

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

JUDICIAL REVIEW NO.: HBJ 39 OF 2007

IN THE MATTER of an application by **RATU OVINI BOKINI, SAKIUSA MAKUTU, RATU EPENISA CAKOBAU** and **RATU RATAVO LALABALAVU** for a Judicial Review under Order 53 of the High Court Rules 1983

A N D

IN THE MATTER of a purported exercise by the President of the Republic of the Fiji Islands of powers under Section 3 of the Fijian Affairs Act Cap 120

THE STATE v. **HIS EXCELLENCY THE PRESIDENT RATU JOSEFA ILOILOVATU ULUIVUDA** and the **Interim Attorney General AIAZ SAYAD KHAIYUM** on behalf of the Interim Government

Respondents

EX-PARTE: **RATU OVINI BOKINI** of Tavualevu, Tavua, Ba, Turaga na Tui Tavua, **RATU SAKIUSA MAKUTU** of Cuvu, Nadroga/Navosa, Turaga na Ka Levu, **RATU EPENISA CAKOBAU** of Mataweilagi, Bau, Businessman and **RATU RATAVO LALABALAVU** of Somosomo, Taveuni, Sea Captain

Applicants

Mr. K. Vuataki and
Mr. S. Komaisavai for Applicants
Mr. A.K. Narayan for Respondents

Date of Hearing: 8th April 2008

Date of Ruling: 16th April 2008

DECISION ON LEAVE

[1] On 24th August 2007 His Excellency the President of the Republic of the Fiji Islands in exercise of his powers under Section 3 of the Fijian Affairs Act made Fijian Affairs (Composition of Great Council of Chiefs) Regulations 2007. He appointed 52 members composed of as follows :

- (a) The Minister
- (b) 42 members to represent the chiefs of the 14 provinces
- (c) 6 co-opted members
- (d) 3 members to represent the chiefs of Rotuma

The President also revoked the 1993 Fijian Affairs (Great Council of Chiefs) Regulations and all appointments made under it.

[2] The Applicants are indigenous Fijians. They are all of high rank in the Fijian community and had been either elected or appointed as members of the Great Council of Chiefs under the 1993 Regulations. As such with the revocation of appointments by the President, their appointments as members of Great Council of Chiefs came to an end. Accordingly they filed this action challenging the legality of the 2007 Regulations on a number of grounds including that the President acted for improper purpose; that he exceeded his powers under Section 3 of the Fijian Affairs Act because he confined the memberships to appointed members only; that the Fijian people had legitimate expectation to be consulted on who should be the elected members of the Great Council of Chiefs.

[3] Leave for judicial review is required by Order 53 Rule 3. The rule requires that no leave should be granted unless the court is satisfied that the

Applicant has a sufficient interest: Order 33 Rule 3(5). Rule 4 provides that the court may refuse leave if there is undue delay in making the application.

- [4] This is only the leave stage of the judicial review application. The leave stage acts as a filter for unsustainable claims. The court refuses leave to apply for judicial review unless it is satisfied that there is an arguable case for judicial review having a realistic prospect of success. Further it must also be satisfied there is no other discretionary bar like delay or alternative remedy.
- [5] There is no need for the court at the leave stage to discuss matters in depth. If on quick perusal of documents and material before the court, the court thinks that it discloses what might on further consideration turn out to be an arguable case, it should grant leave. The court ought to resist the temptation to decide the central issue when all the evidence may not be in. Issues of delay and locus should normally be left to the full hearing except in clear cut cases: – ABU 10 of Fiji Public Service Association & Others v. Public Service Commission – ABU 10 of 2004.
- [6] Mr. Narayan submitted that the Applicants had no locus standi. The core of his submissions is that the Applicants are not the members of the Great Council of Chiefs because their appointments were made in Fijian Affairs (Great Council of Chiefs) Regulations 1993. He submits that the regulations were made by the Minister under Section 5 of the Fijian Affairs Act. Those regulations fixed the number of members of the Great Council of Chiefs which was a power reserved to the President. The President has the power not the Minister to fix the number of members in his Great Council of Chiefs: Section 3 of the Fijian Affairs Act.
- [7] I will not deal with this aspect of locus during leave stage as it is too closely tied with the powers of the President under Section 3 of the Fijian

Affairs Act and the interpretation of Regulation 3, the central aspect of the substantive matter.

- [8] Justice Robert Smellie in a paper titled *Judicial Review – Recent Developments* delivered during a seminar for the Judges of the High Court commented that courts today adopt a more liberal approach to standing than has been adopted in the past. In support of his view he cited a passage from the text *“Constitutional & Administrative Law in New Zealand”* 2nd edition by Philip Joseph :

“A generous approach to standing encourages public-minded citizens and groups to challenge unlawful or suspect public administration. The modern courts emphasize the constitutional rationale of a relaxed standing requirement. In R. v. Greater London Council; ex-parte Blackburn [1976] 3 All ER 184 a ratepayer was granted standing to challenge a local authority decision to issue cinema licences that did not forbid the showing of indecent films. Lord Denning MR proclaimed it “a matter of high constitutional principle” that any interested party should have standing to seek to have the law enforced. In R. v. Inland Revenue Commissioners; Ex-parte National Federation of Self-Employed and Small Businesses Ltd. [1982] 3All ER 617 at 641, Lord Diplock endorsed Lord Denning’s dictum and observed that it would be a “grave lacuna in our system of public of public law” if a public spirited citizen “were prevented by out-dated technical rules of locus standi from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped”. In Peter v. Davison the Court of Appeal identified the relaxed

standing requirement with the “constitutional principle that the courts must ensure that public bodies comply with the law”.

- [9] He went on to emphasize that a similar approach has been adopted in New Zealand in Budget Rent a Car Limited v. Auckland Regional Authority – [1985] 2 NZLR 414 and in Finnigan v. the New Zealand Rugby Football Union – [1985] 2 NZLR 159 where two non members of New Zealand Rugby Football Union tried to challenge the decision of the New Zealand Rugby Football Union to accept an invitation to tour South Africa. They were only members of Football Union but not of New Zealand Rugby Football Union. The Court of Appeal stated that ***“unless persons such as the plaintiffs were accorded standing it might well be in reality there was no effective way of establishing whether or not the New Zealand Union was acting within its lawful powers”.***

Arguable Case:

- [10] As stated earlier the case concerns Section 3 of the Fijian Affairs Act and the 2007 Regulations. The Applicants submit that the Regulations were made for improper purpose because the members of the Great Council of Chiefs did not support the nomination of a certain person to the post of the Vice President. They also submit that Section 3 of the Fijian Affairs Act required members of the Great Council of Chiefs to consist of appointed, elected or nominated persons. The 2007 Regulations they say failed to provide for elected and nominated members to the Great Council of Chiefs. They also say that the President had no power to revoke the 1993 Regulations. Additionally the issue of legitimate expectation has been raised. These are all arguable matters on the basis of affidavits before me. The length of submissions by counsels at this stage suggests that there are certain matters for resolution at the substantive stage matters. There is an arguable case.

- [11] Mr. Narayan invited the court that I should refuse leave on grounds of delay as the Applicants had virtually allowed three months to run before filing this action. The proper process of administration he stated requires that such matters should not be left in abeyance for too long. Mr. Vuataki did not address me on delay in detail. I leave the issue of delay and its consequence to the substantive hearing.
- [12] Mr. Narayan also raised that the issue was moot, a ground not raised in notice of opposition so it may have caught the Applicants by surprise.
- [13] Based on above reasons I grant the Applicants leave to apply for judicial review. However, I refuse stay on the grounds that the proceedings concern matters of public interest and a stay would create a vacuum during the period it is in effect. The best solution is for the parties to quickly move on with the hearing.



[Jiten Singh]
JUDGE

At Suva
16th April 2008