IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

Appellate Jurisdiction

CIVIL APPEAL NO. ABU0078 OF 2008
[On Appeal from Suva High Court
Civil No. HBC329 of 2008]

BETWEEN : **RATU JOSEFA ILOILO ULUIVUDA** in his capacity as President of the Republic of Fiji and President of the Interim Government of Fiji, of Government House, Suva.

COMMODORE VOREQE BAINIMARAMA in his capacity as Interim Prime Minister and Interim Minister of Finance, Interim Administration, and as Co-Chair of the National Council for Building A Better Fiji (NCBBF) and the Peoples' Charter, of Government House, Suva.

AIYAZ SAIYED-KHAIYUM in his capacity as Interim Attorney-General of the Interim Government of Fiji, and as Representative of the First & Second Defendants, of Suvavou House, Suva.

JOHN SAMY in his capacity as Head of the Technical & Support Secretary of the National Council for Building a Better Fiji (NCBBF) of Suva.

Appellants

AND : **LAISENIA QARASE** of Moti Street, Samabula, Suva Deposed Prime Minister.

SOQOSOQO DUAVATA NI LEWENIVANUA (SDL) of itself of McGregor Road, Suva and Vice National Director Peceli Kinivuwai of Namadi Heights, Suva.

Respondents

Before the Honourable Judge of Appeal, Mr Justice John E Byrne

Counsel : S. Sharma and L. Daunivalu for the Appellants
No Appearance for the Respondents

Date of Hearing & Extempore Ruling: 14th November 2008

Date of Published Reasons : 20th November 2008

RULING

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[1] At approximately 5.25pm on Friday the 14th of November 2008 I gave a Ruling on an Ex-Parte summons for Stay pending appeal of a decision of Jitoko J. given in the High Court at 11.00am that morning. Counsel for the Appellants argued only one ground before me namely that the learned Judge was wrong in granting injunctive relief against the State as this was contrary to Section 15 of the State (Crown) Proceedings Act. Five grounds of appeal from Mr Justice Jitoko's decision were filed but counsel for the Appellants relied only on the Section 15 argument which they said had never been considered by the learned Trial Judge. I upheld this argument reserving to myself the right to consider the other grounds of appeal when I had more time to study Mr Justice Jitoko's decision and the submissions made to him by the Appellants on the 6th of November 2008.

[2] I have now had an opportunity to read the Appellants' submissions to the learned Judge and am satisfied that my decision to grant a Stay on the Section 15 argument was not the only ground on which the decision should be stayed. I shall now state my reasons for that conclusion but first it is necessary to comment on the criticism of the way in which the

application was made to me on the 14th of November which has been made in the Media. It was suggested, if not by direct accusation but certainly by the clearest implication that I was wrong in hearing the application and that it could easily have waited until the following week. I was satisfied it could not, for government parties were in the field canvassing the charter and some had gone to Rotuma. This criticism, implied or actual, is baseless for it ignores the practice governing such applications provided in the High Court Rules and in Section 20 of the Court of Appeal Act. Nothing was said of these rules or of Section 20 in the criticism directed at me for hearing the application. The failure by those concerned to refer to the rules or Section 20 is a matter of deep regret apart from being unwarranted. Order 59 Rule 13/4 deals with applications for a stay of a Judgment or Decision. The Rule states:

> ***"The application must be made in the first instance to the Court below (Rule 14)(4); but if it is refused, the application to the Court of Appeal is not an appeal: the Jurisdiction is concurrent".***

[3] Section 20 of the Court of Appeal Act states:

> ***"The powers of the Court under this Part:***
>
> ***(a) to give leave to appeal***
> ***(b)***
> ***(c)***
> ***(d)***
> ***(e)***
> ***(f)***

(g) Generally, to hear any application, make any order, or give any direction incidental to an appeal or intended appeal, not involving the decision of the appeal, may be exercised by any Judge of the Court in the same manner as they may be exercised by the Court and subject to the same provisions".

The position therefore is quite clear:

"Any application for a Stay must first be made to the Judge who gave the decision and if that is not practical for any reason then the application may be made to a Judge of the Court of Appeal".

[4] **The Facts**

The facts are, that when representatives of the Attorney-General's office went to the Civil Registry of the High Court about 3.30pm on 14th of November they spoke to one Sereana who is the Acting Court Officer of the High Court. Sereana then telephoned Mr Justice Jitoko's secretary and was informed that the Judge had gone home and would not be back that day. She then telephoned the Judge's home where a lady answered and told Sereana that the Judge was not in the house and would not be back until late. Having heard this Sereana then went to the Acting Chief Justice who informed her that the parties would have to wait until the following Monday because Mr Justice Jitoko was the only Judge who could hear the application. She then relayed the message to the Attorney-General's representatives. It was shortly after this at about 4.00pm that I was asked to hear the application which I was told was urgent. I duly did

so and concluded the hearing at about 5.25pm granting the orders sought in the summons.

[5] **The Appellants' Submissions to the Trial Judge**

State Proceedings Act, Cap 24 (the Act)

The Appellant's submissions to the trial Judge occupied 13 pages of which four, comprising ten paragraphs, concerned the application of Section 15 of the State Proceedings Act and were the second part of the submissions. I now set out the relevant parts of Section 15:

> ***"15 (1) In any civil proceedings by or against the Crown the Court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:***
>
> ***Provided that –***
>
> ***(a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the Court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and***
>
> ***...***

(2) The court shall not in any civil proceedings grant an injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown."

[6] The learned Judge did not even mention these submissions in his decision. This is most perplexing because regardless of the Common Law on injunctions which is now well known, the Common Law must give way to any statute dealing with the same subject. In this case the State Proceedings Act did this and the learned Judge simply ignored it. It is also of some significance that according to counsel who appeared before me, counsel for the Respondents barely mentioned Section 15 in argument when in my view it was incumbent on him to do so if he had any arguments to advance contrary to those of the Appellants. The learned Judge does not refer to any such arguments which of course is consistent with his failure to pay any notice to Section 15.

[7] Section 15 has been the subject of much judicial discussion in England and, to a lesser extent, in Fiji. I may usefully begin with the decision of the High Court of Fiji in **Crystal Clear Video Limited –v- Commissioner of Police & Attorney-General** [1988] FJHC 1. In that case, the Fiji Police had searched the Plaintiff company's premises and seized a number of items which were allegedly infringing the Copyright Act (Cap. 224). The Plaintiff filed a writ of summons against the Defendants and an interlocutory motion seeking a mandatory injunction for the Police to return all seized items. Fatiaki J. (as he then was) refused the application for a mandatory injunction and held that:

"The Order, if granted, would in effect amount to a mandatory injunction being granted against the State and an officer of the State. This the Court cannot do, for to do so would offend the provisions of Section 15 of the Crown Proceedings Act".

[8] This position, in so far as civil proceedings are concerned, was reiterated by Mr Justice Fatiaki in **Fiji Video Library Association –v- Attorney-General & Ors** [2000] FJHC 97. There the Plaintiff began proceedings by way of Originating Summons and also sought an injunction against the Defendants to restrain them from entering or removing anything from the shops belonging to the members of the Plaintiff's Association. Although an *ex-parte* interim injunction was granted for five days to allow the papers to be formally served on the Defendants, His Lordship refused to extend the *ex-parte* injunction and dissolved it after hearing. In doing so, Mr Justice Fatiaki relied on Section 15 of the Crown Proceedings Act, and held that, in so far as civil proceedings are concerned, there is no jurisprudence or enactment which requires the Court to ignore or over-ride the clear statutory prohibition expressed in Section 15 either as a final or as an interim measure.

[9] In **Vodafone Fiji Limited –v- Minister for Information & Attorney-General of Fiji** (Suva High Court Civil Action No. HBC576 of 2005, 20 December 2005), the Plaintiff filed an originating summons and sought an interim injunction restraining the Minister from awarding any mobile telephone licence to any person or entity for the operation of mobile telecommunication systems within Fiji. After discussing Section 15 and the meaning of *"civil proceedings"* contained in Section 18 of the Act, His Lordship Mr Justice Singh refused the application for an injunction against the Minister. The Judge held that the Plaintiff's claim arose out of an

alleged breach of contract; hence, it was covered under the definition of *"civil proceedings"*. The Court referred to the decisions of the House of Lords in **M –v- Home Office** [1993] 3 All ER 537 and **Davidson** (infra), and held that those authorities clarified that the Section 15 limitation did not apply to judicial review proceedings. His Lordship stated:

> ***"... the House of Lords in Davidson –v- Scottish Ministers 2005 UKHL 74 clarified that the Section 15 limitation did not apply to applications for judicial review as these were proceedings which formerly fell on the Crown side of the Kings Bench Division, and M –v- Home Office should be considered in the context of judicial review proceedings. Both M –v- Home Office and Davidson are judicial review proceedings and what the Law Lords said there ought to be confined to judicial review proceedings. I do not consider that M –v- Home Office was in any way suggesting Courts have general power to make coercive orders against the Ministers of the State in all proceedings".***

[10] This ruling was appealed to the Fiji Court of Appeal in July 2006 but was subsequently dismissed.

Even more recently on 7th November 2008 in the case of **Commodore Josaia Voreqe Bainimarana and Others –v- Angenette Melania Heffernan** Civil Appeal No. ABU0034 of 2007 the Full Court of this Court held that no injunction could be granted against the State.

[11] There is thus abundant authority for the view that injunctive relief is not available against the State and officials of the State in civil proceedings, as defined under the Act. For the purpose of completeness, I should add that the definition of *"civil proceedings"* under the Act is very broad and would include most proceedings.

[12] **The Law On Interim Injunctions**

This is well known now and I accept the broad statement of it by Mr Justice Jitoko. However I am of the opinion that the Judge misstated its applicability to the material adduced so far in this case. The learned Judge said that it was accepted by all the parties that both the **"State of the Nation and the Economy (the SNE Report)"** and the Draft People's Charter recommend changes to the Constitution in the form of abolition of the existing electoral system, the removal of the power-sharing arrangement, changes to constituency boundaries, the lowering of the voting age and the removal of compulsory voting. The Judge then said:

> ***"The dispute is whether these changes will be brought about without Parliament, that is whether the Interim Government will implement these changes outside the Constitution framework and specifically the requirements of Chapter 15".***

He then notes the statement in the Affidavit by John Samy on behalf of the Interim Government that any changes to the Constitution recommended by NCBBF as contained in the draft

Charter, "will be through legal and constitutional means". At page 16 of his Decision the Judge says:

> ***"While counsel for the Plaintiffs has not referred the Court to any direct evidence by way of an official statement of communiqué issued by the Defendants to lend support to their belief that the Interim Government will invoke changes to the Constitution without Parliament, I believe that there is sufficient evidence before me to suggest that this process is seriously being contemplated by the Interim Government".***

[13] With great respect to the learned Judge I fail to see that there was any evidence before him to suggest that this process was seriously being contemplated by the Interim Government. It is at its highest only speculation and that is no ground for granting an interim injunction even if it was possible to injunct the State, which as I have said earlier it is not. It is true that the Court has power to grant a quia timet injunction, where the injury is merely threatened and no wrongful act has yet been committed but on the material before the Court I can see no threat by the Appellants to commit any wrongful act. It seems some confusion has arisen about the NCBBF charter. It must be stated that this is in reality not a charter at all; it is a proposal for a charter and will only become a charter if accepted by the people of Fiji.

[14] Before Jitoko J. the Respondents sought two declarations as follows:

> "**1. A Declaration that the Interim Government of Fiji, of itself and by the 1st, 2nd and 3rd Defendants, individually and collectively, does not have the power nor lawful authority to amend alter, repeal or abrogate the 1997 Constitution of the Republic of Fiji and/or to do anything or make recommendations, including and affecting changes to the electoral system, that are contrary or inconsistent with the current provisions of the Constitution.**
>
> **2. A Declaration that the Interim Government of Fiji, of itself and by the 1st, 2nd and 3rd Defendants, individually and collectively, does not have the power nor lawful authority to appropriate any public fund other than for the day to day running of the Government and that the appropriation of funds for the establishment, promotion of and continuing administration of the National Council for Building a Better Fiji (NCBBF) and Peoples Charter is ultra vires its powers and therefore unlawful".**

[15] In my view these two declarations are really only speculation and not supported by any relevant evidence of an intention by the Appellants to do the things claimed by the Respondents.

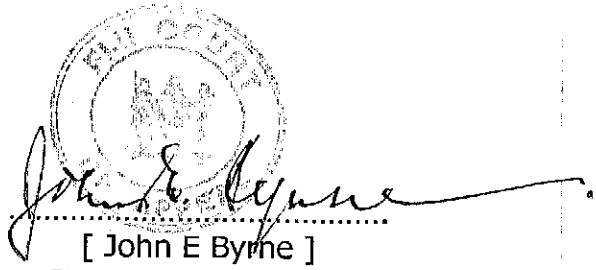
[16] There is nothing unlawful in any government, even an interim one, canvassing opinion on the sorts of issues that might be contained in a future charter. It is sheer speculation as to how any changes to the Constitution might be enacted at some future time. Thus I cannot agree with the conclusion of the learned Judge that these two declarations raised serious questions to be tried. Here it is relevant to consider the recent High Court decision in **Qarase & Ors –v- Bainimarama & Ors,** Civil Actions HBC 60 of 2007S, and HBC398 of 2007S. There three Judges of the High Court determined that the current interim government had, in effect, full powers as that of an ordinarily elected government provided it acted in the best interests of the people. They stated at paragraph 166 of the Judgment that possibly Gates J. had interpreted too narrowly in **Koroi –v- Commissioner of Inland Revenue** [2003] NZAR 18 at p.36 what an interim government could do.

[17] The High Court Judgment is good law for the proposition that the current Interim Government may proceed with soliciting the opinion of the people of Fiji with the aim of putting together *(my emphasis)* a national charter.

[18] Thus in my view the restrictions that might have been imposed on an Interim Government have been over-ruled by the High Court and are now the law until the Judgment is over-turned. In my Judgment, for the reasons which I have given, there is insufficient evidence to form a basis for the Respondent's "serious fear" that the Constitution would be abrogated or amended in any way contrary to the existing laws of Fiji. Accordingly for the reasons which I gave at the conclusion of argument on the 14th of November and on which I have expanded in this ruling and for the additional reasons which I have given now, namely that the learned Judge erred in law in holding that there was a serious issue to be tried and that the balance of convenience weighed in favour of the

Respondents and that the learned Judge erred in law and in fact in finding that the actions of the Appellants appeared to be in preparation for and in contemplation of an illegal act, a Stay should be granted of Mr Justice Jitoko's decision on these grounds also.

[19] I now confirm the orders I made on the 14th of November for the reasons given then and for the additional reasons now given in this ruling.



[John E Byrne]
JUDGE OF APPEAL

At Suva

20th November 2008