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

CIVIL APPEAL NO. ABU0034 OF 2007
(High Court Civil Case No. HBC37 of 2007)

BETWEEN: 1. JOSAIA VOREQE BAINIMARAMA
2. REPUBLIC OF FIJI MILITARY FORCES
3. THE ATTORNEY-GENERAL

Appellants

A N D : ANGENETTE MELANIA HEFFERNAN

Respondent

Hearing: 26 June 2007
Ruling : 28 June 2007

Counsel: A Narayan for appellants
T Draunidalo for respondent.

RULING

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[1] This hearing is to allow counsel to address me on the sole question of whether I, as President of the Court of Appeal, have any power to intervene in a matter of which another justice of appeal is presently seized.

[2] It was first listed before me on 21 June 2007 and I allowed an adjournment at the request of the respondent expressly to allow counsel from abroad, Dr Cameron, to appear. At the adjourned hearing, Dr Cameron was not present and the Court was advised by Mr Narayan, counsel for the appellants, that counsel had been stopped from entering the country by the immigration authorities because of previous

failures to comply with the terms of his entry permit. Counsel also advised the Court that Dr Cameron has been told that he is free to re-apply from abroad.

[3] The unfortunate timing of this incident has effectively placed the respondent at an unexpected disadvantage. Having expressed my concern at the timing and sought an explanation from counsel for the appellants, I have been advised that it did not arise from any action directly connected with this case.

[4] As both counsel know, my appointment as President of this Court expires on Thursday 28 June 2007 and any delay would mean this application could not take place unless and until another President is appointed. To avoid any such delay, Ms Draunidalo has made the submissions and I am grateful to her for doing so in such unexpected circumstances.

[5] The case itself arises from unusual circumstances. Having filed an originating summons in the High Court, the respondent filed an interlocutory application for an injunction against the appellants.

[6] On 20 April 2007, Singh J granted an interlocutory injunction in the following terms:

> "Pending the determination of the substantive matter, the defendants and each of them are hereby restrained and enjoined from any interference direct or indirect with the freedom of the Plaintiff to express her views and those of her employer Pacific Centre for Public Integrity, (PCPI) and to move within Fiji and to leave Fiji in accordance with the law of Fiji as it stood prior to midnight on 4 December 2006."

[7] The order was sealed on 27 April 2007 and, on that day, the appellants applied to the High Court for a stay of its proceedings in the matter pending an appeal. It was refused and the case set for hearing on 6 and 7 June 2007; a date upon which Dr Cameron would be able to attend and represent the respondent.

[8] It appears the notice of appeal was subsequently filed on 17 May 2007 seeking to set aside Singh J's judgment granting the injunction.

[9] From the affidavits filed by the respondents (to which it should be noted, the appellants have not, at the present time, had the opportunity to file any response) it appears that, on Friday, 1 June 2007, there was an application by the appellants to Singh J to recuse himself from hearing the originating summons. He refused and advised the appellants they would need to make formal application. Counsel for the respondents understood that such an application was to be made during the following week, commencing 4 June 2007.

[10] Instead, on 4 June 2007, an ex parte notice of motion was filed in this Court seeking to stay the High Court proceedings due to start two days later. As I was overseas at the time, it was listed, on the advice of the acting Chief Registrar, to be heard by me on 12 June after I returned.

[11] As the case involved the attendance of counsel from abroad and the application sought to alter the dates already fixed for the hearing, it would have been better made much earlier when there would have been time to consider it inter partes. It is also clear that the hearing date allocated for the application was too late to have any practical value even if it was granted.

[12] Whatever the reasons for the late timing of the application, there would still have been time for the matter to be heard inter partes. However, the application was heard ex parte by Byrne J, sitting as an acting Justice of Appeal, the same day that it had been lodged following an alteration, apparently by the judge, of the dates entered by the registry on the notice of motion. The hearing commenced at 4.30pm and the order was made at 5.30pm.

[13] By section 127 of the Constitution, the puisne judges of the High Court are ex officio members of the Court of Appeal. Counsel have been unable to advise me how the matter came to be allocated to Byrne J. No request was made to me to

allocate a judge to hear the matter or, it appears, to the registry to alter the dates it had allocated. The affidavits filed state that the respondents were not advised despite the previous recent communications between counsel.

[14] Since then, there has been a hearing inter partes before the same judge, a timetable for submissions has been set which will be competed on 3 July 2007 and judgment will then be given on notice.

[15] I have set out the brief history of events above to demonstrate the basis for this application. The respondents clearly challenge a number of issues including the right of Byrne J to hear the application as a Justice of Appeal and the propriety of the hearing taking place ex parte.

[16] I have not allowed them to address me on those issues at this stage. As already stated, I have limited counsel to the single question of whether I have any power to intervene. I also directed that the submissions on this issue must be made on the basis that Byrne J is hearing the matter as a Justice of Appeal and cannot, until the question of intervention is resolved, include any challenge to his capacity to sit as such.

[17] Ms Draunidalo has submitted correctly that the court has the power to set aside its own decision made ex parte. She also relies on the decision of the Supreme Court in *Ratu Rakuita Vakalabure v State, Shameem J applying to intervene*, [2006] CAV 3/04, 1 May 2006 in which it was stated:

> "In the final analysis, there is always the residual power, as exercised by the House of Lords in *Pinochet No 2*, to overturn a decision of a court that included a judge who sat in a matter, when he ought not to have done so. Section 122(5) of the Constitution seems to allow for just such eventuality, if the available evidence warrants the adoption such a course. That would be an exceptional case."

[18] That proposition, with respect, is clearly correct and the terms of section 122 (5) give the Supreme Court a wide power of review of its own decisions. Such a power is logical for a court of ultimate appeal as was the case with the House of Lords in *Pinochet No 2*.

[19] Counsel for the respondent asks me to intervene on the basis that Byrne J had no right to sit and ought not to have done so. It requires me to consider the propriety of the manner in which he came to sit and, if I find he was not so entitled, to intervene to set his decision aside.

[20] I consider the approach must be from the opposite standpoint. I must have power to intervene or review a case by another judge in the same jurisdiction before I can consider the manner in which he assumed that jurisdiction.

[21] Counsel has not demonstrated any such power in this court. The Court of Appeal Act and Rules make no such provision.

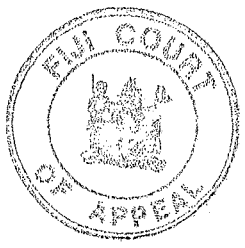
[22] Ms Draunidalo points to rule 7 which provides that, where there is no other provision in the Rules, the jurisdiction and powers of the Court shall be exercised according generally to the practice and procedure at present observed before the Court of Appeal in England. She suggests that that the residual power referred to in *Vakalalabure's case* would be observed by the English Court of Appeal but she provides no authority for that proposition and I do not accept that would be the case.

[23] As the Court in *Vakalalabure's case* pointed out, the residual power to review its own decisions is vested in our Supreme Court by the specific provisions of section 122 (5) of the Constitution. There is no equivalent power vested in this Court.

[24] English authorities show that a decision by a judge sitting ex parte or sitting without jurisdiction may be set aside on application to the court which made it. Similar applications under our High Court Rules are made to the court by which the order was made. I suggest that another judge sitting in the same jurisdiction would only intervene and set aside another judge's order if the judge who made the order is for some reason unable to hear the application. Any challenge to the right of the judge to sit on the case must also be made in the first place to the judge challenged. If a party is aggrieved by his decision, the remedy is to appeal to a higher court. To deal with the case in any other manner would effectively allow a judge to sit in appeal on an equal judge.

[25] As President of this Court I only sit primus inter pares in respect of the other Justices of Appeal. The Act gives the President precedence and an assumed seniority which carries the power to give directions as to the constitution of the Court including the allocation of work to a particular court or to a single judge. Beyond that, neither the Act nor the Constitution confers on the President any jurisdiction not equally conferred on all judges of the court.

[26] I have no power to intervene in this case and must decline to do so.



Gordon Ward
PRESIDENT
FIJI COURT OF APPEAL