

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

CIVIL APPEAL NO. ABU123 OF 2006S
(High Court Civil Action No.HBC532 of 2005S)

BETWEEN: **JOHN ALI**

Appellant

AND: **NAUSORI TOWN COUNCIL**

Respondent

Coram: **Byrne, JA**
 Shameem, JA
 Powell, JA

Hearing: **Friday, 11 April 2008, Suva**

Counsel: **R Singh] for the Appellant**
 S Sharma]
 M A Khan] for the Respondent

Date of Judgment: **Tuesday, 15 April 2008, Suva**

JUDGMENT OF THE COURT

- [1] In 2002 the Nausori Council had two wards and the Nasinu Council had eleven wards. On 28 November 2002 the Minister for Local Government altered the boundaries of the Nausori and Nasinu Towns by transferring four wards from Nasinu to Nausori.
- [2] The appellant was a resident of and property owner in one of the transferred wards, Nakasi ward, and sought judicial review in the High Court seeking to quash the

Minister's decision and also to compel the Electoral Commission to proceed with planned municipal elections for the whole of Nasinu Town and not merely the remaining seven untransferred wards.

- [3] The action for judicial review was dismissed by the High Court and that decision was upheld by the Court of Appeal on 15 July 2005.
- [4] The appellant then organised petitions to the Minister from members of the public within the four wards expressing their unhappiness at the transfer.
- [5] The appellant's complaint was that no elections for Councillors to serve on the Nausori Town Council had been held in the four transferred wards even though each of these four wards contained populations in excess of that in the other two wards.
- [6] Then the appellant, by Summons dated 21 October 2005, sought a declaration that the enforcement of town rates by the respondent Nausori Town Council was illegal, ultra vires and unenforceable.
- [7] On 31 October 2006, following a hearing on 8 September 2006, Singh J ordered that the respondent write to the Minister asking him to refer the matter of division of wards to the Electoral Commission but otherwise dismissed the action.
- [8] The appellant appeals from the decision of Singh J by Notice of Appeal filed 13 December 2006.
- [9] The Notice of Appeal states two grounds of appeal, namely that the trial judge erred in failing to hold that the respondent was not entitled to levy rates in the four wards because of the failure by the authorities and the respondent to follow section 5(3) of the Local Government Act Cap 125 ("the Act") and in failing to hold that enforcement of rates in the four wards was illegal.

[10] Section 5(3) of the Local Government Act Cap 125 sets out the procedure to follow when boundaries of a town are to be extended. It provides:

“Where a new town is constituted or the boundaries of a town are extended or any material change takes place in the population of a town, a Minister may of his own volition or shall upon application by the town council refer the question of the division of the town into wards or the redefining of the wards or the creation of any new ward to the Electoral Commission which shall make such order in relation thereto as it shall think fit. In such an order the Electoral Commission shall provide that each ward shall contain nearly equal numbers of adult inhabitants as appears to be reasonably practicable.”

Failure to Hold Elections

[11] The appellant has multiple arguments as to why Singh J erred in his findings but most of them are irrelevant to the narrow issues in this appeal.

[12] The respondent in its submissions says that it has *“done all it can to see an election undertaken”* but says an election cannot be held until the Office of Supervisor of Elections *“has undertaken and completed all pre-requisites to the holding of elections”*

[13] That would seem to be the case. On 7 November 2006 the respondent complied with the order of Singh J that it write to the Minister asking him to refer the matter of division of wards to the Electoral Commission.

[14] Section 5(2) of the Act provides that when a new township is declared, elections must be held in six (6) months unless the Minister prescribes to the contrary by way of regulations.

[15] If the Minister does not act the Council can force him or her to refer the matter to the Electoral Commission but section 5(3) of the Act is silent as to the time frame within which the Electoral Commission must act.

- [16] It may be that the Court in proceedings to which the Electoral Commission and/or the Minister were parties would declare that section 5(3) procedure must be completed within a reasonable time but that question cannot be determined in this appeal.
- [17] Any remedy the appellant has for failure to call elections would be in the form of mandamus to compel the Minister or the Electoral Commission to hold elections.
- [18] The appellant has two arguments that this Court can address. The first argument is that section 58 of the Act, properly and strictly construed, does not permit a council to levy rates where the council has been elected undemocratically in the sense that only some of the ratepayers were able to vote for the councillors.
- [19] The second argument is that the levying of rates by a council where only some of the ratepayers were able to vote for the councillors offends section 38(2) of the Constitution.
- [20] In relation to both arguments the appellant concedes that if "all" of the respondent's ratepayers were disenfranchised there could be no objection to the respondent levying rates. The offence to section 58 of the Act and section 38(2) of the Constitution occurs, the appellant contends, only where "some" of the ratepayers have been disenfranchised.

Section 58 of the Act

- [21] Section 58 of the Act provides:

"A council may from time to time make and levy a general rate not exceeding in any one year ten cents in the dollar on the UCV of all rateable land within the municipality ... in accordance with the provisions of this Act."

- [22] Section 9 of the Act defines “Council” as comprising such number of councillors as the Electoral Commission shall from time to time order.
- [23] The appellant refers to a number of cases, many dealing with tax legislation, which are to the effect that when a section imposes a pecuniary burden, it should be construed strictly by the Courts. That proposition seems to be unexceptionable.
- [24] However the appellant’s contention in these proceedings is that “council” in section 58 of the Act should be read as only referring to a council where all the ratepayers have been able to vote for the council.
- [25] That submission is rejected. The words of section 58 are plain and unequivocal and “council” cannot be qualified in this way. The section must be strictly construed and it is not open to the Court to insert into the section any such qualifying words.
- [26] In *John Ali & Anor v Local Government (Nasinu) (Interim) Committee* HBC 2001, Scott J found that “Council” did not include “interim committee” and found that an interim committee had no power to levy rates. However here, as Singh J found, the respondent is a duly convened council and has all the powers given to it under the Act.
- [27] It should be noted that the appellant in his written and oral submissions before this Court agrees that the respondent is “a *duly convened council*”.
- [28] This ground of the appeal fails.

Section 38(2) of the Constitution

- [29] Section 38(2) of the Constitution provides:

"A person must not be unfairly discriminated against, directly or indirectly, on the ground of his or her:

(a) Actual or supposed personal characteristics or circumstances, including race, ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age or disability; or

(b) Opinions or beliefs, except to the extent that those opinions or beliefs involve harm to others or the diminution of the rights or freedoms of others."

[30] The appellant says that the respondent has *discriminated* against him on a *personal characteristic or circumstance* namely his place of residence, or more strictly ownership of property in, Nakasi ward.

[31] Place of residence or ownership of property is not a *personal characteristic or circumstance* within section 38(2) of the Constitution, and unsurprisingly the Court has been referred to no authority to suggest that it is. None of the examples given in section 38(2)(a) are anything in the nature of place of residence or place of property ownership.

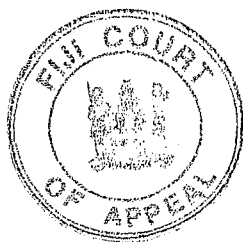
[32] There was some argument during the hearing of this appeal as to whether or not the right to vote in local government elections is a basic human right.

[33] Insofar as this has any relevance to these proceedings the Court notes there is no Constitutional provision for local government. In Fiji as in many other jurisdictions, local government is a creature of statute. Accordingly the legislature could abolish local government altogether if it saw fit.

[34] It is therefore difficult to see how voting in local government elections could be a fundamental human right. Voting in national elections might be an altogether different matter but that is not something that this Court has to decide.

Orders

- [35]
1. The appeal is dismissed.
 2. The appellant is ordered to pay the respondent's costs as agreed or taxed.



John D. Byrne
Byrne, JA

Shameem
Shameem, JA

Russell Powell
Powell, JA

Solicitors:

Kohli & Singh, Suva for the Appellant
M A Khan & Company, Suva for the Respondent