

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0002 OF 2003S
(High Court Civil Action No.240 of 1999S)

BETWEEN:

THE COMMANDER OF FIJI MILITARY FORCES
ATTORNEY GENERAL OF FIJI

Applicant/Appellant

AND:

THE AUDITOR GENERAL

Respondent

Coram:

Smellie, JA
Davies, JA
Penlington, JA

Hearing:

Friday, 7th November 2003, Suva

Counsel:

Mr W. Calanchini for the First Applicant/Appellant
Ms N. Basawaiya for the Second Applicant/Appellant
Mr P. Knight for the Respondent

Date of Judgment: Friday, 14th November 2003

JUDGMENT OF THE COURT

Introduction

This is an application for leave to appeal to the Supreme Court.

The Auditor General contends he has authority to audit certain funds under the control of the Commander of the Fiji Military Forces (hereafter referred as to "the Commander").

In both the High Court and Court of Appeal the Auditor General's contention has been upheld.

As was the case in the Court of Appeal the Attorney-General through his counsel indicated that he did not propose to make submissions and Ms Basawaiya was given leave to withdraw.

The Commander now seeks the leave of this Court to appeal to the Supreme Court.

Penlington JA was a member of the Court which decided the issue in the Court of Appeal but upon inquiry Counsel did not object to him sitting on this matter.

Section 122(2) of the Constitution

The above provisions read as follows:

"122.- (1) The Supreme Court has exclusive jurisdiction, subject to such requirements as the Parliament prescribes, to hear and determine appeals from all final judgments of the Court of Appeal.

(2) An appeal may not be brought from a final judgment of the Court of Appeal unless:

(a) the Court of Appeal gives leave to appeal on a question certified by it to be of significant public importance; or

(b) the Supreme Court gives special leave to appeal."

The task of this Court pursuant to the above provisions is to decide whether this litigation throws up a question of significant public importance and if so to certify what that question is. In the process we are not concerned with the merits of any prospective appeal, it being sufficient that the would-be appellant can establish the existence of an arguable case. See ***Mediterranean Island Resort v. Bianco*** (ABU0061, 1975 judgment 11/3/99).

In that regard the arguments advanced by the Commander in the Court of Appeal and those presented to us on this application are briefly outlined and distinguished.

The Commander's Stance in the Court of Appeal

It was submitted to the Court of Appeal that s.167 (1) of the Constitution sets out the parameters of the Auditor General's authority which is restricted to public funds belonging to the State. It was submitted that that authority does not extend to the funds in issue here. Examples of those funds are the Regimental Fund, the Canteen Fund and the Benevolent Fund as described in the Court of Appeal decision. Further it was argued s.167(3) cannot be employed to bring into consideration the earlier provisions of the Audit Act (Cap.20) particularly the definitions of "accounting officers" "officer" "public officer" and "public moneys" as set out in s.6(1) and (2) of the same because they are repugnant to and *ultra vires* the Constitution.

The Commander's Stance on this Application

The emphasis has changed and an argument not advanced to the Court of Appeal but now central to the Commander's position is relied upon. The essence of it is this: that s.167(3) refers to prospective legislation only and so far has not been utilized. That being so the provisions of the Audit Act which are central to the conclusions reached in both the High Court and the Court of Appeal are subject to s.195(2)(e) and most importantly to s.195(3) of the Constitution which read as follows:

"(2)(e) all written laws in force in the State (other than the laws referred to in subsection (1)) continue in force as if enacted or made under or pursuant to this Constitution and all other law in the State continues in operation;

(3) Subject to section 2, written laws referred to in paragraph (2)(e) or (f) are to be construed, on and from the commencement of this Constitution, with such modifications and qualifications as are necessary to bring them into conformity with this Constitution."

Accordingly Mr Calanchini for the Commander now submits that when the Audit Act provisions are construed with necessary "modifications and qualifications" it is clear that the parameters laid down by s. 167 (1) override the Audit Act provisions which were enacted prior to 1997 Constitution becoming the supreme law of Fiji.

Arguable Case/Question of Significant Public Importance

The way the matter is now put persuades us that there is an arguable case.

Also we are of the opinion that the issues here concerning a dispute between two very senior officers of State involving the correct application of sections 167 and 195 of the Constitution in relation to prior legislation clearly qualify as matters of “significant public importance.”

The Questions Certified

Despite Mr Calanchini’s suggested formulation we consider that the two questions posed for determination by the Court of Appeal still encapsulate the dispute in a way best suited to enable the Supreme Court to consider all relevant aspects. Those two questions were formulated as follows:

1. Is the Auditor General legally required to audit the records and the accounts of the various funds (“the funds”) maintained by the Commander of the Republic of Fiji Military Forces (“the Commander”) namely the Regimental Fund, the Canteen Fund, the Benevolent Fund, the Health and Life Scheme and the RFMF, Welfare Fund, or any one or more of them?
2. Is the Commander legally required to allow the Auditor General access for audit purposes to the records and accounts of the funds or of any one or more of them?

We would, however, add a third question which seeks to focus on the refined approach which the Commander now advances. We formulate this third question as follows:

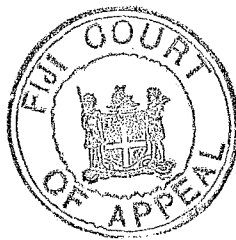
3. How should the sections of the Audit Act (Cap.20) relied upon in the decisions of the High Court and the Court of Appeal be construed given the provisions of section 167 (1) and (3) and section 195(2)(e) and (3) of the 1997 Constitution.

Pursuant to s.122 (2)(a) we certify the above 3 questions to be of significant public importance.

The costs of this application which we fix at \$500.00 will follow the event.

Addendum

During the hearing of this application we stressed to Counsel the desirability, (if not clear necessity), for full and detailed information to be available to Supreme Court on appeal regarding the funds in question. Without being exhaustive this would include their status, purpose, control, ultimate ownership, (legal or beneficial), identification of any beneficiaries or class of beneficiaries, the entity having ultimate responsibility for administration and thereby being subject to being held to account in the event of an adverse audit report.



Robert Smellie JA

Smellie, JA

J Daryl Davies

Davies, JA

Pennington

Penlington, JA

Solicitors:

Directorate Army Legal Services, Suva for the First Applicant/Appellant
Office of the Solicitor General, Suva for the Second Applicant/Appellant
Cromptons, Suva for the Respondent