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

CIVIL APPEAL NO. ABU0034 OF 2007S
(High Court Civil Action No. HBC 037 of 2007S)

BETWEEN:	COMMODORE JOSAIA VOREQE BAINIMARAMA	*First Appellant*
AND:	REPUBLIC OF FIJI MILITARY FORCES	*Second Appellant*
AND:	ATTORNEY GENERAL OF FIJI	*Third Appellant*
AND:	ANGENETE MELANIA HEFFERNAN	*Respondent*

Coram: Powell, JA
Lloyd, JA

Hearing: Friday, 31st October, 2008, Suva
Thursday, 6th November 2008, Suva

Counsel:	A. Narayan S. Sharma	]]	for the First, Second and Third Appellants
	T. Draunidalo	]	for the Respondent

Date of Judgment: Friday, 7th November 2008, Suva

JUDGMENT OF THE COURT

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[1] The respondent ("Ms Heffernan") is the executive director of the Pacific Centre for Public Integrity (PCPI).

[2] On 31 January 2007 Ms Heffernan filed an Originating Summons in the High Court naming Commodore Josaia Voreqe Bainimarama as first defendant, the Republic of

Fiji Military Forces (RFMF) as second defendant and the Attorney-General of Fiji as third defendant. The Summons sought a number of declarations and injunctions on a number of grounds which in short were:

- That since 6 September 2006 members of the RFMF had *"detained and in some cases assaulted and humiliated citizens"* who had questioned their authority.
- That members of the RFMF had expressed a wish to speak to Mrs Heffernan who feared that she may be unlawfully detained by them and that reports of a recent detention and mistreatment of a lawyer Richard Naidu had caused Ms Heffernan to fear that she too may be mistreated.

[3] On the same day Ms Heffernan filed an Ex Parte Motion in these proceedings seeking urgent interlocutory orders restraining the appellants from detaining her or interfering with her freedom of speech, assembly and movement. Ms Heffernan did not pursue that Ex Parte Motion but on 13 February 2007 she filed an Inter Partes Notice of Motion returnable on 18 February 2007.

[4] In her affidavit of 31 January 2007 Ms Heffernan gave evidence that on 23 January 2007 members of the RFMF:

> *"threatened to take me from my residence at Lami. It started with a phone call made to me at 10.06 am. Then at or about 9 pm a friend called to advise that a Suva lawyer Mr Richard Naidu was taken into custody by the first and/or second defendants. After that a few men in civilian dress (who I believe to be members of the second defendant), hung around outside our 7 foot gate before moving a few metres away. They appeared to be awaiting further instructions or reinforcement. In the meantime my neighbour advised us that those members of the second defendant were looking for me. My young family and I were intimidated and their actions forced us to leave our home."*

[5] On the following day she and her family left for the western side of Viti Levu.

[6] The affidavit went on to say that:

> *"On national television news at 6 pm on Sunday 27 January 2007 the first defendant said that he and/or members of the second defendant had better things to do than to look for or harass me. I believe that such statements are not true and that I am in imminent danger of being harmed by the first and/or members of the second defendant. I attach and mark as "AH2" copies of newspaper clippings to show grounds upon which I base my belief."*

[7] The newspaper clippings report that:

- Prior to 11 December 2006 the RFMF questioned a senior executive of the SDL party, and several people who had publicly criticised the regime or the President including a businessman, journalists and a trade unionist Kenneth Zinck. Mr Zinck *"was apparently made to run around a military sports field in Nabua late one evening last week before soldiers put him under a spotlight and warned him to watch what he said about the commander"*.
- On 26 December 2006 soldiers took in six pro-democracy activists for questioning late at night and paraded them around in the rain until releasing them the next day.
- on 24 January 2007 soldiers surrounded the home of prominent lawyer Richard Naidu and took him to the military camp, cautioned him not to make inciteful remarks and dropped him off in Wailoku to find his way home.
- on 26 January 2007 Land Force Commander Colonel Pita Driti confirmed that the military are actively searching for businesswoman Laisa Digitaki and Ms Heffernan because they *"need to be cautioned as they continue to make public statements against the President, the interim government and the military."*
- On 27 January 2007 Colonel Driti said that hiding or seeking United Nations protection would not *"have any effect on us because we are still going to*

arrest them and it's up to them whether they like it or not.... They can run but they can't hide because wherever they are we will flush them out."

[8] In an affidavit sworn 14 February 2007 Major Sitiveni Tukaituraga Qiliho, Chief Staff Officer Operations of the RFMF ("Major Qiliho") deposed that *"The RFMF has no interest at all in arresting the Plaintiff"* and that *"The RFMF recognises her organisation and her efforts and recognises that it is important to work together with NGOs in what they stand for."*

[9] The hearing of the Motion on 18 February 2007 was on that day, at the request of Ms Heffernan, adjourned to allow her to amend her Notice of Motion which the Court ordered her to do by 3 pm 23 February 2007. Ms Heffernan failed to comply with the Court order but on 28 February 2007 Ms Heffernan filed an Amended Inter Partes Motion returnable on 15 March 2007.

[10] In the meantime she filed an affidavit in reply sworn 26 February 2007 to that of Major Qiliho. In this affidavit Ms Heffernan said that she had *"no faith in those assurances based on the conduct of the members of the second defendant since 5 December 2006".*

[11] In paragraph 7 of the affidavit she said:

> *"On the 30th February (sic) a plain clothes military officer went to the PCPI office and demanded to know the whereabouts of the plaintiff. When told by the Pacific Globilisation Network Coordinator (PANG) that she did not know, the military officer threatened to take her up to camp for questioning."*

[12] The affidavit also complained about a phone call on 13 February 2007 but there was no evidence, hearsay or otherwise, of any threat or intimidation or even contact with the military after that date and thus subsequent to the sworn evidence of Major Qiliho.

[13] On 13 March 2008 Ms Heffernan swore a Supplementary Affidavit which in sum swore that *"Despite the assurances in the Defendant's affidavit and elsewhere, my colleagues and I have no faith in those assurances based on the conduct of the members of the 2nd defendant since 5 December 2006."*

[14] The Supplementary Affidavit then annexed further press clippings which comprised reports:

- of a lawyer being prevented from leaving Fiji.
- that the former Prime Minister Laisenia Qarase was seeking a court order to allow him to return to Fiji.
- that a Fiji Times photographer was, on 1 February 2007, detained for an hour by the RFMF during which time he was punched and kicked.
- that on 5 March 2007 a 16 year old high school student was assaulted by the military after someone complained to the military that he was beating up his girlfriend.
- that on 1 March 2007 the general manager of the Fiji Daily Post newspaper was taken from his office by the RFMF and questioned.
- that by 12 March 2007 that the interim administration had reduced the number of people on an immigration watch list from 101 people to *"just over 30 key people, ranging from politicians, businessmen and outspoken activists."*
- that on 8 March 2007 the *"Interim Prime Minister Frank Bainimarama said that people will continue to be taken to military camps for interrogation if the need arises. And he is reiterating the Military doesn't condone the use of violence or abuse of human rights.. any complaints against the Military should be taken to the police."*
- that a United States government report on human rights found that the human rights situation in Fiji had greatly deteriorated since the coup, that the military government had arbitrarily detained and sometimes abused coup

opponents, conducted searches without warrants, engaged in intimidation of the media and restricted the right to assemble peacefully.

[15] In a lengthy affidavit sworn 22 March 2007 Major Qiliho traversed many of the matters deposed to or referred to in Ms Heffernan's three affidavits, difficult as it is to traverse unsourced hearsay newspaper reports. He repeated assurances that the defendants had no interest in detaining or questioning Ms Heffernan or from preventing her from travelling overseas or exercising her constitutional rights.

[16] On the same day Viliame Naupoto, the Director of Immigration, swore an affidavit confirming that there was no ban in place restricting Ms Heffernan from leaving Fiji to travel overseas or from travelling within the islands of Fiji.

[17] On 26 March 2007 Ms Heffernan filed written Objections to the Affidavit of Major Qiliho of 22 March 2007. The objection was to practically the whole of the affidavit including the, in the circumstances, daring ground of *"Hearsay"*.

[18] At the hearing on 28 March 2007 each party provided extensive written submissions. The trial judge reserved his decision and delivered judgment on 20 April 2007.

[19] The trial judge was persuaded that there were serious issued to be tried, that damages would be an inadequate remedy and that the balance of convenience justified the grant of an interlocutory injunction, and on 20 April 2007 made one of the four orders sought by Ms Heffernan namely:

> *"Pending 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 to move within Fiji and to leave Fiji in accordance with her rights under the Constitution except in accordance with the law of Fiji as it stood prior to midnight on 4 December 2006."*

[20] The trial judge granted this injunction notwithstanding section 15 of the ***Crown Proceedings Act*** which provided that injunctions cannot be granted against the State in civil proceedings against the State.

[21] Ms Heffernan was represented by a Dr Cameron.

[22] The trial judge noted Dr Cameron's submission that *"only a lawful state can take shelter behind this provision not a regime which has usurped power from a legitimate government"*, and that *"the Attorney-General is only an "Interim" one. He has not been appointed as provided under section 100(1) of the Constitution. Section 100(3) requires the Attorney-General to be either a member of the House of Representatives or the Senate before he can be appointed as such. While he may have other qualifications he does not meet this qualification as he never was a member of (an) elected House of Parliament. The plaintiff says the interim Attorney-General has been appointed by the military regime and not a constitutionally recognised Government. He is in short not a representative of the State."*

[23] The trial judge held that it was *"clearly an arguable matter,"* and proceeded to make the order referred to above.

[24] The appellants, in a Notice of Appeal filed 17 May 2007, appeal on five grounds namely that the trial judge erred:

- In allowing into evidence the newspaper articles;
- In finding that there was a sufficient evidentiary basis for granting injunctive relief;
- In granting injunctive relief contrary to section 15 of the **Crown Proceedings Act;**

- In his interpretation of section 100 of the Constitution;
- In finding that the Attorney-General was not a lawful representative of the State.

Leave to the Court of Appeal

[25] Ms Heffernan in written submissions of 18 September 2008 authored by Dr Cameron says that the appeal should be dismissed because it is an appeal from an interlocutory decision and in accordance with section 12(2)(f) of the ***Court of Appeal Act*** required leave. The submission says that this case does not come within exception (i) to 12(2)(f) which provides that leave is not required where an interlocutory order concerns *"the liberty of the subject."* However this submission ignores exception (ii) namely that leave is not required *"where an injunction or the appointment of a receiver is granted or refused"*.

[26] In failing to refer to exception (ii) the submission has deliberately sought to mislead the Court. Dr Cameron resides in Western Australia and, presumably, has legal qualifications. His submission in relation to leave is nothing short of a disgrace.

31 October 2008

[27] This appeal was fixed for hearing on 31 October 2008. Ms Heffernan's counsel Ms Draunidalo informed the Court that the parties had agreed to settle this and other proceedings but that she wanted written confirmation of these telephone instructions from Ms Heffernan.

[28] The Court agreed to stand the matter over to 6 November 2008 for the making of consent orders, but on 6 November 2008 was informed that the matter had not settled.

The Newspaper Clippings

[29] On an interlocutory application the Court is entitled to consider evidence that would never be permitted on a final hearing, and that includes newspaper articles or even third hand telephone hearsay.

[30] The appellants' submission that hearsay evidence can only be admitted if notice of the intention to do so is given in accordance with section 2 of the ***Civil Evidence Act*** 2002 cannot be sustained.

[31] Many applications for injunctive relief are urgent and ex parte, and if the section were given the effect that the appellants contend it would excise an important part of the Court's inherent jurisdiction.

[32] As the trial judge observed, Order 41 Rule 5(2) of the High Court Rules specifically provides that an affidavit sworn for the purposes of being used in interlocutory proceedings, *"may contain statements of information or belief with the sources and grounds thereof."*

[33] Whether a judge ought to admit into evidence such matters will depend on the nature and the urgency of the hearing and it is difficult to imagine a case where an appeal court could find that a trial judge hearing an interlocutory injunction application erred in admitting material into evidence.

The Evidentiary basis for Injunctive Relief

[34] What use can legitimately be made of such material is, however, a matter that can be reviewed subject to the principles expounded in ***House v The King*** **[1936] 55 CLR 499** where Dixon, Evatt and McTiernan JJ at 504-5 held:

"The manner in which an appeal against the exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the material for doing so."

[35] To grant the injunction the trial judge had to weigh up competing considerations.

[36] In favour of the grant of an injunction was the fear that Ms Heffernan had of being arrested, detained and questioned. Whether or not those fears were justified there was material before him that would entitle the trial judge to accept that Ms Heffernan genuinely held those fears.

[37] Against the granting of an injunction were a number of matters including:

- The evidence that at least since 13 February 2007 no one in the military had expressed any interest in detaining or speaking to Ms Heffernan and the lack of evidence to the contrary even taking into account the hearsay newspaper clippings. Ms Heffernan's affidavit of 27 February 2007 complained about a phone call on 13 February 2007 but there was no evidence, hearsay or otherwise, of any threat of intimidation or even contact with the military after that date and thus subsequent to the sworn evidence of Major Qiliho.
- The delay by Ms Heffernan in having the interlocutory proceedings heard.
- The weakness of Ms Heffernan's evidence generally. Some paragraphs in her affidavits were clearly composed for her unless she was in the habit of speaking of herself in the third person.
- To grant an injunction against the RFMF involved considering whether it had a legal personality, whether it or its Commander could properly be a party to legal proceedings, and the utility of enjoining a party to, in effect, obey the law.

[38] Weighing the slightness of Ms Hefferman's case against these matters, the members of this Court of Appeal would almost certainly not have granted the injuction.

[39] That however is not the test. As Lord Diplock said in ***Hadmore Productions Ltd & Ors v Hamilton & Ors*** [1982] 1 All ER 1042, in an appeal from a judge's grant of an interlocutory injunction it is not the function of the appellate court to exercise an independent discretion of its own and it must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently.

[40] If the above were the only matters in the balance before the trial judge this Court, while having grave misgivings about the decision, may not have held that the trial judge erred. There was another matter however that lay in the balance and that was that the trial judge was being asked to make what on the face of it was an illegal order, an order beyond his power.

The Crown Proceedings Act

[41] Section 15 of the ***Crown Proceedings Act*** ("the Act") provides that:

> *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 an injunction, 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*

(b) ...

> *(2) The court shall not in any civil proceedings grant any 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.*

[42] It was accepted that for the word "Crown" the word "State" should be substituted.

[43] Dr Cameron's submission was that "State" only means a *"lawful state"* and that therefore section 15 did not apply. The trial judge, without analysis, held *"There is much force in Dr Cameron's submission and (it) is clearly an arguable matter."*

[44] No Court will knowingly make an order beyond its power and any judge would need to be satisfied that he or she had the power before making an unusual or novel order.

[45] However here there was no analysis by the trial judge of the submission by Dr Cameron. The trial judge in his decision to grant the injunction did so knowing that it was only *"arguable"* that the Court had the power to do so and therefore that it was only *"arguable"* that the Court was not committing an illegal act.

[46] This is a matter which ought to have tipped the balance beyond reason. At the very least the trial judge ought to have satisfied himself that it was more likely than not that the Act did not prevent him from ordering the injunction. He did not do this but took the risk, in a case that could not justify such a risk, in a case where there seemed little urgency and where there was doubtful utility in granting the injunction .

[47] In failing to properly take into account this highly relevant material consideration the trial judge made a serious error in the exercise of his discretion.

Other Grounds

[48] It is unnecessary for this Court to determine whether or not the appellants were *"the State"* for the purposes of the Act or to deal with the appellants' other grounds of appeal and in any event the parties accepted that it would have been inappropriate to do so in these proceedings.

[49] The orders of the Court are:

(1) The appeal is allowed;

(2) The injunction of 20 April 2007 is dissolved;

(3) The costs order of 20 April 2007 is set aside;

(4) The respondent is ordered to pay the appellants' costs of this appeal and the costs of the hearing before the trial judge.

Powell, JA

Lloyd, JA

Solicitors:

Office of the Attorney General Chambers, Suva for the First, Second and Third Appellants
Office of Draunidalo, Suva for the Respondent