

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Judicial Review No. 01 of 2016

IN THE MATTER of the Procurement Regulations 2010 issued under the Financial Management Act 2004 of Fiji.

A N D

IN THE MATTER of a decision of the Solicitor-General and Acting Permanent Secretary for Communications dated 24 December 2015 to award and approve the Sun (Fiji) News Limited – Fiji Sun as the Approved Print Media – Newspaper Organisation for Publication of Government Advertisements and Government Notices for 2016.

BETWEEN : **THE FIJI TIMES LIMITED**, a limited liability company having its registered office at 20 Gordon Street, Suva

APPLICANT

A N D : **THE SOLICITOR-GENERAL**

1st RESPONDENT

THE PERMANENT SECRETARY FOR COMMUNICATIONS, Ministry of Communications, Suva, Fiji.

2NDRESPONDENT

A N D : **SUN (FIJI) NEWS LIMITED**

INTERESTED PARTY

Counsel : **Mr. Apted J. for the Applicant**
Ms. Mani R. with Ms. Prasad P. for the Respondents
Mr. Narayan E. for the Interested Party

Date of Hearing : **23rd September, 2016**

Date of Judgment : **28th October, 2016**

JUDGMENT

1. The Applicant is a limited liability Company that is engaged inter alia in the business of publishing the daily newspaper 'Fiji Times'. The 1st Respondent acting as the 2nd Respondent, had called for Expression of Interest (EOI) for 'Advertising for the Fijian Government Newspapers and Magazines' published by the Ministry for Communication. The Applicant and the Interested Party submitted their respective EOIs. Without proceeding to call tenders, the Interested Party was selected as the 'approved print media (News Paper) for Government Advertising' for year 2016. The selection of the Interested Party was communicated to the Applicant on or about 24th December, 2015. The Applicant seeks a declaration that the said decision was null and void and a certiorari to quash the said decision and mandamusto compel the Respondent to conduct a tender process. The Applicant also seeks an order that selection of Print Media for advertising be limited to ministries and departments of the government **excluding** statutory corporations and Companies owned and or controlled by the Government. The Applicant states that decision of 24th December, 2015 did not conform to Procurement Regulation 2010. In my decision dated 17th June, 2016 the leave was granted for judicial review and the relevant law was discussed in that decision.

2. After the leave was granted, an application for strike out was made by the Respondents and it was heard on 1st September, 2016, and the decision refusing the strike out was delivered on 8th September, 2016. The application for strike out was based on the decision to advertise the call for application for publication of government advertisements and government notices in print media published on 16th August, 2016. The process followed in the selection for the said advertisement published on 16th

August, 2016 is not the subject matter of judicial review before me. It had concluded with a public notice published on 23rd September, 2016.

3. When the matter was taken for hearing following additional facts were submitted by a supplementary affidavit filed on 22nd September, 2016, and they are;
 - (a) Due to the change in the Government Fiscal year which began on 1st August, 2016, the Fiji Procurement Office published a notice in the newspaper on 16th August, 2016 calling for publication of Government advertisements and Government notices in print media for the new financial year.
 - (b) In pursuant to the said advertisement, the Government Tender Board had approved to award the contract for publication of Government advertisements and Government notices in print media for 2016-2017 fiscal year to Interested Party.
 - (c) The annexed communication from the Secretary to the Government Tender Board **rescinding approved rates determined in December, 2015.**
 - (d) On 22nd September, 2016 the Fiji Procurement Office issued a Circular to all Permanent Secretaries and Heads of Departments **informing the decision of Government Tender Board to appoint a print media rescinding earlier communication.**
 - (e) The Permanent Secretary for the Ministry of Economy had indicated that Government Tender Board had by its communication indicated that it had approved the Publication of Government Advertisements and Government Notices in Print Media (2016-2017) and **the contract is effective from 22nd September, 2016 to 31st July, 2017.**
4. The circular issued by the 1st Respondent dated 22nd September, 2016, specifically stated that

*'As advised by the Government Tender Board (Tender Board), Government ministries and departments are informed that **the decision and rates determined through the invitation for expression of interest in relation to Government advertising made in December 2015 is rescinded.**'(emphasis added)*
5. The present application for judicial review is based on the earlier decision already rescinded. So there is no decision to be rescinded by judicial review.

6. The Fiji Times sought several remedies relating to the decision already rescinded by the decision making body and the reliefs sought in the Originating Motion are ;

- “1. A declaration that the Decision is unlawful, null and void and of no effect.
2. An order of certiorari to remove into this Court and quash the Decision.
3. An order of mandamus to compel the Second Respondent to request the Director of the Fiji Procurement Office pursuant to Regulations 35-37 of the Regulations to conduct a proper government tender process in accordance with the Regulations.
4. A Declaration that any tender process for government advertisements and notices and any resulting award must be limited to those published by ministries and departments, and not those published by statutory corporations and limited liability companies owned or controlled by the Government.
5. Costs.
6. Such further or other relief as this Honourable Court considers just.”

7. Since the decision taken to appoint the interested party in 2015 by the 1st Respondent acting as the 2nd Respondent was rescinded and communicated to all government Departments and Ministries, by the same party, (as evidenced in annexed S2 to the supplementary affidavit filed on 22nd September, 2016, as quoted earlier in this judgment) the reliefs sought in reliefs 1, 2, 3 are superfluous, redundant and moot.

8. The counsel for Applicant said that once a decision is taken it cannot be rescinded by the same party and it can only be rescinded by the court. I do not agree. Not only the decision was rescinded but a fresh selection process conducted and a selection was completed and communicated to all parties including the general public through a paper advertisement published on the date of hearing. This paper advertisement was submitted by supplementary affidavit.

9. The counsel for the Applicant said that there is 'utility' in this judicial review as it involved government procurement. The legal aspects and the interpretations of the relevant procurement procedure were already dealt in my decision granting leave for judicial review.
10. In my judgment the only utility that remains in this judicial review is the order 4 of the Originating Motion which is quoted earlier in this decision. Though it cannot be granted in the same manner, due to the change in the circumstances, there is some 'utility' in clarifying the applicability of the decision to appoint print media.
11. At the hearing of this judicial review application as well as in the previous hearings the counsel for the Respondents said that the decision to appoint approved print media for government only binds Government Departments and Ministries and it is not mandatory to other institutions such as statutory corporations and limited liability companies owned or controlled by the Government, to publish their advertisements and notices exclusively in the newspaper of Interested Party.
12. In the written submission filed by the Respondents on strike out application at paragraph 13 stated as follows;

'13. Moreover , there has been nothing submitted in the affidavit evidence before this Honourable Court to substantiate the claim by the Applicant that statutory corporation and limited liability companies owned or controlled by the Government have been advised to advertise only with the Interested Party'
13. So, it seems that the submission of the Respondents are that they never intended to direct other statutory bodies, Companies where Government owned majority shares, regarding their decision to publish advertisements and notices.
14. The above submission is further substantiated by the circulars issued on 22nd September, 2016 which was only addressed to 'All Government Departments and Ministries'. (See annexed S2 to the supplementary affidavit filed on 22nd September, 2016. So it is evident

that the direction to advertise in the newspaper of Interested Party only applied to the Government Departments and Ministries.

15. The communication of the Secretary to the Government Tender Board, annexed as S1 to the abovementioned supplementary affidavit also stated that approved rates should be followed by 'Government Ministries and Departments'.
16. I have carefully examined the Public Notice (advertisement) published on the day of the hearing annexed to supplementary affidavit filed on 23rd September, 2016. It only states 'Government advertisements and Government notices'. This may create some ambiguity in the minds of reader whether advertisements and notices of Government Corporations, Statutory Bodies and Companies where the Government holds majority shares are also classified as 'Government notices and advertisement'. So a declaration to clarify that has public utility.
17. So a declaration can be granted to the effect that the selection of print media for the fiscal year 2016-2017 is limited to Government Department and Ministries and not to statutory corporations and limited liability companies owned or controlled by the Government and these statutory bodies and companies are not any way hindered by taking a prudent commercial decision when they decide to advertise in appropriate print media.

CONCLUSION

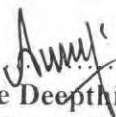
18. The Orders 1, 2, 3 of the Originating Motion seeking judicial review filed by the Applicant are moot, superfluous and or redundant due to the events that had taken after the filing of this action. There is no utility to deal said orders as the legal aspects, of the said orders were dealt in my decision allowing leave for judicial review. A declaration is granted that section of print media for 2016-2017 which was published in the newspaper of 23rd September, 2016 (which is annexed to supplementary affidavit filed with consent on the same day) is limited only to the Government Departments and Ministries. Considering the circumstances of the case there is no order as to costs.

FINAL ORDERS

- a. A Declaration that selection and award of tender to the Interested Party for government print media for fiscal year 2016-2017 is limited to Government Departments and Ministries and it does not apply to advertisements and or notices of statutory corporations and limited liability companies owned or controlled by the Government.
- b. No costs.

Dated at Suva this 28th day of October, 2016




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Justice Deepthi Amaratunga
High Court, Suva