IN THE COURT OF APPEAL
APPELLATE JURISDICTION

CIVIL APPEAL NO. ABU 0024 of 2007
(High Court Civil Action No. HBC 223 of 2003L)

BETWEEN	:	**1. COMMISSIONER OF POLICE** **2. ATTORNEY-GENERAL OF FIJI** ***Appellants***
AND	:	**1. FRED WEHRENBERG** **2. WALBURG WEHRENBERG** ***Respondents***
Coram	:	**Chandra JA** **Kotigalage JA** **Balapatabendi JA**
Counsel	:	**Mr R. Green for the Appellants** **Respondents appeared in person.**
Date of Hearing	:	**15 February 2013**
Date of Judgment	:	**1 November 2013**

JUDGMENT

Chandra JA

1. This is an appeal against the Judgment of the High Court at Lautoka dated 16 January 2007.

2. The Respondents commenced proceedings against the Appellant by filing a Notice of Motion on 1st July 2003 which was later amended to be an Originating summon on 17th October 2003 seeking constitutional redress and sought the following orders :

(1) A declaration that the 1st defendant and his senior officers have engaged in unfair discrimination by denying the plaintiff equal protection under section 38 of the 1997 Constitution.

(2) A declaration that the 1st defendant and his senior officers breached paragraph 1 – 3 of the Agreement reached in Reconciliation Meeting on the 26th March 2002 between him, the plaintiff, and the Fiji Human Rights Commission.

(3) An order for damages for distress, anguish and pain, loss of the pleasures of amenities of life, time and finances.

3. Prior to filing the application for Constitutional Redress in this case, the Respondents had filed a Writ of Summons (HBC 227/96L) for 2 assault and torture incidents and negligence of duty between 1990 and 1996 and one Writ of Summons (HBC 229/97L) for malicious prosecution in 1997. This matter had been heard by Justice Finnigan in January 2007 and after the judgment in this case was delivered on 16.1.2007 Justice Finnigan by his judgment dated 9.2.2007 awarded damages for two assault/torture incidents but dismissed the malicious prosecution and negligence of duty claim. Both parties appealed against that judgment and the appeal was taken up together with the present appeal for hearing.

4. The Respondents relied upon an affidavit sworn by Fred Wehrenberg filed on the 1st July 2003 together with a further affidavit sworn on the 21st November 2003.

5. In his affidavit the 1st Respondent (Fred Wehrenberg) stated that:

He was a New Zealand citizen living with his wife Walburg (the 2nd Respondent) on their two freehold beach frontage residential properties at Nananu-i-ra Island with a population of about 100 people.

He was seeking orders and reliefs due to the unfair discrimination by the 1st Defendant (the 1st Appellant) and his Senior Officers by denying him equal protection under S.38 of the 1997 Constitution.

Since 1990 most residential property owners in his immediate neighbourhood were operating their private homes as illegal guest-houses and by about 1998 nearly all residential home owners, with their staff had formed a racket and were advertising their homes as guesthouses.

The illegal guesthouse operators and their staff were criminally intimidating them by committing serious crimes against them because of their position as informers, state witnesses and objectors.

More than 913 offences had been committed by the racket members since 1990 such as Attempted Murder, Housebreaking with intention to commit a felony, Arson, Assault causing actual bodily harm, common assault, damaging property by throwing objects, damaging property, criminal intimidation, Larceny and criminal trespass against them as reported by them to the Rakiraki Police Station.

The Rakiraki Police Station had done nothing to stop the members of the illegal guesthouse racket operating in the Island of Nananuu-i-ra from criminally intimidating them and not taken the offenders to Court, except in very few cases.

He strongly suspected that the main reason why the Police Force does was denying them equal protection was because of their position as informers, state witnesses and objectors against the illegal guesthouse racket.

The Fiji Human Rights Commission in Suva conducted their investigations between October 1999 and March 2002 and found that the Police Force unfairly discriminated against him and his wife by denying them equal protection.

The Fiji Human Rights Commission held a Conciliation Meeting on 26.3.2002 in Veileka House in Rakiraki between the Police Force, the Fiji Human Rights Commission, his wife and himself. The following agreement had been reached at that meeting:

(a) That the police would update Fred Wehrenberg on the status of all their complaints already lodged with the Rakiraki Police Station and advice whether charges would be laid or not.

(b) The DPC gave an undertaking that the Rakiraki Police would be directed to attend to all future reports by Fred Wehrenberg and also to safeguard their security and their property rights on the island i.e. prevent trespassing, harassment etc.

(c) The Rakiraki Police, through the Station Sergeant also gave an undertaking that they would attend to any future complaints from Fred Wehrenberg.

The 1st Respondent had been informed by telephone on the 17th of November 2002 by a Rakiraki Police Officer that the Police Headquarters had given orders for them not to attend to their reports anymore.

He had since November 2002 reported to the Rakiraki Police of assaults causing bodily harm, criminal intimidation, damaging property, larceny and trespass but that the Police had refused to attend to any of his reports.

6. The Appellants relied on an affidavit of Detective Sergeant Sekaia Suluka sworn on the 5th November 2003. In his affidavit, he stated that:

He was familiar with the facts of the case and that he had been at the Rakiraki Police Station from 1989 and was the Crime Officer since 2001.

He had extracted the complaints made by the 1st respondent at Rakiraki Police Station and annexed same to his affidavit marked "SS1".

The Police had attended to each complaint lodged by the 1st Respondent and conducted investigations.

After investigations that they had filed cases in respect of such complaints in certain instances and that the Police was carrying out its lawful duties as stipulated in the Police Act, Laws of Fiji and the 1997 Constitution.

He denied some of the allegations made against the Police by the 1st Respondent and also stated that the 1st Respondent had not reported that there was an attempt to murder him.

As regards the complaint of arson reported to by the 1st Respondent there had been a full scale investigation and that legal advice was sought from the Director of Public Prosecutions and the advice was that there wasn't sufficient evidence to prosecute the alleged offender.

Regarding the complaints about trespassing on to the beach in front of his residence some people had been charged but that the accused had been acquitted or discharged as the beach was a public place.

He denied breaching the conciliation agreement reached with the Fiji Human Rights Commission and stated that operations would be continued in accordance with the conciliation meeting held with the Commission.

7. The 1st Respondent filed an affidavit on 21st November 2003 in reply to the affidavit of the 1st Appellant and stated that:

The affidavit of the 1st Appellant proved that the police had deliberately and willfully misinformed the offenders in respect of the rights of the Respondents to their property which was freehold.

Sergeant Suluka misused his Police powers against him, due to personal dislike and favouritism by persecuting him and also manipulating Police files of some serious cases that he had reported by twisting the facts.

In the extract of the complaints annexed to the affidavit of Sergeant Suluka only about a third of the complaints had been included and annexed a complete list marked Annex 201.

Reports made by him were classified in about one third of the instances as trivial and some as civil.

Since early December 2002 until November 2003 the Police have not attended to their report nor made any investigations.

The Police were in breach of the Conciliation agreement and was not abiding by any of the three points agreed upon.

He denied that the Police had taken necessary action regarding their complaints and reports.

8. On a consideration of the affidavits filed by both parties which contained the matters set out in summary in paragraphs 5 to 7 above the learned High Court Judge arrived at the following conclusion:

> *"The material before the court leads to the conclusion that police officers have discriminated against the plaintiffs and that the consequence of this discrimination has made life very difficult for the plaintiffs to the point where they have sold their property on Nananu-i-Ra. Similarly it is apparent from the*

material filed that police officers have breached the agreement reached at the conciliation meeting on the 26th March 2002. The attitude of the police officers is highlighted by their refusal to execute it.

No order that the court makes can adequately compensate the plaintiffs for the loss they have suffered. Some of that loss is quite obviously due to their susceptibility to be seen as victims and as a result of their desire to be informers and complainants."

9. The learned Judge having arrived at the above conclusion in his Interim Judgment dated 13th May 2005 ordered as follows:

"In the exercise of the court's discretion, I propose not to make the declarations and orders sought at this time. There is a need for this litigation to be brought to an end and there is a need for the plaintiffs to be appropriately compensated for the humiliation they have suffered due to the manner in which they have been treated by members of the police force and in particular those stationed at Rakiraki. I propose therefore that the defendants make a public apology to the plaintiff highlighting the incorrect advice that was given and the failure to investigate complaints by the plaintiffs from time to time over the years. The content of the apology and the manner of its publication are to be approved by the court. A draft apology and proposal for publication are to be filed within 28 days.

Whilst the plaintiffs have conducted this litigation on their own, costs have been incurred by them and whilst I have declined to make the declarations and orders sought at this time, I consider it appropriate the defendants pay the plaintiffs' costs, which I assess in the sum of Four Thousand Dollars ($4.000.00). This award is made pursuant to Order 62 Rule 11 of the High Court Rules. The costs are to be paid within 28 days.

The matter is adjourned to 9.00 a.m. on 17 June 2005 to monitor compliance by the defendants and to determine such further orders, if any, as are necessary."

10. The Appellants failed to comply with the said interim judgment by the 17th of June 2005 and thereafter when the case had been taken up on 10th January 2007 the Respondents

had been present, the Appellants were represented by Counsel and the Human Rights Commission was also represented and appeared as Amicus. It is also on record that an affidavit had been filed by Monilola Oladip-Ajala, Legal Officer of the office of the Attorney General in Lautoka on 14 March 2006 which has addressed the matters that had been submitted to Court after the interim judgment had been given on 13th May 2005.

11. It has been recorded by the learned trial Judge when the case had been taken up on 10th January 2007 that the Appellants had not complied with the Interim Judgment but attempted to resolve the matter by way of a proposal for the payment of money in lieu of the apology and that the matter did not resolve as the Respondents did not accept such proposal. That the Respondent had filed a notice of motion on 26th September 2005 by which the Respondents sought monetary compensation and damages. That the order sought in the motion was a little different from the Order sought in the Originating Summons and was a little different from the matter that he determined in the Judgment of May 2005 and the matter that was heard in April 2005. It would appear that the affidavit filed by the Legal Officer of the Attorney General on 14 March 2006 had addressed the matters raised in the motion of the Respondent dated 26th September 2005.

12. It is further recorded that the matter as he understood for hearing on that day was a hearing as was necessary to enable a final judgment to be issued either in the same form as the Interim Judgment or with some modifications.

13. Both parties made oral submissions and the Respondents sought to produce some documents to assist the Court in relation to Exhibit 5 which was said to have been filed along with their affidavits. The Appellants objected to the production of further evidence by way of documents at that stage and took up the position that the question relating to pecuniary damages could not be dealt with in these proceedings and could be taken up in the writ proceedings which were proceeding in another Court.

14. The Human Rights Commission in their submissions laid emphasis on the decision in Proceedings Commissioner, **Fiji Human Rights Commissioner v Commissioner of Police** [2006] FJCA 7S; ABU0003.2006S (24 November 2006) where the Court of Appeal had dealt with an allegation relating to violation of human rights.

15. After hearing the submissions made by the parties the learned trial Judge stated that the hearing was over and that he was adjourning the matter for the 16th of January 2007 for judgment.

16. By his judgment dated 16th January 2007 which was termed the final judgment the learned trial Judge stated as follows:

> *"[7] As a result of the failure by the defendants to act in accordance with the proposal in the interim judgment there seems no alternative but for the Court to award damages to the plaintiff and to proceed to consider the declarations sought by the plaintiffs in the Originating Summons.*
>
> *[8] In the Interim Judgment a finding was made that the police officers had discriminated against the plaintiffs and that they breached the agreement reached at the conciliation meeting on the 26th March 2002. It follows therefore that the first two declarations sought by the plaintiffs should be granted."*

17. The learned trial Judge then proceeded in his judgment to consider the aspect of damages. He stated that much of the material and many of the claims are unsubstantiated in any proper manner. That there was no claim made in the pleadings or the affidavits for exemplary damages. That in the affidavit in support of the notice of motion the Respondents had sought to detail the special damages they claimed together with the general damages. That there was no evidence to prove the quantum of damages claimed by way of special damages and that the claim for damages under the heading special damages must fail.

18. Thereafter the learned trial Judge cited the judgment of the Court of Appeal in Proceedings Commissioner, **Fiji Human Rights Commissioner v Commissioner of Police** (Supra) and stated :

> *"[17] In this matter it is apparent from the Interim Judgment the conduct of the defendants has been such as to increase any award of damages. Of note the defendants refused to execute the agreement reached in conciliation by the Human Rights Commission and further refused to give the apology detailed in the Interim Judgment.*
>
> *[18] Also of significance is the period of time over which the breach has occurred. It is now some 15 or 16 years since the allegations of the plaintiff against the defendants first commenced. As I said in the interim judgment, no award of damages will adequately compensate the plaintiff for what they have suffered, some of which has clearly occurred as a result of the plaintiffs' own behavior but behavior which does not justify a public authority such as the Police Force behaving in the manner that I find that it has.*
>
> *[19] Again looking to the decision of the Fiji Court of Appeal in Proceedings Commissioner, Fiji Human Rights Commissioner v Commissioner of Police for guidance, I consider that any award of damages in this matter must be significantly greater than that awarded by the Court of Appeal in that matter. The factors that increase the award are the failure of the defendants to properly and adequately participate in the conciliation process and their failure to apologize at any point in time notwithstanding the Interim Judgment previously issued by the Court together with the extensive period of time over which the breach has occurred. Doing the best I can I award the plaintiffs Thirty Thousand Dollars ($30,000.00) each by way of damages."*

19. The Appellants appealed against the said final judgment by their notice of appeal which set out the following grounds:

> *"1. THAT in the Interim Judgment delivered on the 13th May 2005, the learned trial judge had stated at page 7 as follows:-*

"I propose therefore that the defendants make a public apology to the plaintiffs highlighting the incorrect advice that was given and the failure to investigate complaints by the plaintiffs from time to time over the years"

2. *THAT in the Final Judgment delivered on the 16th January 2007, the learned trial judge increased the award of damages on the following basis as reported on page 6 of the judgment:-*

> "*Again looking to the decision of the Fiji Court of Appeal in Proceedings Commissioner, Fiji Human Rights Commission v Commissioner of Police for guidance, I consider that any award of damages in this matter must be significantly greater than that awarded by the Court of Appeal in that matter. The factors that increase the award are the failure of the defendants to properly and adequately participate in the conciliation process and their failure to apologize at any point in time notwithstanding the Interim Judgment previously issued by the Court together with the extensive period of time over which the breach has occurred. Doing the best I can I award the plaintiffs Thirty Thousand Dollars [$30,000] each by way of damages"*

3. *THAT the learned trial judge erred in law and in fact as follows:-*

> *3.1 in dealing with and later increasing damages as the Court was functus officio on the 10th January 2007 on the point;*
>
> *3.2 even if the Court was not functus officio, increasing the award based on the above (see paragraphs 1 and 2 above) was wrong in law and in fact on the following grounds:-*
>
> *3.2.1 the appellant's non-participation in the conciliation process was not a factor in the interim judgment and therefore should not be a factor in increasing the award as evident in the following:*
>
> *"There is a need for this litigation to be brought to an end and there is a need for the plaintiffs to be appropriately compensated for the humiliation they*

have suffered due to the manner in which they have been treated by members of the police force and in particular those stationed at Rakiraki" (see page 7 of the Interim Judgment)

And later in the Final Judgment at page 6:-

"I …consider that any award of damages in this matter must be significantly greater than that awarded by the Court of Appeal in that matter, The factors that increase the award are the failure of the defendants to properly and adequately participate in the conciliation process and their failure to apologize at any point in time notwithstanding the Interim Judgment…."

3.2.2 That the Order to apologize made in the Interim Order was premised on a finding that Police did give incorrect advice on a land issue AND on the failure of the Appellants/Defendants to investigate complaints by the Plaintiffs from time to time over the years and further :-

(a) That if it were to be accepted that the Police did in fact give incorrect advice as the Learned Judge had found, the incorrect advice did not directly result in any direct breach of any of the Respondents/Plaintiffs rights under Chapter IV of the Constitution and accordingly, it was wrong in law for the learned Judge to increase the award based on the same;

(b) That increasing award based on failure to apologize which in turn was based on a failure to investigate is wrong and contrary to policy considering the following:-

"*while there is a general duty imposed on the police to enforce the criminal law, an action for damages is not an appropriate vehicle for investigating the efficiency of the police force. Furthermore, as a matter of public policy the police are ordinarily immune from actions for negligence in respect of their activities in the*

*investigation and suppression of crime" – **James Satish Bachu v The Commissioner of Police & AG** Civil Appeal No.ABU 0020 of 2004 citing **Hill v Chief Constable of West Yorkshire** [1988] 2 All E 238; [1989] AC 54.*

3.2.3 that further, increasing the award based on failure to apologize which in turn was based on a failure to investigate is also wrong as it did not result in any direct breach of any of the Respondents/Plaintiffs rights under Chapter IV of the Constitution."

20. The Respondents (Plaintiffs) too filed a notice of Appeal setting out the following grounds of appeal:-

"1. The learned judge erred in law and fact when holding in his final judgment in paragraph 13 on page 4 that "No receipts, invoices valuations or other items of evidence have been produced to the court."

2. The learned Judge erred in law when cutting the hearing unexpectedly short and not giving the Respondents the opportunity to exhibit the receipts of hotel accommodation referred to in paragraph 5 p 4 on page 9 of the Plaintiffs (Respondents) replying affidavit sworn on the 26th of April 2006.

3. The learned judge erred in law and fact when awarding only general damages as it should have been a higher damages award which does also include special damages in favour of the Respondents."

21. The notice of appeal filed by the Appellants has not set out the grounds of appeal in clear terms and it was necessary to analyse the material filed as the notice of appeal to identify the grounds of appeal which have been dealt with in this judgment.

The Appeal of the Appellants

(i) **Constitutional Redress and availability of alternative remedy**

22. The Appellants submit that the Respondents had pursued an alternative remedy and that the alternative remedy would be equitable to all parties concerned and that the entire allegations pleaded in the constitutional redress were all also pleaded in the Writ action HBC 227 of 1996L. It was further submitted that Courts in Fiji have dismissed Constitutional Redress applications on the ground that adequate alternative remedy is available to a party.

23. The following provisions in the 1997 Constitution of Fiji are applicable in relation to applications for Constitutional Redress:

> *"S.38(1) Every person has the right to equality before the law.*
> *(2) 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 of freedoms of others; or any other ground prohibited by this constitution.*
> >
> > *(c) Accordingly, neither a law nor an administrative action taken under a law may directly or indirectly impose a disability or restriction on any persons on a prohibited ground.*
>
> *"S. 41(1) "If a person considers that any of the provisions of this chapter has been or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, or is likely to be, a contravention in relation to the detained person),*

then the person (or the other person) may apply to the High Court for redress.

(2) The right to make an application to the High Court under subsection (1) is without prejudice to any other action with respect to the matter that the person concerned may have.

(3) The High Court has original jurisdiction:

(a) to hear and determine applications under subsection (1); and

(b) to determine questions that are referred to it under sub section (5); and may make such orders and give such directions as it considers appropriate.

(4) The High Court may exercise its discretion not to grant relief in relation to an application or referral made to it under this section if it considers that an adequate alternate remedy is available to the person concerned."

23. The basis of the application of the Respondents was that the 1st Appellant and his Senior Officers had unfairly discriminated them by denying them equal protection under S.38 of the 1997 Constitution. The Respondents referred to events starting from 1990 in their application. However, as regards the question whether the same facts were pleaded in the Writ Action HBC 227 filed by them, it is seen that the said Writ action was filed in 1996 and that the facts pleaded therein would be only upto 1996. On the other hand in the present application for Constitutional Redress, which was filed in 2003 facts relating to events that had taken place after 1996 and up to 2003 have been referred to. Further it is to be observed that the application had been filed after there had been an alleged breach of a conciliation agreement entered into between the Police and the Respondents on the intervention of the Human Rights Commission in 2002 and one of the declaration sought was in relation to that. Therefore the seeking of this remedy by the Respondents would seem to be justifiable in those circumstances.

24. The availability of the remedy of constitutional redress has come up for consideration in Fiji in a few instances which have been based on actions and excesses of the Police. The present case is an instance of Police inaction.

25. **Naqa –v- Commander, Republic of Fiji Military Forces** [2004] FJHC 1; HBM0063.2003 (23 March 2004) was a case where there was a complaint about brutalization, ill-treatment and detention by soldiers and police. As the proceedings had been filed three years after his release from alleged detention the application was dismissed as it had been filed after the time limit of thirty days laid down in redress Rules. Justice Jiten Singh dismissed the application on the ground that there was a delay in making the application and also on the basis that the Appellant had an alternative procedure of an action in tort available to him.

26. In **Attorney-General of Fiji –v- Silatolu** [2003] FJCA 12; MISC NO 1 2002S (6 March 2003) the Court of Appeal had to consider the judgment of the High Court where orders by way of constitutional redress were made regarding the applicant's right to be given legal representation. The Applicant had been charged with treason with another person. The Applicant had not been represented whereas the other accused was represented. An application had been made regarding his right to legal representation and to equality before the law. The High Court granted him relief on the basis that his right to legal representation had been contravened. On appeal the Court of Appeal upheld the judgments of the High Court save to the extent that the Court did not consider that mandatory injunctions against the State should have been issued by the High Court. The Court was of the view that the High Court should have issued declarations.

27. **Abhay Kumar Sing –v- The Director of Public Prosecutions and Another** Criminal Appeal No.AAU0037 of 2003S was a case where the Applicant's application for constitutional redress had been summarily dismissed by the High Court. The application

for constitutional redress before the High Court was regarding the secret use of a tape recorder and the intended evidence of the recorded conversation between the applicant and a state witness as being a breach of the applicant's fundamental rights. The High Court had dismissed the application summarily and one of the reasons given was that the Applicant had an alternative remedy as he was entitled to canvass the matters raised at his criminal trial by way of an application to challenge the admissibility of the impugned conversation on a voir dire. The Court of Appeal dismissed the appeal of the Applicant having considered a series of cases dealt with by the Privy Council especially on the ground that where there is an adequate alternative remedy that the relief under constitutional redress would not be granted.

28. **Proceedings Commissioner, Fiji Human Rights Commission –v- Commissioner of Police** (Supra) was a case which was cited and made use of by the learned High Court Judge in the present case. There the proceedings were brought by the Commissioner in the High Court against the Commissioner of Police and the Attorney General of Fiji on behalf of the complainant regarding the breach of her rights by the Police. The proceedings had been instituted following attempts by the Commissioner to secure conciliation, which were unsuccessful by reason of the refusal of the Police to apologise, or to provide reparation for the claimed breach of the complainant's rights. The alleged breached of the provisions of the Constitution, involved a forced medical examination that had been conducted without her consent at the insistence of the Police. The High Court held that the complainant's rights had been breached and granted $5,000 as damages. The appeal to the Court of Appeal was on the basis that the damages awarded were inadequate. The Court of Appeal increased the damages to $15,000 and made the following observations:

> *"[91] …….as we have observed, in the assessment of these damages, it is proper to take into account the subsequent response of the police to the breach, since the nature of that response, or lack of it , is directly relevant to the reinforcement of the hurt occasioned and the prolongation of that hurt.*

> *[92] In this case, there was no immediate apology even though the police knew the complainant had been cleared. They refused to apologise at the attempted conciliation. ……."*

29. The position in Fiji would be that where appropriate constitutional redress will be granted as seen from the above decisions. The fact that there is an adequate alternate remedy is available will not deter a person from seeking relief by way of constitutional redress. In the Privy Council decision in **Attorney General of Trinidad and Tobago –v- Ramanoop** [2005] UKPC 15 (23.2.2005) it was stated:

> *26."… their Lordships hasten to add that the need for the courts to be vigilant in preventing abuse of constitutional proceedings is not intended to deter citizens from seeking constitutional redress where, acting in good faith, they believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them."*

30. In the present case, there are features which show that the 1st Appellant had impliedly accepted failure on their part to recognise the rights of the Respondents. Firstly, when considering the conciliation agreement entered into between the Respondents and the Police on the intervention of the Human Rights Commissioner in 2002, it was an admission on the part of the Police that there had been a failure on their part and that they were going to correct it by taking appropriate action thereafter, which they failed to do. This is further fortified by the fact that as the learned trial Judge stated when considering the affidavits filed by the parties, that the Police had not fully dealt with the matters set out in the affidavit of the Respondents and had in fact not dealt with the events after 2002 regarding which the Respondents had made several complaints.

31. Secondly, after the interim judgment was given, the 1st Appellant failed to make a public apology as required of them. Instead of making an apology they made attempts to make a

payment in lieu of making an apology as the proceedings of January 2007 revealed, the Respondents had refused to accept the proposals made by the Appellants to pay $10,000 dollars in lieu of the apology and $5000 as costs. It would appear that the affidavit filed by the Legal Officer of the Attorney General on 14 March 2006 had addressed the matters raised in the motion of the Respondent dated 26th September 2005. It was stated specifically at paragraph 10(a) of the said affidavit that *"Wehrenberg is entitled to a nominal sum only. Our offer of $15,000 still stands. I believe this is more than sufficient to compensate Wehrenberg for his grievances – whether under the Constitutional Redress Rules or under the Fiji Human Rights Act."*

32. Considering these positions taken up by the Respondents, it would be seen that they had conceded that there had been lapses on their part regarding the grievances of the Appellant. In such circumstances, the learned trial Judge cannot be faulted for granting the declarations sought by the Respondent and also for granting damages.

(ii) **Whether the Court was functus officio**

33. The Appellants had taken up as a ground of appeal that the learned trial Judge was functus officio after making his Interim Judgment. In the interim judgment of the learned trial Judge, the Appellants were required to give an apology and to pay costs. If this order was complied with by the Appellants it would have been the end of the matter. However, the order was not complied with and therefore it was necessary to see whether the learned trial Judge had finally concluded the matter or not. In the interim judgment the learned trial Judge stated : "In the exercise of the court's discretion, I propose not to make the declarations and orders sought at this time". He further stated that the matter was being adjourned to 17 June 2005 to monitor compliance by the defendants and to determine such further orders, if any, as are necessary.

34. Although the learned trial Judge in the course of his interim judgment dealt with the matters set out in the affidavits of the parties he did not make final conclusive orders regarding the declarations and the damages sought by the Respondents. The Appellant made the submission that the Judge was functus officio when he made the final judgment. The authorities submitted in support of that submission Re**: VGM Holdings Ltd** [1941] 3 All ER 417; **In re Laucala Beach Holdings Ltd** [2003] FJHC 108; HBE0073D.2001S (30 May 2003) are not relevant to the present case as they are applicable in totally different situations.

35. In fact, in the written submissions filed by the Appellant it is admitted by them that the earlier judgment was interim and that leaves room for further orders. In the final judgment of the learned trial Judge, he stated:

> *"[7] As a result of the failure by the defendants to act in accordance with the proposal in the interim judgment there seems no alternative but for the Court to award damages to the plaintiffs and to proceed to consider the declarations sought by the plaintiffs in the Originating Summons".*

36. Having stated so, the learned trial Judge proceeded to grant the declarations sought by the Respondents and thereafter proceeded to consider the question of damages. In view of this position it cannot be said that the learned trial Judge was functus officio when he delivered his final judgment and therefore this ground of appeal raised by the Appellants fail.

(iii) Increase of damages on the basis of incorrect advice given by the Police

37. The Appellants have taken up the position that the learned trial Judge premised the Interim Order on a finding that the Police gave incorrect advice on a land issue and in their submissions cited several decisions to support their argument that the learned trial Judge erred in doing so.

38. One of the causes for the complaints of the Respondents to the Police arose from the fact that their claim on their freehold land which had a beach front was private property. According to them the Lands Department had advised them that their land was private property and therefore anyone trespassing on the beach front was committing an offence. There were a number of complaints to the Police on the score of persons trespassing on their land. It was also in evidence in the affidavit of the 1st Respondent that a notice had been put up on the Respondent's land stating that limited access through property during high tide as the Police had required them to put up such a notice.

39. In spite of such a notice there had been several instances of trespass, and prosecutions brought against the offenders had not succeeded as the cases had failed in Courts. In some of these cases the failure being due to the argument taken up that the alleged trespass had been in a public place.

40. The submission was made by the Appellants that the incorrect advice did not directly result in any direct breach of any of the Respondents' rights under Chapter IV of the Constitution and therefore it was wrong in law for the learned trial Judge to increase the award based on same. The Police would not have been in the best position to advice the Respondents regarding their property rights. The allegation that the police had given incorrect advice is not without justification as the Respondents had suffered invasion of their private rights from the local residents on the Island and regarding which their complaints to the Police had not brought about any satisfactory results. It would be incorrect to state that the learned trial Judge increased the award on the basis of incorrect advice given by the Police as that was only one factor that the learned trial Judge had taken into account in awarding damages. Therefore the submission on this ground has no merit.

(iv) **Increase of damages based on failure to apologize**

41. The Appellants have also submitted that increasing the award based on failure to apologize which in turn was based on failure to investigate is wrong and contrary to policy and cited the principle in **Hill –v- Chief Constable of West Yorkshire** [1988] 2ALL ER 238 which was cited in **James Satish Bach –v- The Commissioner of Police & AG** Civil Appeal No. ABU 0020 of 2004 to the following effect:

> *"While there is a general duty imposed on the police to enforce the criminal law, an action for damages is not an appropriate vehicle for investigating the efficiency of the police force. Furthermore, as a matter of public policy the police are ordinarily immune from actions for negligence in respect of their activities in the investigation and suppression of crime."*

42. This argument of the Appellant is on the basis of Police immunity as stated in **Hill –v- Chief Constable of West Yorkshire** (supra). In the affidavit filed in defence by the Police in this case before the High Court, it had been set out that the Police had investigated into the complaints of the Respondents and had taken steps in that regard and that on certain occasions sought advice from the Director of Public Prosecutions. However, as pointed out above the affidavit itself did not include some of the complaints made by the Respondents and was incomplete and they had not addressed the complaints made after 2002 which was after entering into the conciliation agreement with the intervention of the Human Rights Commissioner.

43. As stated above the entering into the Conciliation Agreement was an admission by the Police of their shortcomings and an undertaking to take necessary steps thereafter which too they failed to do. This conduct on the part of the Police in this case is quite different from the principle of police immunity in relation to the conduct of the Police as set out in **Hill –v- Chief Constable of West Yorkshire** (supra). In the present case it is not the position of the Police that they did the best they could do regarding the complaints of the

Respondents to remedy their grievances, it is a case of admitting their shortcomings which as guardians of the law they were under a duty to perform in respect of the Respondents who were lawful residents on that Island. In the special circumstances of this case, the argument based on police immunity would thus fail.

44. Further, the Appellants argued that increasing the award based on failure to apologise which in turn was based on a failure to investigate is wrong as it did not result in any direct breach of any of the Respondent rights under Chapter IV of the Constitution. As stated in paragraph 40 here too, the failure to investigate some of the complaints of the Respondents where they were grieved would have resulted in a situation where there were invasions of their private rights due to the inaction of the Police. The increase of the award as alleged by the Appellant for failing to apologise has been taken in the wrong context by the Appellants. It was not a case of increasing the award of damages due to the failure by the Police to comply with the Interim Judgment that was considered by the learned trial Judge but a situation where irrespective of the interim judgment that the Police had failed to take steps to implement the conciliation agreement. If there was an apology at the stage prior to the commencement of the proceedings by the Respondent it may have to some extent brought some solace to the Respondents.

45. In **Proceedings Commissioner, Fiji Human Rights Commissioner –v- Commissioner of Police** (Supra) in considering the measure of damages it was stated :

> *"[62] First, the context in which the breach occurred, and the existence of a failure by the relevant authority to afford a complainant the protection of other rights, can have a direct bearing on the extend of the hurt to personal feelings, humiliation and loss of dignity, as well as on the complainant's feelings of having been subjected to an injustice.. In this regard the fact that the injustice may have been the act of an authority sworn to uphold and enforce the law cannot be understated as*

> *an aggravating circumstance:* ***Basu –v- State of West Bengal*** *at[9] and* ***Kennedy –v- Ireland*** ***(****1987) IR 587 at 594 per Hamilton P.*
>
> *[63] Secondly of relevance is the subsequent conduct of the Public Authority responsible for the breach.* ***The provision of a timely apology****, or the making of immediate reparation, will justify a lower award then would otherwise be the case :* ***R (Bernard) –v- London Borough of Enfield*** *(2003) HLR 4. (emphasis added).*
>
> *[64] On the other hand the maintenance of an unjustifiable stance by a defendant as to the correctness of its actions, the refusal to participate meaningfully and bona fide in a conciliation, or the exaction of revenge in response to a lawful complaint, or in response to the bringing of proceedings, will be relevant in assessing damages. This follows from the fact that conduct of this kind will only reinforce and prolong the hurt to feelings, the loss of dignity and the humiliation arising from the breach itself, and the complainant's sense of justice."*

46. These observations would be relevant in the present instance too. The consideration of the learned trial Judge that there was no apology which would have meant a timely apology for failure to act in accordance with the conciliation agreement was quite appropriate in granting damages.

Respondents' Appeal

47. The Respondent's appeal was on the question of damages awarded by the learned trial Judge. In their first ground of appeal, they state that the learned trial judge erred in law and in fact when he stated in his final judgment that the Respondents claim for special damages must fail as no receipts, invoices, valuations or other items of evidence were produced.

48. This issue raises the question as to when the trial proper was concluded. The learned trial Judge having considered the affidavits and annexures filed by both parties gave an interim judgment which dealt with the main issues that arose in the case of the Respondents and wanted the case to be mentioned subsequently to monitor compliance and to take steps regarding the claims of the Respondent. The learned trial Judge reserved to himself the necessity of making further orders regarding the case depending on the response of the Appellants to his interim judgment. Therefore the case proper was concluded and all the evidence had been looked into and considered by the trial judge at the stage of delivering the interim judgment and it was only left to see what consequential orders he would had to make thereafter. There was no possibility of tendering further evidence after that stage which was attempted by the Respondents and which was objected to by the Appellants.

49. In those circumstances, although the Respondents had attempted to file further evidence regarding the claim for special damages, the learned trial Judge was correct in stating that the Respondents had not produced documents to prove special damages and therefore the claim for special damages must fail. In view of that position, the first ground of appeal of the respondent regarding special damages fails.

50. The second ground of appeal is on the basis that the learned trial judge had erred in law in cutting the hearing unexpectedly short and not giving the Respondents the opportunity to tender exhibits to prove their damages.

51. As stated above after the delivery of the interim judgment there was no possibility for either party to tender fresh evidence to establish any of their claims. What the proceedings of 10th January 2007 reveal is that the parties were required to make submissions regarding their cases. Not only the parties, even the Human Rights Commission Commissioner too made submissions according to the proceedings on that day. Therefore there was no

question of the learned trial Judge cutting short any proceedings, as a full hearing had been given regarding evidence prior to the delivery of the interim judgment. Therefore this ground of appeal of the Respondents fails.

52. The third ground urged by the Respondents is that the learned judge erred in law and fact when awarding only general damages as it should have a higher award including special damages.

53. In a claim for damages general damages and special damages are considered under separate heads and not together. The trial judge considered the issue of special damages and denied the Respondents claim to same. The position regarding special damages has been dealt above.

54. The complaint of the Respondents is that the general damages should have been higher by including special damages. As stated above, special damages cannot be included under general damages and therefore the ground of appeal of the Respondents on that score fails.

Orders of Court:

(a) The appeal of the Appellants is dismissed;
(b) The appeal of the Respondents is dismissed;
(c) The judgment of the learned trial judge including the order to pay costs is affirmed;
(d) The Appellants shall pay $2000 each as costs to the two Respondents.

Kotigalage JA

55. I agree with the reasons and the conclusions of Chandra JA.

Balapatabendi JA

56. I also agree with the reasons and the conclusions of Chandra JA.

Hon. Justice S Chandra
JUSTICE OF APPEAL

Hon. Justice C Kotigalage
JUSTICE OF APPEAL

Hon. Justice S Balapatabendi
JUSTICE OF APPEAL