

IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

CASE NUMBER: HBJ 45 of 2008

BETWEEN: SIMIONE RABAKA

APPLICANT

AND: PUBLIC SERVICE APPEAL BOARD

1ST RESPONDENT

AND: PUBLIC SERVICE COMMISSION

2ND RESPONDENT

Appearances: *Applicant in Person.*

Ms. Levaci of Attorney – General’s Chambers for the 1st and 2nd Respondent.

Date/Place of Judgment: *Friday 05 June 2015 at Suva.*

Coram: *The Hon. Madam Justice Anjala Wati.*

JUDGMENT

Headnotes:

***JUDICIAL REVIEW - LEAVE** – Leave not heard as proceedings terminated under s. 23 (3) (e) and (g) of the Administration of Justice Decree 2009 (Decree No. 9) – parties not heard when Certificate of Termination issued – subsequent application brought to challenge that the Certificate of Termination was wrongly issued, issued in excess of the jurisdiction and contrary to s. 15(2) of the Constitution of the Republic of Fiji – the basis being that one of the decisions challenged is not caught by the ouster clause of s. 23 (3) (e) and (g)- determination of whether allowing the decision of the initial body to be challenged is an indirect challenge to the decision of the appellate body and thus precluded by the ouster clause - the legal rationale on the enforceability and frivolity*

the result of challenging the decision of the initial body will bring whilst maintaining the decision of the appellate body.

Legislation:

The Constitution of the Republic of Fiji: s. 174(3).

The Administration of Justice Decree 2009 (Decree No. 9) (“AJD”): s. 23 (3) (e) and (g).

The Cause

1. On 14 November 2008, the applicant filed an application for leave for judicial review of the Public Service Appeal Board (“**PSAB**”) of 13 August 2008 wherein it disallowed the appeal against the decision of the Public Service Commission (“**PSC**”) of 8 June 2006 wherein it terminated the employment of the applicant on 25 May 2006.
2. All papers and submissions pertaining to leave were filed by both parties but before the application could be heard, the Chief Registrar issued a Certificate of Termination (“**COT**”) of the proceeding.
3. The COT was dated 18 May 2009. The material part of the COT reads:

“ TAKE NOTICE that pursuant to the powers given to me under...s. 23(3) of the Administration of Justice Decree 2009, I hereby CERTIFY that this proceeding is wholly terminated pursuant to s. 23 (3) (e) (g) of the Administration of Justice Decree 2009”.
4. Subsequently on 25 March 2014 the applicant filed a motion and challenged the decision of the Chief Registrar on the grounds that the decision to terminate the proceeding was wrongful, ultra vires and contrary to s. 15(2) of the Constitution of the Republic of Fiji.

5. On the directions of the Hon. Chief Justice, this matter was listed before me to decide whether the proceeding is caught by the AJD and for the parties to the case to be heard on the issue before a determination is made.
6. It is on this directive that I required the parties to appear before me and make submissions on whether the proceeding is caught by the AJD.

The Submissions

7. The applicant argued that the application for leave to issue judicial review is against two decisions, one of the PSAB and the other of the PSC. The COT was issued pursuant to s. 23(3) (e) and (g) of the AJD.
8. It was argued that the applicant's employment was terminated as a Court Officer by the PSC on 8 June 2006 with effect from 25 May 2006 for offences relating to theft of \$2881.10. On 23 November 2007, he was acquitted by the Magistrates' Court in Nasinu for the offence of larceny. The Director of Public Prosecutions had appeal against the acquittal which was dismissed by the High Court on 19 March 2008. Despite all that the applicant's appeal was disallowed by the PSAB on 13 August 2008.
9. It was contended that s. 23(3) (e) and (g) of the AJD prohibits any person from challenging or bringing proceedings against the decision of the government made between 5 December 2006 and 9 April 2009. If that is the specific time frame then only the decision of the PSAB cannot be challenged but the decision of the PSC to terminate the employment was made well prior to the prescribed dates and is not caught by the AJD.
10. The provision under which the COT was termination was issued was wrong in law and not sustainable.
11. The applicant argues that he is not challenging the lawfulness of the power given to the Chief Registrar under the AJD to terminate the proceedings but the provisions relied on by the Chief Registrar to terminate the proceedings is wrong in law.

12. The applicant argued that he is entitled to access to Court under s. 15(2) of the Constitution of the Republic of Fiji.
13. The counsel for the respondent argued that although it is a right of an individual under s. 15(2) of the Constitution to have access to courts or tribunals, that right has been curtailed by s. 174(3) of the 2013 Constitution of the Republic of Fiji. The s. 15(2) right is therefore limited in nature.
14. The decision of the PSAB falls within the ouster clause and the applicant would not have been allowed to come to Court straight after the decision of the PSC without having exhausted all the appeal process. So if the applicant was not allowed to come for judicial review then he cannot challenge the decision of the PSC now as the appellate body of the PSC has already given its decision which is now unable to be challenged in any Court by virtue of s. 23 (3) (e) and (g) of the AJD.

The Law and Analysis

15. I will start from the legal provision itself based on which the COT was issued in this proceeding.
16. The provision is s. 23 (3) (e) and (g) of the AJD. The section reads as follows:

“Any proceeding, of any form whatsoever, commenced (but not yet determined) in the Courts established by the Constitution Amendment Act 1997 (or any previous Constitutions or written law), which purports:

- (e) ***to challenge any decision of the President, or the executive or the Government or employees of the Government to terminate any employment (whether in a public office or not) between 5 December 2006 and 7 January 2007, on any ground whatsoever;...***
- (g) ***to challenge any decision of the Executive or of the Government or of the employees of the Government made between 5 December 2006 and 9 April 2009, on the grounds of being inconsistent with or contrary to the Constitution Amendment Act 1997;***

shall wholly terminate immediately upon the commencement of this Decree, and a Certificate to that effect shall be issued by the Chief Registrar to all the parties”.

17. The applicant agrees that the decision of the PSAB is caught by the provisions above as the decision disallowing the appeal against the termination was made on 13 August 2008. The applicant however says that his application for leave to appeal does not only focus on the decision of the PSAB but also on the initial decision of the PSC terminating his employment on 8 June 2006, which decision, it was argued is not caught by the provisions of the Decree above.
18. The issue that I have to decide is whether the applicant should be allowed to proceed to seek leave of the decision of the PSC on the grounds that he is not precluded by the AJD to challenge that decision.
19. Definitely under the above provision the decision of the PSAB cannot be challenged and as a result the decision of the PSAB remains intact. If the decision of the PSAB is allowed to stand then it is inconceivable on what legal basis the decision of the PSC should be allowed to be challenged. The first reason is that the result of allowing the challenge to the decision of the PSC will lead to absurdity if the substantive cause is decided in favour of the applicant. The decision of the appellate body which upheld the decision of the PSC will remain intact and valid. Any decision impeaching the decision of the PSC will contradict a good and valid decision.
20. Secondly, and alternatively, if the decision of the PSC is allowed to be challenged and the Court quashes the decision of the PSC then indirectly the decision of the PSAB has been challenged by virtue of hearing the matter against the PSC. If the decision of the initial body is challenged then there is nothing for the appellate body to uphold anymore and the decision of the appellate body cannot stand on its own.
21. The result would be that the Court would have allowed the applicant to circumvent the provisions of the Decree and I do not think that a direct or an indirect challenge of the decision of the PSAB is permissible under the provisions above.

22. S. 174(3) of the Constitution of the Republic of Fiji reinforces the provisions of the AJD and precludes the Courts from hearing any matters in which its jurisdiction has been excluded under the AJD:

“ Notwithstanding anything contained in this Constitution, sections 23, 23A, 23B, 23C, and 23D of the Administration of Justice Decree 2009 shall continue in force and shall not be amended, revised, altered or repealed, and the courts established by, or continued in existence under, this Constitution shall not have jurisdiction to –

(a) accept, hear or determine any matter for which the jurisdiction of the courts is excluded under the Administration of Justice Decree 2009 or under any Promulgation, Decree, Declaration or under any other written law; or

(b) accept, hear or determine any proceeding which had been terminated under the Administration of Justice Decree 2009 or under any Promulgation, Decree, Declaration or under any other written law”.

23. By allowing the decision of the PSC to be challenged, the decision of the PSAB which upheld the decision of the PSC will also be under challenge and thereby in breach of the Constitution as well.

24. S. 173(4) of the Constitution also curtails a person’s rights to access to courts or tribunal. This right to access to courts or tribunals is thus not an absolute right and has limitations.

25. Further, in considering whether leave should be granted to file judicial review, the Courts normally see whether all the internal procedures have been exhausted like whether the applicant has come to Court without following the procedures available to him. Where the Court finds that the procedures have not been followed, the leave application is normally stayed or adjourned or dismissed.

26. In this case, if the Court allows the decision of the PSC to be challenged than the principle that all avenues should be exhausted is neither given any validity not adhered to because there is no point in following that principle if the decision of the PSAB was allowed to stand and the decision of the PSC is challenged. In effect the Courts would have in the past then said that even if the

internal process is not complied with, it will still go ahead and hear whether the decision of the initial body can be impeached.

27. I do not find that the law permits that the decision of the initial body be challenged without challenging the decision of the appellate body.
28. I find that the decision of PSC cannot be challenged and that the COT that was issued was proper in the circumstances.

Costs

29. It is not proper that any award of costs be made against the applicant as when the initial COT was issued he was not heard. The proceeding was discontinued administratively. I find that where parties dispute that a proceeding is caught by the ouster clauses, they have a right to have the issue argued in Court.
30. Since that process was not accorded to the applicant, he had to move the Court and seek audience to present his argument in Court. Irrespective of the fact that he is not able to establish that the COT was improperly issued, the bringing of the proceedings is neither an error nor his fault.
31. Ordinarily if he was heard, there would not have been a need for a separate application to Court and if the COT was issued, again the initial proceeding for leave for judicial review cannot be held against him as the matter has never been decided on merits but discontinued for reasons beyond the control of the applicant.

Final Orders

32. On the above basis I find that the applicant's application that the COT issued by the Chief Registrar in the proceeding for leave for judicial review is wrong, ultra vires and contrary to the Constitution does not have any merits and is dismissed.

33. Each party must bear their own costs of the appeal proceedings.



A handwritten signature in blue ink, appearing to read "Anjala Wati".

Anjala Wati

Judge

05.06.2015

To:

1. *The Applicant in Person.*
2. *Attorney – General’s Chambers for the Respondent.*
3. *File: HBJ 45 of 2008.*