise and the provision at appropriate levels of education and training responsive to the well-being and needs of the communities of the South Pacific.

22. No religious, ethnic or political test shall be imposed upon any person in order to entitle him to be admitted as a member, professor, teacher or student of the University or to hold office therein, or to graduate thereat or to hold any advantage or privilege thereof."

Paragraphs 1 to 8 of the Statement of Claim relate to the status of the appellant and the University, set out the effect of Articles 3 and 22 and assert that one of the defendants who is not a party to these proceedings was a student of the University. Paragraphs 9,10, and 11 are as follows:

"(9) *The Plaintiff claims that in contravention of Article 3 of the Royal Charter under which it was incorporated, the First Defendant admitted as members, professors, teachers or students the following persons:-*

(1) Mr Warden Narsey
(2) Mr Vijay Naidu
(3) Mr Bob Briscoe
(4) Mr Nil Plange
(5) Mr Rajesh Chandra.

(10) The admission of the persons referred to in paragraph (9) above were not conducive to and did not as a fact promote the maintenance, advancement and dissemination of knowledge by teaching, consultancy and research, and did not provide the appropriate level of education of training responsive to the well being and needs of the communities of the South Pacific.

(11) Alternatively: the First Defendant, the University contravened Article 22 of the Royal Charter by admitting as members, professors, teachers or students the persons referred to in paragraph 9 above on the grounds of ethnic and/or political considerations."

There is no assertion that the appellant's personal interests - as distinct from the interests generally of members of the University - were affected adversely, or indeed at all, by the matters set out in paragraphs 9,10 and 11. Accordingly, if the appellant was not a member of the University, he had no standing to seek the declarations. At the time when the writ was issued, he was a member of the University. There was no clear evidence that he had ceased to be a member when the matter was heard. His Lordship appeared to believe that he was no longer a member but proceeded to base his decision also on the absence of justiciability. That was the issue which was argued before us.

We turn therefore to consider whether the appellant, having at the time of the issue of the writ of summons an interest as a member of the University in its well being, could

seek the declarations in a Court. His Lordship referred to Patel v University of Bradford [1979] 2 All E.R. 583 and Thorne v University of London [1966] 2Q.B.237 as authority for the proposition that a claim by a member of a university relating to the internal affairs of the university is not justiciable in the courts. The decision in Patel's case to which his Lordship referred was given in the Court of Appeal; it affirmed the decision at first instance of Megarry V-C which is reported at [1978] 3 All E.R.841. The Vice-Chancellor examined in great detail decisions of the English courts from 1661 to 1973 in which the common law relating to Visitors of universities and other eleemosynary corporations was discussed and expounded. The University of Bradford had been established by the Queen. Its constitution provided for the appointment of a Visitor by the Queen upon request from the Council of the university. No request had ever been made; so no Visitor had been appointed by that process. However, Megarry V-C held that the common law required that there be a Visitor and that, until one was appointed, the Queen, as the person who had established the university, was its Visitor. He observed further that by tradition the visitatorial functions were performed on the monarch's behalf by the Lord Chancellor, but not in his judicial capacity.

Section 22(1) of the High Court Act (Cap 13) provides for the common law in force in England on 2 January 1875 to be in force in Fiji. Although originally made as an Ordinance in 1875 (then the Supreme Court Ordinance) and amended on numerous occasions thereafter, the Act has continued ever since to be part of the laws of Fiji by virtue of section 5 of the Fiji Independence Order 1970, section 2 of the Fiji Existing Laws Decree 1987 and section 8 of the Constitution of the Sovereign Republic of Fiji (Promulgation) Decree 1990. On the authority of Patel's case and the cases cited in Megarry V-C's judgment we are satisfied that, if there was a Visitor of the University when the appellant's writ of summons was issued, he should have taken his complaint to the Visitor and that the matter was not justiciable

in the Courts. It is necessary, therefore, to consider whether or not there was a Visitor. That question was not initially addressed by either Mr Fa or Mr Keil. We raised it with them and invited them to address us on it. Mr Fa did not take up the invitation, saying simply that he had no submission to make. Mr Keil suggested that it was not necessary for us to decide the question in this appeal; the University would deal with it if it received a complaint which needed to be heard and determined by its Visitor. We do not agree that it is a question which can be left unanswered in this appeal.

Article 27 of the charter establishing the University provides as follows:

> *"27. We reserve unto Ourself, Our Heirs and Successors, the right, on representation from the Council made in pursuance of a resolution passed by a simple majority of the members of the Council present and voting, to appoint by Order in Council a Visitor of the University for such period and with such duties as We, Our Heirs and Successors, shall see fit and his decision on matters within his jurisdiction shall be final."*

It is not in dispute that the Council of the University has never made representation to the Queen for the appointment of a Visitor and that no Visitor has been appointed by her.

In February 1970, when the University was created, Fiji was a Colony of Great Britain. The charter by which the University was created contains a lengthy preamble in which reference is made to the fact that, in addition to Fiji, another colony, a protectorate of Great Britain and several other countries which were independent nations or nations enjoying internal self-government wished that the University should be established. However, the operative part of the Charter commences:

> *"Now therefore know ye that We by virtue of Our Prerogative Royal <u>in respect of Fiji</u> and of Our especial grace, certain knowledge and mere motion have willed and ordained and by these Presents do for Us, Our Heirs*

and Successors will and ordain as follows:-" (Emphasis added)

It is clear, therefore, that Her Majesty was exercising her royal prerogatives as Queen of Great Britain and its Colonies in respect of Fiji only, not in respect of that other colony or that protectorate. Section 1 of the 1970 Constitution of Fiji provided that Fiji should be **"a sovereign democratic state"**. Section 72(1) vested the executive authority of Fiji in Her Majesty. However, because Fiji had become a sovereign democratic state, she had that authority from the date of independence onward as Queen of Fiji, not as Queen of Great Britain. There can be no doubt, we believe, that from February 1970 to October 1970, when Fiji became an independent nation, the Queen was the Visitor of the University in the capacity in which she established it, namely as Queen of Great Britain and its Colonies However, because in establishing it she expressly exercised her royal prerogative *in respect of Fiji*, it is our opinion that after Fiji had become independent she was the Visitor in her capacity as Queen of Fiji.

On 1 October 1987, following the coups which had recently taken place, the 1970 Constitution was revoked by a decree of the Commander and Head of the Interim Military Government of Fiji. The decree also provided that all decrees promulgated under his hand and seal were to be **"regarded as law"** and to be **"observed and enforced"**. On 7 October 1987, Fiji was declared by such a decree to be a republic. On 5 December 1987 a President was appointed (Appointment of Head of State and Dissolution of Fiji Military Government Decree, section 4). The decree vested the executive authority of Fiji in the President and empowered him to exercise it. When the 1990 Constitution of Fiji was promulgated on 25 July 1990 section 32 provided that the executive authority of Fiji was vested in the President. It was to be exercisable by him or by the Cabinet or any Minister authorised by the Cabinet.

Section 167 of the 1990 Constitution of Fiji reads:

> *"167.-(1) All rights, liabilities and obligations of Her Majesty in right of the Government of Fiji or of the Fiji Military Government shall after the commencement of this Constitution be rights, liabilities and obligations of the State.*
>
> *(2) In this section, rights, liabilities and obligations include prerogative rights and rights, liabilities and obligations arising from contract or otherwise, other than rights to which section 166 applies."*

There can, in our view, be no doubt that the right and obligation of the Queen, which from 10 October 1970 until 1987 she had had in right of the Government of Fiji, to be the Visitor of the University are now vested in the President. The decree by which the first President was appointed in 1987 contained no provision in terms similar to section 167 of the 1990 Constitution; we have examined all other decrees promulgated between October 1987 and 25 July 1990 and can find no such provision in any of them. Nevertheless we are satisfied that not only did the right and obligation to be the University's Visitor cease to be a right and obligation of the Queen when she ceased to be the Queen of Fiji but also, because they had been her right and obligation by virtue of her being the head of state of Fiji, they passed to the head of state who took her place, that is to say the President appointed in 1987. They remained his right and obligation until his office was reestablished by the 1990 Constitution when they became the right and obligation of the holder of that office by reason of section 167 of that Constitution.

We have no doubt, therefore, that in August 1989 when the appellant's writ of summons was issued, even though no Visitor had been appointed in pursuance of section 27 of the charter, the University had a Visitor, namely the President of Fiji, by

operation of law and that it has done so ever since. Accordingly, we are satisfied that the learned judge was right when he ruled that the appellant could not come to a Court to seek the declarations which he was seeking in his Statement of Claim. As a member of the University he could have taken to the Visitor his complaint about the matters raised in paragraphs 4 to 11 of his Statement of Claim; they were, therefore, not justiciable in a court. If the appellant had not been a member of the University, he could not have made them the subject of a claim in a court because he lacked the standing to do so. Consequently his Lordship correctly ordered that paragraphs 4 to 11 be struck out. The appeal must, therefore, be dismissed.

Because we have reached that conclusion for reason that the matter was not justiciable in a court, it is not necessary for us to consider the third ground of appeal, that is say whether paragraphs 4 to 11 were so devoid of particularity as to disclose no cause of action or, although lacking sufficient particulars, could be amended so as to include them. Nor have we found it necessary to rule on the first ground of appeal.

We have dealt with the appeal on its merits. We consider, however, that we should place on record that the appellant should have sought leave to appeal. An order striking out pleadings is an interlocutory order (Re Page [1910] 1 Ch.489). (See also the discussion in Charan v Shah (Civil Appeal No. 29 of 1994; decided 3 March 1995) of the test to be applied in deciding whether an order is final or interlocutory.) Unfortunately we did not raise with the parties the needs for leave to appeal; neither party raised the matter and neither objected to the appeal being dealt with on its merits. Accordingly, having heard it on its merits, we have dealt with it on its merits as though leave to appeal had been granted. If it is necessary, we grant leave now of our own motion

The appeal is dismissed; the appellant is to pay the first and second respondents their costs of the appeal.

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Sir Moti Tikaram
President Fiji Court of Appeal

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Sir Mari Kapi
Justice of Appeal

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Mr Justice I.R. Thompson
Justice of Appeal