

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Judicial Review No.: HBJ 09 of 2018

BETWEEN : STATE -v-

1. THE DIRECTOR OF LANDS
2. THE DIRECTOR OF ENVIRONMENT
3. ITAUKEI LANDS AND FISHERIES COMMISSION
4. SGV PACIFIC PROPERTIES GROUP

RESPONDENTS

Ex-parte : KAIKUILAU HOLDINGS COMPANY LIMITED

APPLICANT

Counsel : Applicant: Mr A R Matebalavu

1st and 2nd & 3rd Respondents: Ms Motofuga M and
Ms Pranjivan R

4th Respondent: Mr. I. Fa

Date of Hearing: 26th February, 2019

Date of Judgment: 28th March, 2019

JUDGMENT

INTRODUCTION

1. The Applicant had filed this application, seeking leave of the court to file Judicial Review. The statement made in pursuant to Order 53 rule 3(2) seeks certiorari and mandamus. Applicant had sought lease of state foreshore and area known as Denarau South (the Land) and for this prerequisites were Environment Impact Assessment (EIA) and waiver of traditional fishing rights. Both requirements were fulfilled and some additional requirements requested such as site plan, investment and funding requirements were fulfilled, but 1st Defendant on **29th day of August, 2018** had informed the Applicant that its application for lease cannot be considered, since a subsequent withdrawal of waiver of fishing rights by owners. The waiver of fishing rights was endorsed by 3rd Respondent on 31.3.2015 in favour of Applicant is purportedly withdrawn by the owners on 22nd March, 2017. This is the reason for rejection the application submitted for lease by the Applicant on 13.2.2014. The Applicant states that it had complied with all the requests made by 1st Respondent and

rejection of their application due to subsequent application by 4th Respondent is illegal and should be quashed and mandamus issued compelling 1st Respondent to hear and determine its application, in terms of law. There was no hearing granted for the Applicant for rejection of its application. Since 2014 Applicant had legitimate expectation of grant of lease and had complied with requests of 1st Respondent. The applicant is also seeking a declaration.

FACTS

2. Applicant seeks leave to apply for judicial review of the decision of 1st Defendant. This is based on letter of 29th August, 2018, rejecting its application for a Foreshore Lease the Land.
3. Said letter stated as follow:

*"The Director
Kaikūilau Holdings Ltd
P O Box 3029
Nadi*

Dear Sir,

Re: FORESHORE LEASE APPLICATION REQUIREMENTS

1. *We refer to our e-mail of 1 November 2017 and your response of 2 November 2017 in regards to the above.*
2. *Please be advised that the waiver of fishing rights endorsed by the Chairperson of the iTaukei Lands & Fisheries Commission ('TLFC') 31 March 2015 in favour of Kaikūilau Holdings Company Limited ('KHCL') was withdrawn by the resource owners on 22 March 2017.*
3. *On 18 November 2017, the Chairperson of TLFC has endorsed the waiver of fishing rights to SVG Pacific Properties Group.*
4. *Therefore we are unable to consider KHCL's application for a foreshore lease any further.*
5. *Please contact the undersigned for any further queries.*

Sincerely

.....
*Lia Tuivuya (Mrs)
for "Director Lands"*

4. According to said letter grounds for rejecting the application for the State Foreshore Lease of the Land, was the waiver of fishing rights previously endorsed for the

Applicant on 31st March, 2015 had been withdrawn by the owners on 22nd March, 2017, further the same waiver of fishing rights had been endorsed for the benefit of 4th Defendant on 18th November, 2017.

5. First Respondent in the affidavit in opposition stated that fishing rights waiver granted to the Applicant was revoked and it was the reason for rejection of Applicant's request for the lease of the Land.
6. The affidavit in opposition states that the affidavit in opposition had annexed revocation of fishing rights granted in favour of the Applicant marked 'C' to the affidavit, but in the said document there is no mention about Applicant.

ANALYSIS

7. First there are requirements are spelt out in Rule 3(2) and Rule 3(5) of Order 53 of the High Court Rules. The Applicant had filed an affidavit in support and it had sufficient interest as the matter in issue is its application for lease of the Land.
8. Applicant filed this application on 29.11.2018, and inter alia seeks declaration against the First Respondent for breach of natural justice, furthermore alleges errors of law also on the part of First Respondent.
9. In its Statement in support of this application seeking leave following grounds are stated:
 - (a) *The First Respondent acted unfairly and in breach of the Rules of Natural Justice in purporting to direct cancellation of the Waiver of Fishing Rights granted to of the Applicant without giving the Applicant an opportunity to be heard.*
 - (b) *The first Respondent acted unfairly and in breach of the Rules of Natural Justice in purporting to direct cancellation of the Approval of Environmental Impact Assessment Report granted to the Applicant without giving the Applicant an opportunity to be heard.*
 - (c) *The First Respondent abused his discretion in that he did not take into consideration the following relevant matters:*
 - (i) *The Waiver of Fishing Rights had been duly furthermore properly granted to the Applicant.*
 - (ii) *The Approval of Environmental Impact Assessment Report had been duly furthermore properly granted to the Applicant.*
 - (iii) *There were proper procedures to be followed if the First Respondent wanted the Applicant divested of firstly the Waiver of Fishing Rights,*

secondly the Approval of Environmental Impact Assessment Report.

- (d) At all material times the Applicant remained exclusively vested with all the rights and privileges appurtenant to firstly the Waiver of Fishing Rights and Secondly the Approval of Environmental Impact Assessment Report applicable to the areas subject of the Applicant's application for State Foreshore Development Lease.*
- (e) For all intent and purpose lawful authority and power to secure the Waiver of the Fishing Rights for the Applicant is vested in law exclusively in the owners of the fishing rights in consultation with the Native Lands and Fisheries Commission the Third Respondent, not with the First Respondent.*
- (f) Likewise, lawful authority and power to grant the Approval of Environmental Impact Assessment Report is vested by statute exclusively in the Second Respondent, and not with the First Respondent.*
- (g) In relation to applicable Waiver or Consent of Fishing Rights, the First Respondent abused his discretion in that he failed to take into consideration the following relevant matters:*
- (i) authority to grant Waiver of Fishing Rights is vested exclusively in the registered itaukei owners of the fishing rights, in consultation with the Itaukei Lands and Fisheries Commission.*
 - (ii) the First Respondent has neither statutory nor any other authority to direct cancellation of Waiver of Fishing Rights granted in favour of the Applicant.*
 - (iii) the First Respondent has neither statutory no any other lawfull authority to direct grant of Fishing Rights to the Fourth Respondent granted previously further subsisting lawfully in favour of the Applicant.*
- (h) In relation to applicable Waiver or Consent of Fishing Rights, the First Respondent abused his discretion in that he failed to take into consideration the following relevant matters:*
- (i) authority to grant Waiver of Fishing Rights is vested exclusively in the registered itaukei owners of the fishing rights, in consultation with the Itaukei Lands and Fisheries Commission.*
 - (ii) the First Respondent has neither statutory nor any other authority to direct cancellation of Waiver of Fishing Rights granted in favour of the Applicant.*

- (iii) the First Respondent has neither statutory nor any other lawful authority to direct grant of Fishing Rights to **SGV PACIFIC PROPERTIES GROUP** granted previously further subsisting lawfully in favour of the Applicant.
- (i) In relation to applicable Environmental Impact Assessment Report, the First Respondent abused his discretion in that he did not take into consideration the following relevant matters:
- (i) authority to grant Environmental Impact Assessment Report is vested exclusively in the Director of Environment.
 - (ii) the First Respondent has neither statutory nor any other authority to direct cancellation of Environmental Impact Assessment Report granted in favour of the Applicant.
 - (iii) the First Respondent has neither statutory nor any other lawful authority to direct grant of Environmental Impact Assessment Report to **SGV PACIFIC PROPERTIES GROUP** granted previously further subsisting lawfully in favour of the Applicant.
- (j) The First, Second and Third Respondents have acted arbitrarily and/or unreasonably.
- (k) The First, Second and Third Respondents have made errors of law.
- (l) The First and Second Respondents have exceeded their jurisdiction in purporting to cancel the Environmental Impact Assessment Report granted in favour of the Applicant.
- (m) The First and Second Respondents have exceeded their jurisdiction in purporting to cancel the Waiver of Fishing Rights granted in favour of the Applicant.

The First, Second and Third Respondents have acted contrary to the legitimate expectations of the Applicant.

10. In *Proline Boating Company Ltd v Director of Lands* [2014] FJCA 159; ABU0020.2013 (25 September 2014) Fiji Court of Appeal held,

"This is necessary in order "to eliminate frivolous vexatious or hopeless applications" that would prima facie appear to be so. (vide: Harikissun Ltd v. Dip Singh & Ors [FCA Rep. 96/365].

[43] These requisites in developed jurisdictions may be noted as follows:

(1) Was there an inordinate delay in seeking Judicial review against the decisions that is complained of by an applicant?

(2) Does that decision emanate from the exercise of statutory power by a public body even if disputes involving private parties are involved?

(3) What reliefs have been sought by an applicant in his/her application for leave to apply for Judicial review and against whom?

11. There is no inordinate delay as this application was filed on 29.11. 2018 and the rejection of its application for lease of the Land was dated on 29.8.2018 and would have communicated after this date to the Applicant. Though the exact date of communication is not stated. Even from the date of letter the Applicant had filed this application within stipulated time.
12. The decision to reject Applicant's application for lease was taken by 1st Respondent, which is a statutory position created by a statute, though it is affecting the Applicant.
13. According to the statement filed by the Applicant, First Respondent is responsible for State Lands including the leasing thereof under Law.
14. On 13.2.2014 the Applicant had paid required fees for lodgement with the First Respondent an application for a State Foreshore Development Lease over the Land.
15. The Statement of Applicant further stated that upon initial lodgement of the Application the Applicant was initially required to provide to the First Respondent together with its Application, the following information namely-
 - (a) A Site Map of the area subject of the Application.*
 - (b) A Concept Plan setting out the proposed development.*
 - (c) An Environment Impact Assessment Report (EIA)*
 - (d) A Waiver or Consent by the Owners of the Fishing Rights for the Foreshore area encompassing the proposed development lease area.*
16. According to the Applicant all the above requirements were fulfilled by the Applicant. There is no denial of that by 1st Respondent in the affidavit in opposition.
17. In a letter dated 2nd August, 2017 addressed to the Applicant the First Respondent required production by the Applicant in support of its Application, the following, namely-
 - (a) A Fisheries Impact Assessment Survey, to determine compensation payable to the owners of the traditional fishing rights in the area subject of the Application; and*
 - (b) The details regarding the Applicant's source of funding for its proposed foreshore development.*

18. According to the Applicant, it had attended to the following, in order to fulfil said requirements by the First Respondent, namely-
- (a) *Liased with personnel in the Ministry of Fisheries for the purpose of securing relevant fisheries report and as well as the amount of compensation payable.*
 - (b) *Had produced the First Respondent details of the Applicant's source of funding for the proposed foreshore development.*
19. 31.3.2015 Waiver of Fishing Rights for the development area had been obtained from the owners of fishing rights and it was ratified by the Chairman 3rd Respondent.
20. In the letter rejecting the application of the Applicant there is no mentioning of any breach or failure to fulfil the condition imposed by Respondents or any other agency. According to the statement filed by the Applicant it was informed that the said waiver of fishing rights granted to the Applicant was withdrawn by the owners.
21. This position is reiterated in the affidavit in opposition filed by the 1st Respondent, but here was no evidence of such revocation presented. What is annexed as 'C' to the affidavit in opposition of first Respondent is a revocation of waiver to a person named therein and not to the Applicant. This is the basis of opposition and without valid revocation there cannot be subsequent waiver of rights.
22. Apart from that Applicant had legitimate expectation of the grant of lease of the Land and in pursuant to that expectation had invested in the said project. On the request of 1st Respondent Applicant had not only obtained EIA and submitted but also submitted that to 2nd Respondent for approval and approval was also granted subject to certain conditions on 16th March, 2017.
23. Legitimate expectation can be procedural as in case of *A-G of Hong Kong Vs Ng Yuen Shiu [1983] 2 AC 629*. Even when there is no established procedure the Applicant needs to be considered fairly before rejection as stated in *R Vs. Birmingham City Council ex p Dredger [1993] COD 340*¹.
24. In *R v. Devon County Council [1995] 1 All ER 73* Simon Brown LJ stated that it is superfluous to state that public body will act fairly considering legitimate expectation.
25. So it seems that legitimate expectation is now converged to "act fairly" and this needs to be considered by public officials in the decision making process.
26. Substantive legitimate expectation is a recognized as consideration for decision making body in Judicial Review first UK in *Shmidt v Home Secretary [1969] 2 Ch 149*². (see also *R v Secretary of State for Transport ex p Richmond upon Thames LBC [1994] 1 WLR 74 at 92*).

¹ Administrative Law (11th Ed)(Oxford) by H.W.R.Wade and C.F.Forsyth p 458

² Ibid p459

27. Legitimate expectation is recognized as a ground for consideration in the decision making in *R(Bibi) v Newham LBC* [2002] 1 W.L.R. 7237 though finally court rejected the allocation of resources to be directed by the court.(see also *R(ABC/FER) V Secretary for Defence* [2003] EWCA Civ 473 [2003]QB 1397.
28. In paragraph 4(d)(ii) of the affidavit in opposition of the first Respondent stated that it had annexed such revocation of waiver of fishing rights to the Applicant but had filed only a document that does not show a revocation of waiver of fishing rights to the Applicant. Whether such revocation can be done without due process is another issue. When fishing rights are waived to the Applicant there were no conditions attached to that and it was unconditional waiver by the owners and there was no time period stated. In such a situation whether what was waived can be waived again subsequently for another party is another issue that 1st Respondent needed consideration. There is no evidence of such consideration by 1st Respondent.
29. Legality of the second waiver on behalf of 4th Respondent which was endorsed by 3rd Respondent is another issue. Once a valid waiver is done and endorsed under what circumstances it can be withdrawn and how it should be done is not clear.
30. There is an arguable case for Applicant for judicial review against the first Respondent for failure to consider its application for lease in terms of law and rejecting the same *ex parte* without proper consideration of legitimate expectation.
31. There is no order cancelling approval of EIA granted to Applicant as stated in the statement in support of the Application seeking leave. So no leave can be granted for an order seeking quashing such a determination which was not made. There is no evidence of cancellation of approval of EIA, hence non-existent order cannot be declared null and void, by the same token there is no evidence that 4th Respondent had obtained approval for an EIA and such non-existent order cannot be declared unlawful, null and void. So leave in terms of paragraphs 17 (e) and (g) of statement of Applicant (subject to above reasons) is refused.

FINAL ORDERS

- a. The application for Leave for judicial review is granted.
- b. Cost of this application is cost in the cause.

Dated at Suva this 28th day of March, 2019.



Deepthi Amaratunga
Justice Deepthi Amaratunga
High Court, Suva