IN THE HIGH COURT OF FIJI
SITTING AS THE COURT OF DISPUTED RETURNS
(CENTRAL DIVISION) AT SUVA

HBM No: 40 of 2015

IN THE MATTER of section 66(1)(a), (2) and(3)(iii) of the Constitution of the Republic of Fiji

AND

IN THE MATTER of the vacant seat in the Parliament of Republic of Fiji pursuant to section 63(1)(a) of the Constitution of the Republic of Fiji

AND

IN THE MATTER of a Petition by the Attorney General, Office of the Attorney General, Level 7, Suvavou House, Suva in the Court of Disputed Returns

BETWEEN : **ATTORNEY GENERAL**

Petitioner

AND : **ELECTORAL COMMISSION**

First Respondent

AND : **MIKAELE ROKOSOVA LEAWERE**

Second Respondent

Before : The Hon. Mr Justice David Alfred

Counsel : Mr. D Sharma and Ms N Choo for the Petitioner
Mr. B C Patel and Mr C B Young for the First Respondent
Mr. J Apted, Ms M Fong and Mr S Valenitabua for the Second Respondent

Dates of Hearing: 22 May, 28 May and 29 May 2015
Date of Interlocutory Judgment: 2 June 2015

INTERLOCUTORY JUDGMENT

[1] This is an Application by the Hon. Mr. Aiyaz Sayed-Khaiyum, the Attorney-General of Fiji wherein he questions the entitlement of Mr. Mikaele Rokosova Leawere to be a member of the Parliament of Fiji. It involves a complex interaction between the various legal issues that arise. Before I go into the facts and the constitutional and legal principles which come into play and consider the issues that fall for my decision as the Court of Disputed Returns, I shall state that the lodestar for me in reaching my decision is what Lord Hewart C.J said in **Rex v Sussex Justices, Ex-Parte MacCarthy** [1924] 1 K.B 256, 259, ***"that it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly, be seen to be done".*** This is because as Counsel for the Petitioner stated in his oral submission there is an important constitutional issue here which affects all political parties.

A. THE FACTUAL SITUATION

[2] It is common ground that the first General Election under Section 170(1) of the Constitution of Fiji (the Constitution) was held on 17 September 2014.

[3] In that Election, Ratu Viliame Manakiwai Tagivetaua was elected as a Member of Parliament as shown in the Return of Writ for Election to the President of Fiji, by the Electoral Commission, dated 22 September 2014.

[4] Subsequently the said Ratu Tagivetaua passed away on 5 March 2015. On 27 April 2015, the Electoral Commission pursuant to Section 64(1) of the Constitution awarded the seat declared vacant by the death of the aforementioned Ratu Tagivetaua, to the Second Respondent.

[5] The contentions of the Petitioner as stated in the Affidavit of the Attorney General in verification of Election Petition sworn on 17 May 2015 are that because the Second Respondent was at the time of the vacancy in Parliament

and also at the time of confirming his availability and eligibility to fill the vacancy in Parliament, holding a public office as the Acting General Secretary of the Fijian Teachers Association, the Petitioner firmly believed the Second Respondent was ineligible to be awarded that seat in Parliament.

[6] Thus the Petitioner also firmly believed the First Respondent erred in awarding that vacant seat to the Second Respondent.

[7] This is the matrix of the matter. When it first came up before me as the Court of Disputed Returns, on 22 May 2015 the leading Counsel for the Second Respondent made it clear at the outset, that his client's objections went to the root of the Petition *viz* whether the Petition was properly before the Court and whether in the first place, the Court had any jurisdiction to hear the Petition.

[8] Counsel for the First Respondent, Ms. Lidise informed the Court that she was only appearing in a technical capacity (whatever that might mean was not made clear) and that the First Respondent was not taking the jurisdictional point of the Second Respondent and would leave it to the Court.

[9] Seen in the light of the Second Respondent's Counsel's submission that a decision in favour of the Second Respondent on the preliminary issue would be the end of the matter and that therefore his objections had to be decided first, which was in contradistinction to the Petitioner's Counsel's preference for a hearing on a holistic basis, I decided to give the following directions:

[i] The Second Respondent was to file and serve his Summons to Strike Out the Election Petition with his Affidavit by the afternoon of 25 May 2015.

[ii] The Petitioner and the First Respondent were to file and serve their Affidavits in Response by the afternoon of 27 May 2015.

[iii] Parties were given liberty to file and serve any affidavits deemed necessary.

[10] I also instructed the Counsel appearing in a technical capacity for the First Respondent that whichever Counsel would be appearing for her client, he should be in a position to inform the Court of the First Respondent's stand.

[11] All the above were duly complied with when the matter came up on 28 May 2015 for the hearing of the Second Respondent's Summons to Strike Out the Petition (Summons). This commenced with his Counsel, Mr Apted, submitting in extenso that the Petition was defective and that the Court had no jurisdiction to hear it.

[12] In concluding, Counsel asked for the Summons to be allowed, the Petition being a nullity to be struck out and that the Petitioner should pay the Second Respondent lump sum costs on an indemnity basis. This was because the Petitioner had been invited by Counsel's letter to withdraw the Petition and his refusal to do so had put the Second Respondent to unnecessary costs.

[13] Before the day's proceedings ended, Mr. Patel the Counsel for the First Respondent stated his client's position. This was not to make any submission on the preliminary issue. This did not mean the Electoral Commission (the Commission) was taking sides but was merely to ensure its independence, neutrality and integrity. However, the Commission would wish to be heard in the event the Second Respondent's preliminary objection was disallowed because the Petition would raise important issues of law.

[14] The hearing resumed the next morning, the 29 May 2015, with the Petitioner's Counsel, Mr. Sharma making his submission. The main thrust of this was that the Petition was filed under the Constitution and not under the Electoral Decree 2014 and that a person could be elected to Parliament via one of three ways; either through a General Election, or by being awarded a seat by the Commission (the First Respondent) or by a by-election. In any event, the Second Respondent was disqualified from being a Member of Parliament and that this Court was the Court with the correct jurisdiction to hear the Petition.

[15] In his response, Counsel for the Second Respondent stated the poll in section 66(3)(b) of the Constitution could not possibility refer to the award which was not an election; that the signing of the Petition by the Attorney General and the non-signing of it by the Solicitor General was fatal; that the Petition was being pursued unmeritoriously and cited several similar decided cases where the Petitions were struck out. They felt it was their duty to bring this up for the Court's decision, ending up on by now the familiar refrain that the Court of Disputed Returns does not have jurisdiction to hear the Petition.

[16] At the conclusion of the hearing, in which Counsels for the Petitioner and the Second Respondent had cited decisions in their respective clients' favour, I reserved my decision, on the Striking Out, to be delivered on 2 June 2015 at 3:30pm. I now proceed to do so.

[17] In the course of my preparing this decision I have perused the following:

[i] The Election Petition.

[ii] The Affidavit of the Attorney General in verification of the Election Petition sworn on 17 May 2015.

[iii] The Affidavit of Larry Thomas for the First Respondent sworn on 27 May 2015.

[iv] The Answering Affidavit of the Second Respondent sworn on 27 May 2015.

[v] The Answer of the Second Respondent.

[vi] The Affidavit of Aiyaz Sayed-Khaiyum in response to the Affidavit of the Second Respondent, sworn on 26 May 2015.

[vii] The Summons to Strike Out the Election Petition made by the Second Respondent pursuant to Order 18 rule 18(1) of the Rules of the High Court and under the inherent jurisdiction of this Court.

[viii] Affidavit in Support of the Second Respondent sworn on 25 May 2015.

[ix] The Written Submission of the Second Respondent re the Striking Out.

[x] The Petitioner's Written Submission on the Preliminary Issues.

[xi] The Petitioner's List of Authorities

[xii] The Second Respondent's List of Authorities.

B. THE CONSTITUTIONAL AND LEGAL BACKGROUND OF THE MATTER

[18] To enable me to arrive at my decision I had recourse to the decision of the Privy Council, in:

> ***C. Devan Nair... Appellant and Yong Kuan Teik ... Respondent [1967] 2 A.C at page 44, an appeal from the Federal Court of Malaysia regarding an Election Petition struck out by the Election Judge.***

[19] This decision is important for two reasons but for my present purposes I shall only be considering the second reason which is contained in the judgment of their Lordships which was delivered by Lord Upjohn. His Lordship said:

> ***"So the whole question is whether the provisions of rule 15 are "mandatory" in the sense in which that word is used in the law, i.e., that a failure to comply strictly with the times laid down renders the proceedings a nullity; or "directory," i.e., that literal compliance with the time schedule may be waived or excused or the time may be enlarged by a judge. If the latter, it cannot be doubted that the respondent has waived literal compliance by taking a step in the action, that is, by asking for particulars of the petition."***

[20] Counsel for the Second Respondent has referred me especially to two decisions of my fellow Judges which are as follows:

> ***[i] Viliame Cavubati v Adi Koila Nailatikau & the Returning Officer for Lau Fijian Provincial Communal Constituency [1999] 43 FLR 136.***

In this case Shameem J, found the requirements of Section 144(d) of the Electoral Act which require the Petitioner to sign the Petition, to be mandatory. Because the Petition was not signed by the Petitioner, but by a Barrister and Solicitor as his agent, Shameem J dismissed the Petition with costs.

[ii] Between Steven Pradeep Singh... First Plaintiff, Fiji Labour Party... Second Plaintiff And Electoral Commission... First Defendant, The Supervisor of Elections... Second Defendant, Attorney-General of Fiji and Minister of Elections... Third Defendant [2014] FJHC 660; HBC 245.2014.

In this case Kumar J held the Court does not have jurisdiction to deal with the Declaration and Order sought by the Plaintiffs in the Motion and as such the action is dismissed and struck out for want of jurisdiction.

[21] With the greatest respect, I am unable to agree with the submission of these two authorities by the Second Respondent's Counsel to bolster his arguments that the instant Petition ought to be dismissed.

[22] I will point out with clarity that these two decisions can be distinguished on their facts.

[23] The decision of Shameem J is to the effect that the Petitioner must sign the Petition and not anyone else, which is a mandatory requirement. Here the contention is that the Attorney General should not sign.

[24] The decision of Kumar J was given in a Civil Action in a Civil Court where he held the Court did not have jurisdiction to relation to election matters and the Courts jurisdiction is given by the Electoral Decree and Constitution. In his Judgment dated 10 September 2014, it is clear the Learned Judge is pointing in the direction of the Court of Disputed Returns as the proper forum, for he correctly concludes it is not the function of his Court to determine the eligibility or ineligibility of the Plaintiff to be a candidate for the 2014 General Elections.

[25] It is time to come back to the facts of the Petition. In arriving at my conclusion with regard thereto, I shall rely on the Privy Council Appeal No. 37 of 1981 from the Fiji Court of Appeal: ***The Attorney General... Appellant v Director of Public Prosecutions... Respondent.*** Lord Fraser of Tullybelton in giving the advice of the Board to Her Majesty (The Queen of Fiji) made reference to, and further stated:

> ***"The judgment of the Board delivered by Lord Diplock in Ong Ah Chuan v. Public Prosecutor [1981] A.C. 648, 669, which repeats the well-known passage in the Minister of Home Affairs v Fisher [1980] A.C. 319, to the effect that: "the way to interpret a Constitution on the Westminster model is to treat it not as if it were an Act of Parliament but 'as sui generis calling for principles of interpretation of its own, suitable to its character ... without necessary acceptance of all the presumptions that are relevant to legislation of private law."***
>
> ***Their Lordships fully accept that a constitution should be dealt with in that way and should receive a generous interpretation. But that does not require the courts, when construing a constitution to reject the plain ordinary meaning of words. Proper construction of a constitution or of any other document would be impossible if the court could***

not assume that the reader was reasonably intelligent and that he would read with reasonable care."

[26] Therefore in interpreting the Constitution and the Decree I follow the advice of Lord Fraser to accept the plain ordinary meaning of words, and to read with intelligence and care.

[27] The Petition is brought under the provisions of Section 66 of the Constitution.

[28] It was not brought under Section 124(1) of the Electoral Decree 2014 and therefore did not require under Section 124(2) to be signed by the Solicitor General for and on behalf of the Attorney General.

[29] Section 122(d) of the Decree provides that every Petition must be signed by the Petitioner, except in the case of a petition filed by the Attorney General under Section 124 of the Decree or Section 66 of the Constitution. It did not state who should sign.

[30] So looking at Section 122(d) of the Decree, I see that according to the Oxford Advanced Dictionary of Current English, the word "except" means "not including", "but not", "exclude from" or "set apart from a list".

[31] This it become plain as a pikestaff that the Attorney-General is either not included in or is excluded from the requirement to sign the Petition when he files it under Section 66 of the Constitution. He may if he wants to but does not have to. Therefore, I find if he does so, this is not fatal.

[32] The reason for my finding is that Section 122 (d) does not require a Petition by the Attorney General under Section 66 of the Constitution to be signed by the Solicitor General unlike a Petition under Section 124(1) of the Decree where subsection (2) does so expressly require the Solicitor General to sign, so that, a failure to strictly comply with that would render the Petition a nullity.

[33] The only other argument that I have to deal with is the time limit submitted by the Second Respondent's Counsel. All I need to say applying the *reductio ad absurdum* principle is that if the Petition has to be filed within 21 days of the General Election this would mean that this Petition would have had to be filed EVEN BEFORE the demise of Ratu Tagivetaua.

[34] The sole pleading before me at this juncture is not the Petition proper, but the Summons to Strike it Out.

[35] To arrive at my ruling, I would first rely on the decision of Scott J, in: **Lekh Ram Vayeshnoi v Fiji Television Limited, Tukaha Mua, Iras Iqbal, Inoke Bainimarama and Ahmed Ali,** 11 FLR [2000] at page 22. Scott J said:

> ***"The Court's power to Strike Out given by RHC O18 r (1) (a) will only be exercised in 'plain and obvious cases' (Hubbock v Wilkinson [1899] 1 QB 86) and where the impugned pleading is 'obviously unsustainable' (Attorney General of Duchy of Lancaster v L & NW Rly Co. [1892] 3 Ch 274). So long as a Statement of Claim discloses at least some cause of action or raises some question fit to be decided by the Court the mere fact that the case is weak or is not likely to succeed is no ground for striking it out (Wenlock v Maloni [1965] 1 WLR 1238)."***

[36] At the end of the day, I would say, adopting the words in the White Book that the submission to strike out the Petition involving prolonged and serious argument and a relatively long and elaborate hearing caused me to harbor doubts about the soundness of the Summons.

C. CONCLUSION

[37] **Now in the light of all I have said above, I state my Ruling as follows**:

[i] **The Petition, was filed under Section 66 of the Constitution. This was the correct Section and the Petition was addressed to the correct Court, the Court of Disputed Returns.**

[ii] **Section 66(3) (b) requires the petition to be brought within 21 days of the declarations of the poll. In my opinion the declaration of the poll here would be the Award by the Electoral Commission to the Second Respondent of the seat in Parliament won by the sitting member in the poll or General Election of 17 September 2014 which seat had since become vacant because of the death of the sitting member.**

The award was made on 27 April 2015. This petition was filed in Court on 18 May 2015. Thus I find and so hold the petition was validly brought within the 21 days period prescribed by Section 66(3)(b) of the Constitution.

[38] I therefore dismiss the Second Respondent's Summons to Strike Out the Election Petition and order the Second Respondent to pay the Petitioner costs which I summarily assess at the sum of $1,000.00.

[39] I will now proceed to hear the substantive Petition and call on the Petitioner's Counsel to commence his submission.

Delivered at Suva this 2nd day of June 2015.

David Alfred
JUDGE
High Court of Fiji