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

CIVIL APPEAL NO. ABU 32 OF 2018
(High Court Civil Action HBJ Nos: 8 and 9 of 2015 at Lautoka)

BETWEEN : **CHIEF EXECUTIVE OFFICER**
CIVIL AVIATION OF FIJI
1st Appellant

AND : **CIVIL AVIATION AUTHORITY OF FIJI**
2nd Appellant

AND : **THE CONTROLLER OF AIR SAFETY**
3rd Appellant

AND : **TIMOTHY JOHN JOYCE, Sunflower Aviation Limited**
JOYCE AVIATION (FIJI) LTD, *t/a* Heli Tours Fiji
JOYCE AVIATION (FIJI) LTD, Tall Pines Ltd t/a **Pacific Flying School**
TANDEM SKYDIVE (FIJI) LTD and **CAPT. LEPANI NALOMA**
Respondents

Coram : **Basnayake JA**
Lecamwasam JA
Dayaratne JA

Counsel : **Mr R P Singh for the 1st and 2nd Appellants**
Mr A K Narayan for the Respondents

Date of Hearing: 21 May 2019

Date of Judgment: 7 June 2019

JUDGMENT

Basnayake, JA

[1] I agree that this appeal should be allowed with costs.

Lecamwasam, JA

[2] The Appellants have preferred this appeal against the decision of the High Court Judge at Lautoka delivered on 9th April 2018. As the background to the case is vividly and accurately narrated by the learned High Court Judge in his judgment, I opt to rely on the same description which unfolds thus:

> *"[08] Timothy John Joyce (First Applicant) is the Chief Pilot, Chief Executive Officer, Director and shareholder of SUNFLOWER AVIATION LIMITED, JOYCE AVIATION (FIJI) LIMITED t/a HELI TOURS FIJI, JOYCE AVIATION (FIJI) LIMITED, TALL PINES LIMITED t/a PACIFIC FLYING SCHOOL, TANDEM SKYDIVE (FIJI) LIMITED, the second to fifth applicants (the Companies). The first applicant is fully involved in all operation of the Companies and he handles all their daily affairs and activities that they were involved in.*
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> *[09] Captain Lepani Naloma, the sixth named applicant (the Applicant in JR 9 of 2015 hereafter referred to as the second Applicant) is a Chief Pilot with the Companies.*
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> *[10] On 25 June 2015, the second applicant piloted a flight to Nanuku in a Beechcraft Duchess aircraft with three passengers. The aircraft was alleged to have run off the side of the run way (the incident). The first respondent wrote to the second applicant on 25 June 2015, advising of a report he had received of the incident and pending investigations by the Civil Aviation Authority of Fiji (CAAF), the third respondent his pilot's license was suspended.*
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> *[11] By a letter dated 17 July 2015, the first respondent advised the first applicant of the completion of investigations and suspension of first applicant's position as a fit and proper person status with the Companies alleging 47 breaches of the Fiji Air Navigation Regulations (ANR). The letter also called on the first applicant to make representations as to why his said status should not be revoked.*

[12] Both the first and the second applicants made representations to the first respondent. Neither had been provided with the reports that the first respondent had compiled which had matters that were adverse at least against the First applicant. On 17 July 2015, the first respondent advised the first applicant that upon completion of investigations the applicants status as a fit and proper person for the Companies has been revoked with immediate effect for a period of 5 years. The first applicant was also advised of the right of appeal and provided with a circular entitled "Function No. 1/2012."

[13] The second applicant was advised by a letter from the first respondent on 30 July 2015, that his pilot's license has been suspended for 12 months with immediate effect. He was similarly advised of a right of appeal and provided with a copy of the circular entitled "Function No. 1/2012."

[14] Thereafter, the first applicant met the second respondent and sought distance disclosure of documents and particulars of charges. This was repeated by their solicitors.

[15] The second respondent caused a disclosure to be made of a document entitled disclosure and no particulars of the charges were in fact provided. Instead, the first respondent on appeal advised that he was withdrawing the charges against the first applicant and proceeding with one revised charge. He also extended the time for appealing. Issues were taken on these actions by the applicants' solicitors as well as the procedure.

[16] The second respondent then proceeded to give his decision after the applicants' Solicitors and the first respondent made submissions.

Judicial Review

[17] The judicial review was initially brought against the decision of the first respondent dated 30 July 2015 and part of the decision made by the second respondent dated 22 October 2015 following an appeal pursuant to section 12F of the Civil Aviation Authority of Fiji Act 1979. By his decision, the second respondent directed the first respondent: 'to put proper charges with full particulars to the applicant within 21 days afresh together with documentary evidence against the Applicant and to reconsider the decision after the Applicant has been provided [with] an opportunity to respond.'

[18] The second respondent set aside the first respondent's decision. No reasons were provided in the decision of the second respondent dated 22 October 2015. A clarification was provided and the respondents conceded that the decision was set aside on the basis that the applicants had not been afforded a fair hearing by the first respondent when the first respondent dealt with the charges against

them (the applicants). As a result, the applicants discontinued the application against the first respondent. The second and third respondents have by virtue of this conceded that the challenge to the decision of the first respondent was justified.

[19] The applicants apply for judicial review of the Second Respondent's decision of 22 October 2015, in part."

[3] Against the above background, the learned High Court Judge heard the case and issued a writ of certiorari. The directions given by the second respondent was also quashed by the learned High Court Judge mainly for the reasons stated in paragraph 62 of his decision under the caption of **"*conclusion*"**. Paragraph 62 reads as follows:

"*For the reasons set out above, I conclude that the second respondent had acted without jurisdiction and illegally when directing that the matter is to be referred back to the Controller for proper charges with full particulars of each breach alleged to have been committed to be put to the applicants within 21 days from the date hereof, afresh. I am satisfied that there are grounds for issuing quashing orders (writ of certiorari) to remove the second respondent's this particular part of his decision dated 22 October 2015. The second respondent's decision is partially good and partially bad. He made a proper order setting aside the suspensions imposed on the applicants by the first respondent upon withdrawal of charges at the appeal stage but added some direction which is beyond his powers. If the bad can be cleanly severed from the good, the court will quash the bad part only and leave the good standing. I accordingly issue a writ of certiorari to remove the bad part of the second respondent's decision."*

The learned High Court Judge allowed the application and made the following orders:

"1. Writ of certiorari (quashing order) issued quashing the bad part of the second respondent's decision dated 22 October 2015.
2. The second respondent's direction (the bad part of his decision dated 22 October 2015) that the matter is to be referred back to the Controller for proper charges with full particulars of each breach alleged to have been committed to be put to the applicants within 21 days from the date hereof, afresh be quashed.
3. The respondents will pay summarily assessed costs of $1,500.00."

[4] The Appellants have urged the following grounds of appeal before this Court:

1) ***"THAT*** *the Learned Trial Judge erred in law and in fact ordering Writ of Certiorari quashing the decision of the First Appellant dated the 22 of October 2015.*

2) ***THAT*** *the Learned Trial Judge erred in law and in fact by holding that the act of review of a decision pursuant to Section 12 F of the Civil Aviation Authority of Fiji Act by the First Appellant did not incorporate the power for the First Appellant to refer the matter back before another Controller with the Second Appellant for reconsideration and to deal with the allegations/charges a fresh.*

3) ***THAT*** *the Learned Trial Judge erred in law and in fact in finding that all the charges against the Respondents were withdrawn when one charge remained a foot before the First Appellant at the time the First Appellant exercised his powers pursuant Section 12 F of the Civil Aviation Act of Fiji whilst dealing with the appeal lodged by the Respondents.*

4) ***THAT*** *the Learned Trial Judge erred in law and in fact in finding that the First Appellant had referred the matter back to the Second Named Appellant to reconsider the charges against the Respondents when the matter was referred to another Controller."*

[5] In view of the above positions the respondents filed a notice that reads thus:

"1) The decision of the High Court dated 9th April 2018 issuing a Writ of Certiorari (quashing Order) quashing the bad part of the Second Respondent's (First Appellants) decision dated 22nd October 2015 be affirmed.

2) The Second Respondent's (First Appellant) direction (the bad part of his decision dated 22nd October 20125) that the matter is to be referred back to the Controller for proper charges with full particulars of each breach alleged to have been committed to be put to the Applicants/Respondents within 21 days from the date hereof afresh be quashed, be affirmed.

3) The order that the Appellants will pay summarily assessed costs of $1,500.00 be set aside and the Appellants to pay the Respondents costs on a solicitor/client full indemnity basis to be assessed.

4) The Appellants to pay damages to Respondents to be assessed by the High Court on a damages hearing."

[6] As per the notice, the orders sought by the Respondents are supported by the following grounds :-

> *"1. The Learned Judged failed to deal with the following issues on the material and evidence before him:-*
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> *1) Whether the decision of the Second Respondent was unreasonable;*
> *2) Whether the Second Respondent failed to take into account relevant factors and took into account irrelevant factors;*
> *3) The Learned Judge failed to consider or find that the decision of the First Appellant/Second Respondent was biased;*
> *4) Failed to find that the decision by the First Appellant to refer the matter on fresh charges after charges had been withdrawn on appeal was in breach of the 1st and 7th Respondent's Constitutional rights and the rule against double jeopardy;*
> *5) Failed to hold that the right to appeal to the Chief Executive under section 12F was invalid and unconstitutional.*
>
> *2. The award of costs summarily assessed at $1,500.00 was unreasonable and low in view of the history of the matter, proceedings and attendances when costs were claimed against the Appellants' on the solicitor/agent full indemnity basis.*
>
> *3. The Learned Judge failed to deal with the claim by the Respondents for damages and should have held an enquiry/hearing on damages after his findings and quashing of the impugned decision on the Judicial Review."*

[7] The crux of the issue before this court revolves around the direction given by the second Respondent (hereinafter referred to as first appellant) to refer the matter back to the Controller. Paragraph 62 of the learned High Court Judge's decision reveals that the basis for the issuance of the writ of Certiorari was the conduct of the first appellant in acting illegally and *ultra vires* when he directed that the matter be referred back to the controller for proper charges.

[8] Even at the argument stage the learned Counsel for the Respondents (before the Court of Appeal) admitted that the outcome of the entire case was predicated on the interpretation given to the directions given by the First Appellant and invited the Court to decide such issue. Hence I will advert my attention to the above facts which will decide the fate of

this consolidated Judicial Review application Nos.HB 8 and HB 9 of 2015. In view of this position, I will address the issues of judicial review and public purpose only in so far a discussion of these issues does not become redundant.

[9] It is therefore important to ascertain whether the direction given by the Chief Executive Officer (First Appellant) to refer the matter to the Controller is *ultra vires viz-a-viz* the powers conferred on the CEO under section 12F of the Civil Aviation Authority of Fiji Act No.18 of 1979. Section 12F deals with appeals and states:

> *"12F. Any person who is aggrieved by the Authority's decision on the refusal, withdrawal, revocation, variation or suspension of an aviation document may appeal to the Chief Executive for the review of the Authority's decision."*

[10] As per the above section it is common ground that the CEO (first appellant) had the power to entertain and hear appeals for the review of the authority's decisions. However, the position of the Respondent is that the first appellant's decision to refer the matter back to the Controller exceeds the power conferred on him by section 12F and therefore, the first appellant had delegated or abdicated his power of review under the Act.

[11] The Respondents (the original Applicants) further state that they did not object to the procedures of appeal *per se* before the High Court but to the *ultra vires* decision of the First Appellant, pursuant to a review of the matter, to refer it for reconsideration. The original applicants challenged the order of the First Appellant before the High Court on the grounds of *ultra vires* and illegality, Procedural impropriety, Breach of natural justice, and Breach of Constitutional rights. However, their main position before the Court of Appeal is that the first appellant acted *ultra vires* the powers conferred on him by section 12F and therefore to affirm the orders of the High Court.

[12] It is not disputed that the First Appellant possessed the power to entertain appeals. The instant matter being one of review subsequent to the decision of the Controller, I will now examine whether he has in fact gone beyond his statutory jurisdiction and acted *ultra vires*. His findings are found in page 248 of the High Court Record which reads thus:

"1. I acknowledge receipt of your letter dated 14th October 2015.

2. I have limited myself to the procedural complaints contained in the grounds of appeal by the Appellant in which he had submitted that proper Natural Justice was not accorded to the Appellant and as a consequence a fair hearing did not take place.

3. I have not considered the merits of the decision made by the Controller.

4. After considering the complaints about the lack of natural justice, the particulars of which were contained in the Grounds of Appeal lodged by Tim Joyce and the response filed on the 14th of October 2015, and without considering the merits of the decision of the Controller, and in the exercise of my powers under section 12F of the Civil Aviation Authority of Fiji Act, 1979, I direct as follows:

a) That the matter is to be referred back to the Controller for proper charges with full particulars of each breach alleged to have been committed to be put to Tim Joyce within 21 days from the date hereof, afresh.

b) That the charges with the particulars are to be forwarded to Tim Joyce together with all documentary evidence that the Controller proposes to utilize against the said Tim Joyce.

c) That the charges are to be reconsidered by the Controller after Tim Joyce has been provided an opportunity to respond to the allegation against him.

d) That in the meantime all the suspensions against Tim Joyce in relation to his appeal be uplifted and all adverse notations against him arising from this particular case to be revoked."

[13] A closer scrutiny of paragraph 4 clarifies that he had considered the procedural aspects complained about before considering the merits of the decision of the Controller. Having found procedural lapses, the first appellant makes the directions under 4(a), (b), (c), and (d). Accordingly, it is apparent that there was an allegation of failure to follow principles of natural justice and therefore the First Appellant had rectified the situation as per 4(a & b). While a strict technical severance of the parts of his decision and subsequent direction is not necessary to understand that he has not abdicated his review powers, it is pertinent to state that the directions following the review of the matter is not tantamount to the review itself. Section 12F confers power on the First Appellant to entertain and hear appeals to review decisions of the Authority. However, it does not place any restrictions

as to the powers vested or the procedures the first appellant could adopt or directions he is permitted to issue. Therefore it is as clear as blue water that even though the directions were predicated on the review of the decision, the directions were subsequent to the review and not part of the review and that the first appellant was not fettered in adopting reasonable procedures within the confines of the legislative power conferred on him.

[14] The Respondent's argued that the Second Respondent in the High Court i.e. the first appellant, by not providing explanation and reasons has failed in his duty to review and determine the fundamental question of whether the First Respondent's decision was unlawful, irrational and procedurally unfair and thereby their Constitutional Rights under section 16 (1) (c) of the Constitution were violated. Section 16 reads thus:

> *"16 – (1) Subject to the provisions of this Constitution and such other limitations as may be prescribed by law –*
>
> *(a) Every person has the right to executive or administrative action that is lawful, rational, proportionate, procedurally fair and reasonably prompt;*
> *(b) Every person who has been adversely affected by any executive or administrative action has the right to be given written reasons for the action; and*
> *(c) Any executive or administrative action may be reviewed by a court, or if appropriate, another independent and impartial tribunal, in according with law.*
>
> *(2) The rights mentioned in subsection (1) shall not be exercised against any company registered under a law governing companies.*
> *(3) This section shall not have retrospective effect, and shall only apply to executive and administrative actions taken after the first sitting of the first Parliament elected under this Constitution."*

12F is a piece of legislation introduced by an act of Parliament and the third appellant has not violated any power subsumed in that section. Of course, requirement to give reasons cannot be over-looked. But in this instance, the First Appellant's direction itself is self-explanatory and hence no need of further elucidation. Section 16(1)(c) of the Constitution is not violated though it is alleged by the Respondents to the contrary

[15] A textual reading of the statute in question makes it abundantly clear that the First Appellant had the power to deal with an appeal. It is to be appreciated that it is not possible for the legislature to cater to all possible eventualities. When the power is conferred on a particular person by way of statute, as observed by *Lord Selbourne LC* in **Attorney-General –v- Great Eastern Railway Co**. (1880) 5 App Cas 473 cited by the Respondents as well at the Appellants in their written submissions, *"whatever may fairly be regarded as incidental to, or consequential upon, those things that the legislature has authorized, ought not (unless prohibited) to be held by judicial construction, to be ultra-vires."*

[16] It is beyond the role of the legislature to legislate on the procedural aspects of the course of an inquiry. It is an established commonsensical approach for the inquirer to decide on the best course of action upon reviewing the matter. This is exactly what the First Appellant had done. He had reviewed the matter at the outset before making the impugn directions. This direction was issued subsequent to a review and the natural outcome of such a review based on the facts of the matter. Therefore, one cannot deny that the direction is incidental to the authority vested in the first appellant by way of legislation. The learned High Court Judge referred to the 'good' and 'bad' parts of the decision of the First Appellant. I, of course, find both parts to be 'good'. It was unfortunate that the learned Judge failed to appreciate the causal relation between the review and the subsequent directions, treating both as one and the same.

[17] Further, on a careful consideration of the matters before this Court it is clear that the first appellant, in issuing the direction, was solely propelled by a compulsion to remedy the alleged injustices caused to the original applicants by providing an opportunity to be heard and reconsider the charges. Therefore, the course of action taken by the first appellant cannot be said to be a delegation or abdication of the powers conferred by legislation.

[18] Moreover, exhibit 'F' reflects that the first appellant intended to refer the matter to another competent person, and not the person who handled the initial inquiry. Direction 4(d) at (page 249) requires lifting the suspension and revoking adverse notations against the respondents. All these steps have been taken to address the concern of a "*lack of natural justice"* in order to protect the rights of the respondents. This is sufficient evidence of *bona fides* and impartial conduct and points to the fact that the first appellant had sufficiently lent his mind to the matter.

[19] I reiterate that the reconsideration of charges cannot under any circumstance, be considered a part of the review. It is a direction given **subsequent** to the review. Hence the power of review itself was exercised by the first appellant and not by the Controller. This direction also accrued to the benefit of the original applicants. I finally hold that the directions given by the first appellant was never a part of the review and therefore it cannot be construed as being a delegation or abdication of his powers to the controller.

[20] For the reasons aforesaid I hold that the learned High Court Judge had erred by issuing a Writ of Certiorari against the directions given by the first appellant. Hence, I set aside the order of the learned High Court Judge dated 9th April 2018. Cumulatively taken, I answer the grounds of appeal raised by the appellants in their favour and reject the notice issued by the respondents. I allow the appeal and quash the decision of the learned High Court Judge.

Dayaratne, JA

[21] I agree with the reasons given and the conclusions arrived at by Lecamwasam JA.

Orders of the Court:

1) *Appeal allowed.*
2) *The decision dated 9th April 2018 of High Court is quashed.*
3) *Respondents to pay $5,000.00 as costs to the First and Second Appellants (charges have been withdrawn against the Third Appellant).*

Hon. Justice E Basnayake
JUSTICE OF APPEAL

Hon. Justice S Lecamwasam
JUSTICE OF APPEAL

Hon. Justice V Dayaratne
JUSTICE OF APPEAL