

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 45 of 2022

THE FIJI LABOUR PARTY

1st Plaintiff

UNITY FIJI

2nd Plaintiff

THE SPEAKER OF PARLIAMENT

1st Defendant

THE GOVERNMENT OF FIJI

2nd Defendant

THE ATTORNEY- GENERAL OF FIJI

3rd Defendant

Before: Honourable Chief Justice, Mr. Kamal Kumar

Solicitors: Mr. S. Valenitabua for the Plaintiffs
Mr. D. Sharma and Ms. G. Fatima
for the Defendants

Date of Hearing: 17 June 2018

Date of Judgment: 18 October 2022

JUDGMENT

Introduction

1. On 28 January 2022, Plaintiffs filed Originating Summons – Expedited Form seeking following declarations and orders:-
 - i. **A DECLARATION** that the terms of section 30 of the principal Act are unreasonable and in breach of section 15(2) of the 2013 Constitution of the Republic of Fiji ("**the Constitution**").
 - ii. **A DECLARATION** that the terms of section 30A(3) of the principal Act are in the breach of section 15(2) of the Constitution.
 - iii. **A DECLARATION** that the terms of section 30 of the principal Act are in breach of section 16(1)(c) of the Constitution.
 - iv. **A DECLARATION** that the terms of section 30A(3) of the principal Act are in breach of section 16(1)(c) of the Constitution.
 - v. **A DECLARATION** that section 30, being an ouster or privative clause of the principal Act, is invalid, null and void due to its inconsistency with section 15(2) and 16(1)(c) of the Constitution.
 - vi. **A DECLARATION** that section 30A(3), being an ouster or privative clause of the principal Act, is invalid, null and void due to its inconsistency with section 15(2) and section 16(1)(c) of the Constitution.
 - vii. **A DECLARATION** that in purporting to enact sections 30 and 30A(3) of the principal Act respectively, the 1st Defendant and the 2nd and 3rd Defendants acted wrongfully and unlawfully and in breach of, among other things-
 - (1) Section 2(1) and (2) of the Constitution;
 - (2) the Plaintiffs' respective rights under section 16(1)(a) of the Constitution being the right to administrative action that is lawful, rational, proportionate and procedurally fair.
 - (3) the Plaintiffs' respective rights under section 26 of the Constitution being the rights to equality before the law, to equal protection, treatment and benefit of the law.
 - viii. **A DECLARATION** that the Electoral Commission would not be an independent tribunal to hear appeals against the Registrar's decisions pertaining to political parties and other political and election matters.

- ix. **A DECLARATION** that the voting procedure utilized in Parliament during the enactment of the amending Act breached section 69(1) of the Constitution which in turn was also a breach of Standing Orders 53 and 54 of the Parliamentary Standing Orders.
 - x. **AN ORDER** that sections 30, as amended and 30A(3) respectively of the principal Act are unconstitutional, invalid. null and void.
 - xi. Such other Orders or Ancillary Orders or Relief as to give effect to the Declarations sought herein.
 - xii. **AN ORDER** for Costs on a Solicitor/Client indemnity basis.
2. The Originating Summons was called on 2nd March 2022, when the Plaintiffs were granted leave to file Supplementary Affidavit; parties was directed to file Affidavits and this matter was adjourned to 20 April 2022, for further directions.
 3. On 20 April 2022, the parties were directed to file Submission and this matter was adjourned to 17 June 2022, for hearing.
 4. Following Affidavits were filed by the parties:-

For the Plaintiffs

- i. Affidavit of Mahendra Pal Chaudhary sworn and filed on 28 January 2022 (**Chaudhary's 1st Affidavit**);
- ii. Supplementary Affidavit of Mahendra Pal Chaudhary sworn and filed on 2 March 2022. (**Chaudhary's 2nd Affidavit**);
- iii. Affidavit in Reply of Mahendra Pal Chaudhary sworn and filed on 13 April 2022 (**Chaudhary's 3rd Affidavit**);
- iv. Affidavit of Lynda Tabuya sworn on 26 January 2022 and filed on 15 February 2022 (**Tabuya's Affidavit**).

For the Defendants

Affidavit of Priya Preetika Prasad sworn on 24 March 2022 and filed on 25 March 2022 ("**Prasad's Affidavit**")

5. The parties filed submissions and made oral submissions at the hearing.

Preliminary Issues

6. Following preliminary issues needs to be determined:-
 - i. Whether authorities given to the leaders of the Plaintiffs dated 4th and 19 January 2021, and are too general?

- ii. Whether under those authorities the leaders can institute and maintain this proceeding?
 - iii. Whether Tabuya's Affidavit is defective due to her not using her legal name?
 - iv. Whether Preetika Priyadarshani Prasad has authority to depose Affidavit for and on behalf of the 2nd and 3rd Defendants.
 - v. Whether the Plaintiffs have wrongfully joined the Speaker of Parliament, the Government of Fiji and The Attorney- General of Fiji as the Defendants to this proceeding.
7. Three preliminary issues in this proceedings relates to Affidavits filed for and on behalf of respective parties and in particular, the authority given to deponents to institute legal proceedings or sign Affidavits, failure to use legal name, authority to depose Affidavit.

Authority dated 4 January 2022 (Annexure MPC1 of Chaudhary's 1st Affidavit)

8. This Court accept Defendants Counsels' submission that this authority is too general and not specific to this proceeding and as such cannot be accepted as an authority by the so called Management Board to institute and maintain this proceeding.
9. No evidence has been produced in Court to prove that, the 1st Plaintiff's Constitution gives the Management Board, the power to issue a general authority to the deponent as leader of the 1st Plaintiff.
10. This authority is given by Management Board of the 1st Plaintiff, the leader of the 1st Plaintiff. At paragraph 4(3) of the Authority it is stated

"3. Making, swearing and execution of legal document which may be necessary for the pursuit and furtherance of any of the Fiji Labour Party Legal actions whether inside or outside Courts."

11. This Court holds that this authority is too general and insufficient to institute and maintain this proceeding.

Authority dated 19 January 2022 (Annexure "MPC 2 of Chaudhary's 1st Affidavit").

12. The comments made in respect to MPC1 applies to this authority as well except that Management Board is changed to Executive Board.

13. No evidence has been produced in Court to prove that the Executive Board of the 2nd Plaintiff has that power to give any person including its leader such an authority.
14. In the last sentence at paragraph 3 of the Authority it is stated that;

*“In this Meeting, the **Board members hereby authorize** Unity Fiji to institute Legal action in respect of any matter or issue which may need such legal action to be taken.”*

[Emphasis Added]
15. Also at paragraph 4 of the Authority it is stated that

*“**The Board also authorizes** the Leader of Unity Fiji, Mr. Savenaca Narube, to take all actions, necessary and expedient in the institution of such legal actions”*

[Emphasis Added]
16. The question that needs to be asked is when the Authority says **“Board members hereby authorizes”** and **“The Board also authorizes”** then why the so called **“Board Members”** did not signed the authority.
17. Furthermore, there is nothing in this authority that permits, the leader of the 2nd Plaintiff to delegate this authority to a third Party which in this case is the leader of the 1st Plaintiff.
18. When this Court at hearing of this proceedings or a related matter enquired with the Plaintiffs Counsel if the Plaintiffs Constitutions could provide such a power to the leader of the party, the Counsel honorably answered that such provision can be abused and used arbitrarily.
19. On the same token a general authority like Annexures MPC1 and MPC2 can be abused or used arbitrarily by the person with such an authority.
20. For the reason stated at paragraphs 8 to 19 of this Judgment, this Court holds that authorities dated and 4 January 2022 and 19 January 2022 is defective and insufficient to institute and maintain this proceeding.
21. Having held that the authorities relied on by the deponent is insufficient to institute this proceeding this Court can dismiss this proceeding.
22. Even though, the Affidavit filed on behalf of the Plaintiffs are defective for the reasons stated above, this Court grants leave to use the Affidavits on the ground that the irregularity is as to form. Order 41 Rule 4 of the High Court Rules 1988.

Tabuya’s Affidavit

23. The Defendants submit that the deponent did not use her legal name as required under section 2(9) of the **Interpretation Act 1967 (IA)**.
24. Section 2(9) of the IA provides as follows:-

“Where any written law authorizes or require a person to provide his or her name, the person must provide his or her name as specified on his or her birth certificate, and where any written law authorities or requires a person to provide any form of identification of himself or herself, the person must provide such form of identification which accurately reflects his or her name as specified on his or her birth certificate.”
25. Under Order 41 of the High Court Rules 1988 (HCR), the deponent is required to express her name in the Affidavit.
26. Pursuant to section 2(9) of IA the deponent was to have expressed her birth certificate name.
27. Annexure A of Prasad’s Affidavit establish that the deponent’s birth certificate name is Lynda Diseru Tabuya.
28. Under Order 41 Rule 4 of High Court Rules an Affidavit with irregularity in the form may be filed or used with leave of the Court.
29. In this instance, not using the legal name is not an irregularly in the form but breach of law being s2(9) of IA.
30. This Court holds that Tabuya’s Affidavit is in breach if s2(9) of IA.
31. Accordingly, it is ordered that Tabuya’s Affidavit be expunged from the Court file.

Prasad’s Affidavit

32. Preetika Priyadarshani Prasad at paragraph 1 of her Affidavit states that she is authorized to depose the Affidavit for on behalf of the 2nd and 3rd Defendant.
33. The Plaintiffs by their counsel submit that Prasad as Acting Solicitor did not have the authority to swear Affidavits as the authority to do has not been delegated to her by the Solicitor General.
34. At paragraph 3.1 (5) of the Plaintiffs submissions filed on 4 July 2022 they state as follows:-

“It is submitted that the functions and powers of the Solicitor General conferred pursuant to section 116 of the Constitution cannot be delegated. There is no provision in the Constitution which delegates the Solicitor General’s constitutional functions and powers, if he is unable to perform, to the Acting Solicitor General. The Defendants are invited to disclose such a provision to the Court for the Court’s and the Plaintiffs’ purpose.

35. Section 116(6) of the Constitution provides:

“The President may, on the recommendation of the Judicial Services Commission following consultation by it with the Attorney-General, appoint a person to act as the Solicitor-General during any period or during all periods, when the office of the Solicitor-General is vacant or when the Solicitor-General is absent from duty or from Fiji or is, for any reason, unable to perform the functions of office.”

36. It goes without saying that an acting appointment is made when the person appointed to perform certain functions and duties for some reason is absent from office.

37. When a person assumes the role of acting position, then the person so appointed performs the functions and duties of the person who is absent from office.

38. The question that needs to be answered is how can the Solicitor General delegate his powers to Acting Solicitor General when the Solicitor General is not in the office and not performing the functions and duties of Solicitor General.

39. In this instance, Preetika Priyadarshani Prasad having been appointed Acting Solicitor General assumes the responsibility to perform the functions and duties of the Solicitor General including signing of legal documents like court pleadings and Affidavits for and on behalf of governmental bodies, Ministries and the Attorney – General of Fiji.

40. This Court therefore holds that Preetika Priyadarshani Prasad, being the Acting Solicitor General had the legal authority to swear her Affidavit on 23 May 2022.

Whether the parties named as Defendant have been joined wrongfully?

41. Defendants submit that it is the Parliament which deliberates on Bills and passes the legislation and once an Act is passed by the Parliament it is assented to be the President of Fiji.
42. The relevant provisions of the Constitution are sections 46(1)(2), 47(1), 48(1) and 54(1) which sections provide as follows:

Section 46(1)(2)

“(1) The authority and power to make laws for the State is vested in Parliament consisting of the members of Parliament and the President, and is exercised through the enactment of Bills passed by Parliament and assented to by the President.

(2) No person or body other than Parliament has authority to make any law in Fiji, except under authority conferred by this Constitution or by a written law.”

(emphasis added)

Section 47(1)

“(1) Any member of Parliament may introduce a Bill in Parliament, but only the Minister responsible for finance, or another Minister authorised by Cabinet, may introduce a Money Bill, as described in subsection (4).”

(emphasis added)

Section 48(1)

“(1) When a Bill has been passed by Parliament, the Speaker must present it to the President for assent.”

(emphasis added)

Section 54(1)

“(1) For the first general election of members of Parliament held under this Constitution, Parliament shall consist of 50 members, elected in accordance with this Constitution”

In 2017, member of members was increased to 51.

43. It must be noted that **only the Parliament has the constitutional authority to make laws except** under authority of the Constitution or any written law (s46(2) – the Constitution).
44. This Court takes judicial notice of the fact that the current Parliament (more so when the relevant provision were passed) consists of Fiji First Party (FFP), Social Democratic Liberal Party (SODELPA) and National Federation Party (NFP). The number of seats held by each of these parties are as follows:-
FFP: 27 seats
SODELPA: 21 seats
NFP: 3 seats
45. When Bills are presented in Parliament, the members present either physically or virtually have the opportunity to deliberate on the Bill and vote on the Bill. The Bill is passed unanimously or by majority of parliamentary members in attendance and once it is passed it is submitted by the Speaker to the President for his assent.
46. This Court will in brief consider the roles and responsibilities of the Defendants.

The Speaker of Parliament (The Speaker)

47. The Parliament by simple majority vote elects the Speaker who then presides over every sitting of the Parliament.(s77(1)(3) of the Constitution)
48. Section 77(6) of the Constitution provides as follows:-
The Speaker, Deputy Speaker, or any other person presiding at any time, in the performance of the functions of the Speaker—
a. is independent and subject only to this Constitution and any other law;
b. serves to secure the honour and dignity of Parliament;
c. is responsible for ensuring—

The Attorney-General of Fiji (“The Attorney-General”)

55. The Attorney-General of Fiji is Chief Legal advisor to the Government of Fiji. (s96(1) – the Constitution)
56. Even though the Office of the Attorney-General prepares or vet Bills for and for and on behalf of the Government, the Attorney-General presents those Bills to Parliament and moves motion in favor of the Bill, the Attorney-General does not make law as power to make laws is vested in the Parliament.
57. It is interesting to note that s44(7) of the Constitution gives the Attorney-General discretion to intervene in a proceeding that relate to matters concerning a provision in Chapter 2 of the Constitution (Bill of Rights).
58. The law subject to this proceeding was made by the Parliament being the legislative authority with the President’s assent.
59. This Court therefore holds that the Speaker, Government of Fiji and The Attorney-General has been wrongfully joined as parties to the proceeding.
60. Usually, this Court after determining the preliminary issues would deal with substantive issues. However, in this instance, it is inappropriate to do so for the simple reason that any declaration or orders made would not be enforceable against the Defendants named in this proceeding.
61. For reasons stated at paragraphs 41 to 59 of this Judgment, this Court has no option but to refuse to made any declaration in respect to Declaration 1 to 8 in the Originating Summons and dismisses and strike out orders sought at paragraph 10 of the Originating Summons. This Court will only determine the issue in Declaration 9.

Declaration 9

62. Section 69(1) of the Constitution provides as follows:-

“(1) Except as otherwise provided in this Constitution, any question proposed for decision in Parliament must be determined by a majority vote of the members present and voting”

63. Section 71 of the Constitution gives the Parliament the discretion to “make standing orders and rules for orderly conduct of business and proceedings in Parliament.

64. Standing Order in simple terms is set of practice and procedure for the Parliament to conduct its business in an orderly manner which obviously is the internal affair of the Parliament.

65. Order 20 of the Standing Order provides as follows:

***“20 Additional powers of Speaker and Secretary-General
The Speaker and the Secretary-General have the power to do everything necessary or convenient to be done for, or in connection with, the performance of their functions under these standing Orders.”***

66. Pursuant to Order 20 of the Standing Order, the Speaker as the presiding Officer has the authority to decide how to conduct matters raised in Parliament including the manner of voting on Bills/ Motion. In this instance the Speaker decided to take vote by acclamation which was endorsed by the Business Committee.

67. It is interesting to note that the Business Committee of the Parliament comprises of :-

- (a) The speaker, who is the chairperson of the committee;*
- (b) The Prime Minister;*
- (c) The Leader of the Opposition;*
- (d) The Leader of any other party; and*

This obviously indicate that all the parties in Parliament have the opportunity to contribute to matters before the Business Committee.

68. It is undisputed that one of the functions of the Speaker and the Secretary General is to put motion including Bills presented in Parliament to vote by the members present at the particular sitting of Parliament.
69. The manner of voting on motions including Bill is certainly an internal affair of the Parliament.
70. This Court takes judicial notice of the following facts;-
- i. The speaker sometimes in early 2020 decided that all voting in Parliament will be by acclamation;
 - ii. Since, then the motion and Bill including appropriation Bills were voted by using this method of voting;
 - iii. It has taken the Plaintiffs more than two (2) years to institute this proceeding.
71. It is well settled that Court will not interfere or inquire into internal affairs of the Parliament as it has no jurisdiction to do so. **Babla v Devika Prasad and Another** 44FLR (Tuivaga CJ).
72. In **State v Speaker of Parliament and Anor Exparte Tikoca** (2017) Judicial Review No. HBJ 4 of 2016 (31 August 2017) his Lordship Justice Seneviratne summarized the case law on this issue in reference Erlare May's Treaties on the Law, Privileged, Proceedings and Usage of Parliament, 24th Edition (Pages 201, 203, 204); **Bradlaugh v Gosset** (1883-4) 12 QBD 271 (Stephen J); **Madhwan v Falvey and Ors** 19 FLR 140 (Court of Appeal); **Butadroka v Attorney General** (1993); 39 FLR 115; **Rest -v- Edwards** 1 ALLER 641 (Poppelwell J); **Vakalalabure v Nailatikau & Ors** (2005) FJHC 741 HBC 6R of 2005S (20 May 2005); **Anismic v Foreign Compensation Commission** [1969] 2 AC 147.
73. This Court fully endorses and adopts following statement in **Exparte Tikoca**:-
- “If the courts start interfering with the internal affairs of the Parliament it will open floodgates for the Members to challenge any resolution passed by the Parliament in court which will lead to a***

situation where the judiciary will, virtually, be controlling the internal affairs of the parliament and the entire system of administration of the country can collapse in no time”.

74. In simple terms interfering with internal affairs of the Parliament by the Courts unless such power is bestowed on the Courts under the Constitution would lead to **fracture of the doctrine of Separation of Power** which doctrine is fundamental to our system of government; ***Babla (ante), Gavoka v Bulitavu and Ors*** [2021] HBM 61 of 2021 (10 September 2021)

75. For the reasons stated above this Court refuses to make the declaration sought by the Plaintiffs at Declaration No. 9 of the Originating Summons.

Cost

76. This Court takes note that parties filed submissions on preliminary issues and substantive issues.

77. Parties made oral submissions at the hearing.

78. The Plaintiffs proceeded with hearing of this proceeding despite being put on notice by the Defendants Counsel that Defendants have been wrongfully joined as Defendants as they do not make laws.

Order

79. Originating Summons – Expedited Form filed on 18 March 2022, is dismissed and struck out.

80. 1st and 2nd Plaintiffs jointly and severally do pay \$2000.00 each to the 1st, 2nd and 3rd Defendants as cost within seven (7) days from the date of this Judgment.

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Kamal Kumar
CHIEF JUSTICE

Solicitors

Ratumaiyale Esquires for the Plaintiffs

R. Patel Lawyers, Suva for the Defendants