

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 59 of 2022

THE FIJI LABOUR PARTY
1st Plaintiff

UNITY FIJI
2nd Plaintiff

THE CONSTITUTIONAL OFFICES COMMISSION
1st Defendant

THE ATTORNEY- GENERAL OF FIJI
2nd 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: 14 July 2022

Date of Judgment: 18 October 2022

JUDGMENT

Introduction

1. On 14 February 2022, the Plaintiffs filed Originating Summons – Expedited form seeking following declarations/ order:-
 - i) **A DECLARATION** that the Courts of Law in Fiji have the jurisdiction, pursuant to s.132(5) of the 2013 Constitution of the Republic of Fiji ("the Constitution"), to direct the 1st Defendant to exercise its powers and functions as conferred on the 1st Defendant by the provisions of section 137(1), (2) and (3) of the Constitution.
 - ii) **A DECLARATION** that the 1st Defendant has the function, as provided in section 137 of the Constitution, and is obliged by law pursuant to section 137(3)(a)(i) of the Constitution to appoint a Tribunal to investigate complaints of misbehavior against the Supervisor of Elections on allegations which would warrant the Supervisor of Elections' removal from office.
 - iii) **A DECLARATION** that the 1st and 2nd Plaintiffs have, through communication to the Chairman of the 1st Defendant, and copied to His Excellency the President, raised serious allegations of misbehaviour against the Supervisor of Elections warranting the appointment of a Tribunal by the 1st Defendant to investigate the allegations.
 - iv) **A DECLARATION** that the failure of the 1st Defendant to appoint a Tribunal to investigate the allegations against the Supervisor of Elections amounts to a non-performance of the 1st Defendant's public duty and constitutes a serious breach of the 1st Defendant's function under the Constitution.
 - v) **AN ORDER** of this Honourable Court directing the 1st Defendant to appoint a Tribunal to-
 - (1) investigate the allegations of misbehaviour against the Supervisor of Elections;
 - (2) furnish a written report on the allegations of misbehaviour and the investigation thereof; and
 - (3) advise the President of the Republic of Fiji whether or not to remove the Supervisor of Elections from office on the ground of misbehaviour.
 - vi) **AN ORDER** directing the 1st Defendant to advise the President that the Supervisor of Elections be suspended from office pending investigation and referral to and appointment of a Tribunal.

- vii) **AN ORDER** as to Costs.
 - viii) **AND** any other Order this Honourable Court may deem just.
(“the Originating Summons”)
2. The Originating Summons was called on 16 March 2022, where parties were directed to file Affidavit and adjourned to 26 April 2022, for mention.
 3. On 26 April 2022, the parties were directed to file submission and the Originating Summons was adjourned to 14 July 2022 at 10.30am, for hearing.
 4. Following Affidavit were will filed by the parties.

For the Plaintiffs

- i. Affidavit of Savenaca Narube sworn on 12 February v2022 and filed on 14 February 2022 (**“Narube’s 1st Affidavit**).
- ii. Affidavit of Savenaca Narube sworn and filed on 20 April 2022 (**“Narube’s 2nd Affidavit”**)

For the Defendants

Affidavit of Preetika Priyadarshani Prasad sworn on 4 April 2022 and filed on 5 April 2022 (**‘Prasad’s Affidavit’**).

5. Counsel for the parties relied on Submission filed and made brief oral submissions at the hearing.

Preliminary Issues

6. Three preliminary issues in this proceedings relates to Affidavits filed for and on behalf of respective parties in particular, the authority given to them to institute this proceeding or sign Affidavits in this proceedings.

Authority dated 19 January 2022 (Annexure SN1 of Narube’s 1st Affidavit)

7. This Court accept Defendants Counsels’ submission that this authority is general and not specific to this proceeding and as such cannot be accepted as an authority by the so called Executive Board to institute and maintain this proceeding.
8. Also no evidence has been produced in Court to prove that, the 2nd Plaintiff’s Constitution gives the Executive Board, the power to issue a general authority to the deponent as leader of the 2nd Plaintiff.
9. 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]

10. 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]

11. 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 sign the authority.
12. For the reasons stated at paragraphs 7 to 11 of this Judgment, this Court holds deponent that authority dated 19 January 2022, is defective and insufficient for the to institute and maintain this proceeding for and on behalf of the 2nd Plaintiff.
- Authority dated 4 January 2022 (Annexure “SN2 of Narube’s 1st Affidavit”).**
13. The comments made in respect to SN1 applies to this authority as well except that Executive Board is changed to Management Board.
14. No evidence has been produced in Court to prove that the Management Board of the 1st Plaintiff has the power to give any person including its leader such an authority.
15. This authority (SN2) is given by Management Board of the 1st Plaintiff to the leader of the 1st Plaintiff. At paragraph 4(3) of the Authority is states:-
- “3. Making, swearing and execution of legal document which may be necessary for the pursuit and furtherance of any of Fiji Labour Party Legal actions whether inside or outside Court’s.”*
16. There is nothing in the authority that permits, the leader of the 1st Plaintiff to delegate this authority to a third party which in this case is leader of the 2nd Plaintiff.
17. Even if the leader of the 1st Plaintiff had power to delegate, there is no proof that the leader of the 1st Plaintiff had authorized the deponent to swear any Affidavit for and on behalf of the 1st Plaintiff.

18. When this Court at the hearing of this proceeding 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 SN1 and SN2 can be abused or used arbitrarily by the person with such an authority.
20. For the reasons stated at paragraph 7 to 19 of this Judgment, this Court hold that authorities dated 19 January 2022 and 4 January 2022 are defective and insufficient to institute and maintain this proceeding. In addition there is no authority from leader of the 1st Plaintiff to the deponent to swear the Affidavit for and on behalf of the 1st Plaintiff.
21. Having held that the authorities relied on by the deponent is insufficient to institute this proceedings Court can dismiss this proceeding on this ground.
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.

Declaration 1

23. Section 132 (1) of the Constitution of the Republic of Fiji (**“the Constitution**) establishes Constitutional Offices Commission, the 1st Defendant (**hereinafter referred to as “the Commission”**)
24. Section 132(5) of the Constitution provides as follows:-

*“(5) In the performance of its functions or the exercise of its authority and powers, **the Commission shall be independent** and shall not be subject to the direction or control of any person or authority, except by a court of law or as otherwise prescribed by written law.”*

25. The Defendant by their Counsel do not dispute the fact that the Courts do have power to direct or control the performance of the functions of the Commission or the exercise of the Commission’s authority and powers. Hence, there is no need to dwell with this issue any further.

Declaration 2

26. Section 137 (1) (2) (3) (a)(i) of the Constitution provides as follows:-

“(1) A person to whom this Part applies may be removed from office for inability to perform the functions of his or her office (whether arising from

infirmary of body or mind or any other cause) or for misbehaviour, and may not otherwise be removed.

(2) Removal from office must be pursuant to this section.

(3) If the Constitutional Offices Commission considers that the question of removal from office ought to be investigated, then—

(a) the Constitutional Offices Commission appoints—

(i) in the case of alleged misbehaviour—a tribunal, consisting of a chairperson and not less than 2 other members, selected from amongst persons who hold or are qualified to hold the office of a Judge”

(Emphasis added)

27. If appears that, the Plaintiffs have sought, these declarations without analyzing and having due regard to the working of section 137(3) (a)(i).
28. It must be said outright, that there is no binding obligation on the Commission to appoint a tribunal as soon as any allegation is made against the officer concerned.
29. A tribunal needs to be **only** appointed **if the Commission considers** that the **question of removal of the officer concerned** from office in the **case of alleged misbehavior** of the officer **ought to be investigated** otherwise there is no need to appoint a tribunal.
30. In essence:-
 - i. If Commission based on clear cut evidence before it determines that the officer concerned is guilty or his/ her action caused financial loss to the government or members of the public and/ or for any other genuine reason decides to remove the officer without further investigations then there is no need to appoint a tribunal.
 - ii. If Commission determines that the allegation lacks merit on the ground that it is frivolous or vexatious, or an abuse of process, or is to unduly harass or undermine the credibility of the officer concerned or for any other reason, the Commission may resolve to dismiss the allegation. Obviously if this happens then the need to appoint a tribunal is out of question.
31. In this instance, it is for Commission after analyzing the allegation against the Supervisor of Election to consider (decide) as to whether the allegations amount to misbehavior which ought to be investigated.

Declaration 3

32. This Court adopts the comments made under Declaration 2 and would say no more.

Declaration 4

33. Section 132 (2) of the Constitution provides:-

“The Commission consists of:

- a) The Prime Minister, who shall be the chairperson*
- b) The leader of the Opposition*
- c) The Attorney-General*
- d) 2 person appointed by the President on the advice of the Prime, Minister*
- e) 1 person appointed by the President on the advice of the Leader of the Opposition*

34. The Plaintiffs Counsel stated in Court, that it was delay by the 1st Defendant to respond to various political parties complaint against the Supervisor of Elections prompted the Plaintiffs to institute this proceeding.

35. The complaint was lodged on or about 20 August 2021, which consisted of allegation is respect to case of **Electoral Commission -v- Supervisor of Elections** [2014] HBC 240 of 2014 (24 August 2014), **Electoral Commission -v- Supervisor of Elections** [2016] ABU 69 of 2014 [29 November 2016], **Mahendra Reddy; Sitiveni Rabuka; Isoa Tikoca Nawaikula -v- Supervisor of Elections** [2021] FJHC 232; HBM 58 of 2021 (17 August 2021).

36. The Plaintiffs complain of delay by 1st Defendant in not responding to the complaint fits well with the idiom “**pot calling the kettle black**” for the simple reason that except for Nawaikula’s case all other cases referred to by Plaintiffs are more than 3 years old. In fact that first two cases mentioned in paragraph 30 are 8 and 6 years old.

37. The Commission’s position was that, before it could convene and respond to the complaint, this proceedings was instituted and as such it waited for final determination of this action.

38. It is interesting to note that SODELPA and NFP (parties with representatives in Parliament) who also signed letter of complaint did not join this proceeding.

39. This Court accepts the reason advanced by Defendants Counsel as to why the Commission did not respond to the complaint and holds that the Commission in not having appointed a tribunal prior to the Commission considering whether question of removal of the Supervision of Elections ought to be investigated does not amount to non-performance of the Commission’s duty.

Orders 5 and 6

40. In view of what is stated at paragraph 26 to 39 of this Judgment this Court is not in a position to grant the orders sought by the Plaintiffs.
41. Furthermore, the Commission is an independent body established under the Constitution which has its own policies and procedures to perform its function bestowed under the Constitution or written law.
42. Even though, Courts can give directions or control the function of the Commissions it should also do so in very exceptional circumstances for the Courts to consider as to whether allegations amount to misbehavior which ought to be investigated tantamount to this Court usurping the powers of the Commission.

2nd Defendant

43. This Court notes that no declaration or orders are sought against the 2nd Defendant.
44. This Court sees no reason as to why the Plaintiffs joined the 2nd Defendant and put his office to unnecessary expense.

Costs

45. This Court takes into consideration that:-
 - i. The Parties filed submissions and relied on it during oral hearing.
 - ii. Except for Declaration 1 all other declarations sought by the Plaintiffs are misconceived.

Declaration/ Orders

46. This Court makes following declaration and orders:
 - i. It is declared that, Courts do have the power to direct or control the performance of the function of the Commission or the exercise of its authority and powers which power should be exercised in exceptional circumstances.
 - ii. Declarations 2 to 4 are held to be misconceived and as such is refused.

- iii. The Plaintiffs prayers for orders directing that 1st Defendant to appoint an Tribunal to investigate the allegations of misbehaviour against the Supervisor of Elections; furnish a written report on the allegations of misbehaviour and the investigation thereof; and to direct the 1st Defendant to advise the President that the Supervisor of Elections be suspended from office pending investigation and referral to and appointment of a Tribunal is dismissed and struck out.
- iv. The 1st and 2nd Plaintiffs jointly and severally pay to the 1st Defendant costs assessed in the sum of \$5000.00 within 7 days from the date of this Judgment.
- v. The 1st and 2nd Plaintiffs jointly and severally pay to the 2nd Defendant cost assessed in the sum of \$1000.00 within 7 days from the date of this Judgment.

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Kamal Kumar
CHIEF JUSTICE

Solicitors

Ratumaiyale Esquires, Suva
R. Patel Lawyers, Suva