IN THE HIGH COURT OF FIJI
AT LAUTOKA
WESTERN DIVISION
CIVIL JURISDICTION

Civil Action No. HBM 24 of 2017

BETWEEN	:	PRANIL SHARMA	APPLICANT
AND	:	LEGAL AID COMMISSION	1ST RESPONDENT
AND	:	SOLICITOR-GENERAL'S OFFICE	2ND RESPONDENT
AND	:	DIRECTOR OF PUBLIC PROSECUTION	3RD RESPONDENT
AND	:	ATTORNEY-GENERAL'S OFFICE	4TH RESPONDENT
AND	:	FIJI HUMAN RIGHTS AND ANTI-DISCRIMINATION COMMISSION	5TH RESPONDENT

Counsel	:	Applicant in person (Ms) Olivie Manuliza Faktaufon for Attorney – General's Chambers. Mr Waisale Tokalau for Fiji Human Rights and Anti-Discrimination Commission (Intervener)
Date of hearing	:	Monday, 26th March, 2018
Date of ruling	:	Friday, 20th April, 2018

RULING

[A]. Introduction

1. The applicant applies for **constitutional redress** pursuant to Section 44(1) of the Constitution of the Republic of Fiji 2013 **(the Constitution)**, by way of Notice of Motion and Affidavit. The applicant claims a declaration that human rights guaranteed to him by chapter two (2) of the Constitution had been contravened by the Legal Aid Commission and seeks redress from the High Court under Section 44(1) of the Constitution. His complaint is that his constitutional right to legal aid representation pursuant to Section 15(10) of the Constitution was denied by the Legal Aid Commission **(the Commission)**.

2. In his **Affidavit supporting the Motion**, the applicant deposes that;

   (i) He was charged in the Magistrate's Court of Nadi for "Disorderly conduct in the Police Station" contrary to Section 47 of the Police Act, Cap 85.

   (ii) He applied to the Magistrate's Court of Nadi for constitutional redress under Section 44(1) of the Constitution. The applicant's application for constitutional redress stems from the applicant's complaint that he was not produced in Court by the Correction Authorities along with three (3) of his witnesses on 13th June, 2016 and further he was subjected to sexual harassment whilst he was in custody of the Corrections Authorities.

   (iii) The learned Magistrate in his Written Ruling dated 27th January, 2017 held that the Magistrate's Court has no jurisdiction to hear the application for constitutional redress.

   (iv) The learned Magistrate in his Ruling further held that the High Court is the appropriate Court to hear an application for constitutional redress and directed the applicant to file his application in the High Court for constitutional redress with the assistance of the Legal Aid Commission since the applicant was represented by the Legal Aid Commission in the Magistrate's Court as a duty solicitor.

(v) The applicant sought the Legal Aid Commission's assistance to file an application in the High Court for constitutional redress.

(vi) The applicant's constitutional right to legal aid representation pursuant to Section 15(10) of the Constitution was denied by the Legal Aid Commission.

3. As I understand the central proposition in the submissions of the applicant, he assumes that;

(a) the Resident Magistrate in his Ruling dated 27th January, 2017 **made an order that** the Legal Aid Commission file an application for constitutional redress in the High Court on behalf of the applicant.
(b) that he has an **absolute constitutional right** to have representation by the Legal Aid Commission at public expense.

4. The applicant's Notice of Motion and the Supporting Affidavit was served on all the Respondents.

5. Upon receiving the Notice of Motion and the Supporting Affidavit, the Attorney-General, on 30th October, 2017, filed Inter-Parte Summons to strike out the applicant's Notice of Motion pursuant to Order 18, rule 18 (i) (a) (b) and (d) of the High Court Rules, 1988 and pursuant to the inherent jurisdiction of the Court. The Attorney - General's Summons is supported by an Affidavit sworn on 30th October, 2017 by "Vasemaca Tamaniau". In the Affidavit the deponent states that she is a Senior Legal Officer, at the Legal Aid Commission.

6. As I understand it, the Attorney - General's Summons to strike out the applicant's Notice of Motion and the Supporting Affidavit sworn on 14th July, 2017 is based on three main grounds;

(i) it discloses no reasonable cause of action;
(ii) it is scandalous, frivolous or vexatious;
(iii) it is an abuse of process of the Court.

B. Jurisdiction

1. Against that background, I now turn to the applicable law.

2. (i) This application of the Attorney-General is made pursuant to Order 18, Rule 18 (1) (a), (b) and (d) of the High Court Rules, 1988.

(ii) Order 18 , rule 18 (1) states that;

"the court may at any stage of the proceedings order to be struck out or amend any pleadings or the indorsement, on the ground that-

(a) It discloses no reasonable cause of action or defence as the case may be,
(b) It is scandalous, frivolous or vexatious; or
(c) It may prejudice, embarrass or delay the fair trial of the action; or
(d) It is otherwise an abuse of the process of the court

And may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(iii) Moreover, Order 18, rule 18(2) provides the scope for applications made under O 18, r 18 (1) (a) where it states that;

"No evidence shall be admissible on an application under paragraph (1) (a)

C. Principles to be Applied

1. Against that factual and legal background, it is necessary to turn to the judicial thinking in relation to the principles governing the exercise of the discretion to make the Order the Attorney-General now seeks.

2. **Justice Byrne** held in **Timber Resource Management Limited v The Minister for Information, The Minister for Agriculture, Fisheries and Forests, The Attorney General of Fiji and Others (HBC 0212 of 2000)** that;

"Time and again the Courts have stated that the jurisdiction to strike out proceedings under Order 18 rule 18 should be very sparingly exercised and only in exceptional cases where legal questions of importance and difficulty are raised – per Marsack J.A. in Attorney General v Shiu Prasad Halka (1972) 18 FLR 210 at page 215.

In Hubbuck & Sons Ltd v Wilkinson, Heywood & Calrk Ltd (1899) 1.Q.B.86 at page 96 Lindley M.R. said "the .....Procedure is only appropriate to cases which are plain and obvious, so that any Master or Judge can say at once that the statement of claim as it stands is insufficient even if proved to entitle the Plaintiff to what he asks. The use of the expression "reasonable cause of action" shows the summary procedure .....Is only intended to be had recourse to in plain and obvious cases."

Master Tuilevuka (as he then was) held in **Sugar Festival Committee 2010 v Fiji Times Ltd (2012) FJHC 1404; HBC 78.2010 (1 November 2010)** that;

"Court rarely strikes out a proceeding on this ground. It is only in exceptional cases where, on the pleaded facts, the Plaintiff could not succeed as a matter of law or where the cause of action is so clearly untenable that it cannot possibly succeed will the courts act to strike out a claim. If the facts as pleaded do raise legal questions of importance, or a triable issue of fact on which the rights of the parties depend, the court will not strike out the claim.

The scope of the hearing of applications in this nature was discussed in **Khan v Begum (2004) FJHC 430; HBC 0153.2003L (30 June 2004)** where **Justice Connors** held that;

"it is said that the fact the Court has this inherent jurisdiction is one of the characteristics which distinguishes the Court from other institutions of the government. It is a jurisdiction, to be exercised summarily and as I have said, is in addition to the jurisdiction conferred by the rules. It is not in issue that if a party relies solely upon Order 18 rule 18 there no evidence may be considered by the Court in making its determination but that limitation does not apply where the applicant relies upon the inherent jurisdiction of the Court".

In **National MBF Finance (Fiji) Ltd v Buli (2000) FJCA 28; ABU0057U.98S (6 July 2000)** held that;

> *"the law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention".*

D. Analysis

1. Before moving to the substance of the Attorney - General's Inter-Parte Summons to strike out the applicant's Notice of Motion and Supporting Affidavit for constitutional redress let me record that Counsel for the Attorney - General has done a fairly exhaustive study of the judicial decisions and other authorities which she considered to be applicable.

   Whilst most grateful for the benefit of oral arguments advanced by the applicant and Counsel for the Attorney-General, I interpose to mention that I have given my mind to the oral submissions made by the applicant and Counsel as well as to the Written Submissions of the applicant and the Attorney - General and the judicial authorities referred to therein. Counsel for the Fiji Human Rights and Anti- Discrimination Commission sought leave of the court to intervene on the applicant's application and was granted intervener status under Section 39(2) of the Human Rights and Anti –Discrimination Commission Act, 2009. The court is grateful to counsel for the Fiji Human Rights and Anti- Discrimination Commission as intervener for his learned submissions.

2. The applicant's application to the High Court for constitutional redress concerned the refusal of legal aid by the Legal Aid Commission to file an application in the High Court for constitutional redress under Section 44(1) of the Constitution in respect of the alleged breaches of the applicant's rights under the Constitution by the Corrections Authorities.

The applicant has applied unsuccessfully to the Legal Aid Commission for legal assistance and had also been unsuccessful in seeking reconsideration of the Acting Director's refusal pursuant to the review procedures available under the Legal Aid Act, 1996.

The applicant has no further review of the decision.

Therefore, the applicant had exhausted all avenues for legal aid.

3. As I understand the Submissions of the applicant, he centers his right for the legal aid advice and representation on **two assumptions;**

(i) that the Resident Magistrate in his Ruling dated 27th January, 2017, **"made an Order"** that the Commission file an application for constitutional redress in the High Court on behalf of the applicant;

AND

(ii) that he has an **"absolute constitutional right"** to have representation by the Commission under Section 15(10) of the Constitution.

4. The Attorney-General invited this Court to exercise its discretion in summarily dismissing the applicant's application for constitutional redress. I now set out the essential points put forward by the Attorney-General. (Reference is made to paragraphs 10, 11, 15, 17 and 20 of the written submissions of the Attorney-General filed on 03rd April 2018).

*(10) The Applicant's constitutional redress application is based on a non-existent order. It is therefore an abuse of the court's process to institute such proceedings. Also no such order could have been expected to be made by the Resident Magistrate as this would have been wrong in law. The Resident Magistrate , having considered any likelihood of questions of contravention of constitutional rights, must make a referral of the same to the High Court. Pursuant to Section 44(5), any proceedings in a subordinate court may (or in the case where a party requests, must) be referred to the High Court. Such referral would be governed by Section 6 of the High Court (Constitutional Redress) Rules 2015 ('**HCCR**').*

(11) *Again the main point to be made under this ground of strike out is that if the Applicant is basing his right to legal representation by the Commission on the order of the Resident Magistrate Court's ruling, then no such order exists and no reasonable cause of action would stem from the same (or at least one that could be brought by way of a constitutional redress application pursuant to Section 44 of the Constitution). In* ***Trevor Mervyn Tamblyn v Director of Public Prosecution and Attorney-General, Civil Action HBM 11 of 2014,*** *reference was made to* ***Singh v Director of Public Prosecutions [2004] FJCA 37 AAU0037.2003S (16 July 2004)*** *which ruled as follows:*

> *"No.....Reasonable Cause of Action*
> *It is only in exceptional cases where, on the pleaded facts, the Plaintiff could not succeed as a matter of law or where the cause of action is so clearly untenable that the Courts will strike out a pleading on this ground. If the facts as pleaded do raise legal questions of importance, or a triable issue of fact on which the rights of the parties depend – the Court's will not strike out the claim."*

(15) *This brings us to the assumption under paragraph 4(b) herein whereby, independent of any order of the Resident Magistrate, the Applicant alleges that he has an absolute right to representation by the Commission and the refusal of the Commission to represent him as a breach of such a right.*

(17) *Our response is firstly that there is no absolute right to legal aid representation guaranteed by the Constitution and we rely on* ***State v Antonio Tanabureinisau & Ors HAC 44 of 2004*** *where the honourable Court viewed the right to legal representation under a scheme for legal aid was not an absolute right.*

(20) *The Applicant, aggrieved of the decision of the Commission in refusing to provide him legal representation, should have applied to judicially review the decision of the Commission. This constitutional redress application is clearly a misuse of the proceedings under Section 44 of the Constitution.*

5. Let me pause here to consider whether the Attorney-General is entitled to invoke **Order 18, rule 18 of the High Court Rules** for summary dismissal of the application for constitutional redress. Rule 7 of the High Court (Constitutional Redress) Rules, 2015 is plain in its terms. The jurisdiction to deal with a constitutional redress application is to be in accordance with the practice and

procedure of the High Court in relation to the Civil Proceedings. It necessarily follows that the High Court Rules, 1988 also apply to such an application. In turn, it necessarily follows that in a proper case the Court is empowered to summarily dismiss an application for constitutional redress if one of the grounds set out in Order 18, rule 18 can be satisfied. That rule authorizes a summary dismissal of a proceeding where;

(a) the proceedings does not disclose a reasonable cause of action.

(b) the proceedings is scandalous, frivolous or vexatious.

(c) the proceedings may prejudice, embarrass or delay the fair trial of the proceeding; and

(d) the proceedings is otherwise an abuse of the process of the Court.

6. **The Law on the Issue of Reasonable Cause of Action**

Justice Jitoko in *"Prasad v Home Finance Company Ltd [2003] FJHC 322; HBC0116D.2002S (23 January 2003)"* extensively discussed the issue of reasonable cause of action where his Lordship held that;

> *"what constitutes a reasonable cause of action or defence does not mean that the Court should delve into whether the claim or defence is likely to succeed, As Lord Pearson stated in Drummond Jackson v British Medical Association [1970] 1 WLR 688, 1 ALL ER 1094 CA at P.1101: No exact paraphrase can be given, but I think a reasonable cause of action means a cause of action with some chance of success, when (as required by r.19 (2) only the allegations in the pleadings are considered.....)*
>
> *The Courts view and many decisions on this matter is clear: As long as the statement of claim or the particulars (Davey v Bentinct: (1893) 1 QB 185) disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed is no ground for striking it out. (Supreme Court Practice 1985 Vol. 1 p.306).....*
>
> *It is therefore very clear that in both the exercise of its powers under O.18 r.18 and under its inherent jurisdiction, a Court may only strike out a Statement of Claim and dismiss the action if in the words of Lord Blackburn, in Metropolitan*

Bank v Pooley (1885) 10 App. (As 210 at p.221) if and when required by the very essence of justice to be done:.

Let me now turn to the application bearing in mind the aforesaid legal principles and factual background uppermost in my mind.

Reasonable Cause of Action

(7) (i) Dealing first with the "reasonable cause of action" the applicant relied on a passing remark to be found in the paragraph sixteen (16) of the learned Magistrate's written ruling dated 27th January 2017 and contended that the learned Magistrate has ordered the Legal Aid Commission to file an application for Constitutional redress in the High Court and therefore he is entitled for legal assistance at the expense of the State. The central proposition in this submission is that he was deprived of the remedy which the Magistrate's Court gave him.

(ii) This is manifestly untenable.

(iii) As the Attorney-General correctly pointed out, the Resident Magistrate made no such Order at paragraph 16 of his written ruling. It is desirable to set out paragraph sixteen (16) of the written ruling. It is as follows;

'Now that he is represented by Legal aid, as ordered by this court on the last date, it is imperative that with the legal assistance, applicant can now file his application in the High court '.

To my mind, the applicant fails to take into account the context in which the paragraph should be interpreted. The applicant's argument (based on hypothetical circumstances) was not developed fully in submissions, principally because the applicant's case was primarily founded upon the existence of an alleged absolute constitutional right.

(iv) I refer to the Attorney-General's contention in relation to paragraph 16 of the written ruling of the learned Magistrate. It is quite correct that the

Resident Magistrate, in considering the application before him and thereafter finding that he had no jurisdiction to deal with the same, made the comment at paragraph 16 acknowledging the presence of the Legal Aid Commission and indicating that the proper forum for filing of the applicant's constitutional redress application is the High Court.

(v) It is certainly not an order. Therefore, the applicant cannot assert legal rights over it. With respect, he is not merely clutching at a non- existent straw but expecting to be carried by it.

(vi) Assuming, without deciding that it is an order, it is worth mentioning that, the courts can point out that the administration of Justice is an inalienable function of the State and that the very security of the State depends on the fair and efficient administration of Justice, but the courts cannot compel the legislature and the executive government to provide legal representation at public expense. And there is the Legal Aid Act 1996 in Fiji, which lays down the circumstances in which legal aid may be provided, those circumstances involving considerations which extend beyond the interests of justice in the particular case. But the interests of justice cannot be pursued in isolation. There are compelling demands upon the public purse which must be reconciled and the funds available for the provision of legal aid is necessarily limited. In my opinion, to declare such an entitlement by the Court without power to compel its satisfaction amounts to an unwarranted intrusion into legislative and executive functions.

It is clear that the applicant's constitutional redress application is based on a non-existent order. Thus, no reasonable cause of action would stem from the refusal of legal assistance at the expense of the State. A reasonable cause of action means a cause of action with some chances of success. See; **Drummond – Jackson v British Medical Council, 1970 (1) WLR 688 and McKay and Another v Essex Area Health Authority and Another, 1982 (2) ALL.E.R 771.**

In short it may be said fairly that the applicant's alleged right for the legal aid advice and representation is based on a mere speculation. I consider that the applicant's constitutional redress application is frivolous and vexatious.

(8) (i) Turning to the second suggested source of the right for which the applicant contends, he relied on Section 15 (10) of the Constitution and contended that he has an "absolute right" for legal representation at public expense. His application for constitutional redress concerned the Legal Aid Commission's refusal to provide legal representation at public expense. The applicant argued that as a result of the refusal to provide legal representation at public expense the applicant had been denied his absolute constitutional right to legal aid representation. This branch of the applicant's argument assumes that Section 15 (10) of the Constitution supports the "absolute right" for which he contends.

(ii) The Attorney-General relied on the High Court of Fiji decision **"State v Tanaburenisau" (2005) FJHC 127** and said with some force that there is no "absolute" right to legal aid representation guaranteed by the Constitution.

(iii) I acknowledge the force in that proposition.

(iv) Section 15 (10) of the Constitution reads;

> *"The State, through law and other measures, must provide legal aid through the Legal Aid Commission to those who cannot afford to pursue justice on the strength of their own resources,* ***if injustice would otherwise result".***
>
> (Emphasis added)

(v) The constitutional right granted by Section 15 (10) of the Constitution is determined by the requirement of "the interest of justice". It therefore appears clear that the Constitution does not entrench an absolute right to legal assistance at public expense irrespective of the circumstances of the particular case. The applicant's right under Section 15 (10) of the Constitution is qualified by the words "if injustice would otherwise result". The constitutional right does not permit every impoverished person to call upon the State to provide legal assistance at public expense. All factors relating to legal aid must be taken into account, including the applicant's monetary circumstances and need for legal assistance in the particular circumstances. The right "to be given the services of a legal practitioner under a scheme for legal aid" has been said often enough not to be an absolute right: **State v Tanaburenisau** (*Supra*)

Abuse of process of the Court

(9) The Attorney-General further contended that an adequate remedy was available to the applicant, namely, the judicial review proceedings. The Attorney-General relied on the Court's discretionary power to refuse relief under Section 44 (4) of the Constitution since an adequate remedy is available.

As I understand the submissions of the applicant, he did not argue against the objection of the Attorney-General and he did consider that judicial review is an adequate alternative remedy for him.

In **Harrikissoon v Attorney General of Trinidad and Tobago [1979] 3 WLR 62**, the appellant was transferred in his employment without the required 3 months' notice. Instead of availing himself of the review procedure available in the Regulations, the appellant applied to the High Court for constitutional redress. He sought a declaration that his rights had been violated. He was unsuccessful in the High Court, the Court of Appeal and the Privy Council.

In delivering the opinion of their Lordships, Lord Diplock said at p.64:

> *"The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."*

In **Chokolingo v. Attorney General of Trinidad and Tobago [1981] 1 WLR 106,** the appellant had been committed to prison for 21 days for contempt. He did not appeal against that committal. Two and half years later, he made an application for constitutional redress seeking a declaration that his committal was unconstitutional and in breach of human rights and fundamental freedoms. This applicant was also unsuccessful in all courts.

In dismissing the appeal to the Privy Council Lord Diplock stated at pp. 111-2:

> *"Acceptance of applicant's argument would have the consequence that in every criminal case, in which a person who had been convicted alleged that the judge had made any error of substantive law as to the necessary characteristics of the offence, there would be parallel remedies available to him: one by appeal to the Court of Appeal, the other by originating application under section 6(1) of the Constitution to the High Court with further rights of appeal to the Court of Appeal and to the Judicial Committee. These parallel remedies would be also cumulative since the right to apply for redress under section 6(1) is stated to be "without prejudice to any other action with respect to the same matter which is lawfully available" The convicted person having exercised unsuccessfully his right of appeal to a higher court, the Court of Appeal, he could nevertheless launch a collateral attack (it may be years later) upon a judgment that the Court of Appeal had upheld by making an application for redress under section 6(1) to a court of co-ordinate jurisdiction, the High Court. To give to Chapter 1 of the Constitution an interpretation which would lead to this result would in their Lordship's view, be quite irrational and subversive of the rule of law which it is a declared purpose of the Constitution to enshrine."*

I consider that **"judicial review"** is an adequate alternative remedy for the applicant. The applicant can apply for judicial review of the Legal Aid Commission's decision. It is an administrative action performed by the Legal Aid Commission in the exercise of functions vested in them by the Legal Aid Act, 1996. I cannot shut my eyes to the fact that the value of the constitutional remedy will be diminished if it is used as a general substitute for normal judicial review procedures. The right to apply to the High Court under Section 44(1) of the Constitution for redress when any constitutional right or human right is likely to be contravened, is an important safeguard of those rights; but its value will be

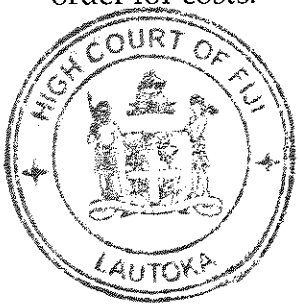
diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control over administrative actions.

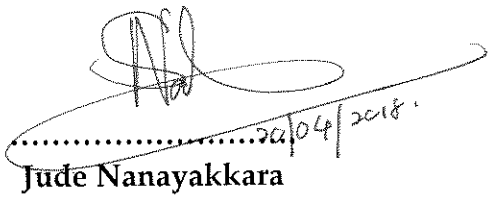
I regard that an application for constitutional redress in these circumstances as an abuse of process of the Court.

(10) In conclusion, I find that this application of the applicant for constitutional redress has not disclosed any reasonable cause of action and also amount to an abuse of process of the Court. It is apparent that the allegation is frivolous or vexatious and an abuse of process of the court.

(E) ORDER

The applicant's constitutional redress application is struck out and there be no order for costs.





Jude Nanayakkara
Judge

At Lautoka
Friday, 20th April 2018