

IN THE HIGH COURT OF FIJI AT SUVA

CENTRAL DIVISION

CIVIL JURISDICTION

Civil Action No. HBJ 39 of 2023

IN THE MATTER of an Application by **MANJULA DEVI trading as PACIFIC BAKERY & INVESTMENT** for a Judicial Review under Order 53 of the High Court Rules 1988 and High Court (Amendment) Rules 1991.

IN THE MATTER of a Decision of the **Acting Chief Executive Officer of the Nausori Town Council** made on the 1st day of November 2023 whereby she purported to terminate the Applicants Tenancy Agreement dated 31st of January 2023 for her business premises Bakery No 1, outside the Nausori Market.

And

IN THE MATTER of a Decision of the **Acting Chief Executive Officer of the Nausori Town Council** made on the 01st day of November 2023 whereby she purported to direct the Applicant to vacate the premises Bakery No. 1 outside the Nausori Market no later than 01st December 2023.

EX-PARTE

BETWEEN:

MANJULA DEVI trading as PACIFIC BAKERY & INVESTMENT

APPLICANT

AND

NAUSORI TOWN COUNCIL

RESPONDENT

Date of Hearing : **7 December 2023**
For the Applicant : **Ms Kant**
Date of Decision : **11 January 2024**
Before : **Levaci, SLTTW Acting Puisne Judge**

RULING

(EX- PARTE APPLICATION FOR LEAVE FOR JUDICIAL REVIEW)

PART A - BACKGROUND

1. The Applicant is seeking to make an application for leave for judicial review under Order 53 of the High Court Rules.
2. Her application stems from the decision of the Nausori Town Council to issue her sole proprietor business a Notice to Quit and require her to vacate the commercial premises inside the Nausori Market where she operates her business from.
3. The Court thereafter directed the Plaintiff/Applicant to file written submissions on the same.
4. The Applicant seeks leave for judicial review and a stay of the decision in respect of:
 - (i) The Acting Chief Executive Officer of Nausori Town Council issued a notice on the 1st day of November 2023 whereby she purported to terminate the Applicant's Tenancy Agreement dated 31st of January 2023 for her business premises Bakery No. 1, outside the Nausori Market; and
 - (ii) The Acting Chief Executive Officer of the Nausori Town Council issued a Notice on the 1st day of November 2023 whereby she purported to direct the Applicant to vacate her business premises Bakery No 1 outside the Nausori Market no later than 1st December 2023 and thereby forced closure of the Applicants business.
5. The Applicant seeks the following reliefs:
 - (a) **AN ORDER OF CERTIORARI** to remove the Notice date 1st November 2023 and the same be quashed and/or set aside;
 - (b) **A DECLARATION** (in any event) that the Respondent has acted unfairly and/or against the Rules of Natural Justice and /or arbitrarily and/or unreasonably and/or acted in breach of the Applicants legitimate expectation and/or made errors of law and/or with bias and/or exceeded its jurisdiction in purporting to by way of written notice dated 1st November 2023 terminating the Tenancy Agreement dated 31st January 2023 and directed the Applicant to vacate the premises no later than 1st November 2023;
 - (c) **AN ORDER** that the Respondents notice dated 1st November 2023 is unlawful and null and void;

- (d) Damages;
- (e) Further Declarations and Orders or Reliefs as this Honorable court deems just in the circumstances; and
- (f) Costs of this action on an indemnity basis.

PART B: AFFIDAVIT

6. The affidavit of the Applicant is as follows:

“5. That since 2019 until 10th August 2023, I operated my business as Pacifica Bakery. I baked and sold bread from my Shop. Annexed hereto and marked “MD-3” is my Tenancy Agreement dated 31st January 2023.

6. That on 17th April 2023 I raised an issue with Ms. Tupou, the Market Master of the Nausori Town Council to stop fish sellers sitting in front of the Bakery to sell seafood.

7. That Ms Tupou refuse to hear me as one of the sellers, Mr Bhan Pratap, who was selling seafood in front of my Shop is a friend of Ms Tupou. That Mr Bhan does not pay rent to the Nausori Town Council.

8. That after my Solicitor contacted Ms Tupou on 20th April 2023, she informed my solicitor that she will be relocating the fish sellers; however the fish sellers were not relocated.

9. That on many occasions Mr Bhan Pratap has invited other sellers to sit in front of the Bakery Shop and sell sea produce to cause hindrance to my operation of business. Further, Mr Pratap has picked fights with me on many occasions and has lodged various complaints regarding me and my business with the Nausori Town Council, which the former Chief Executive Officer, Ms Anurashika Bari, has already dealt with.

10. That on or about later October 2023, Mr Pratap came to my bakery and informed me that as soon as the Respondents new Chief Executive Officer is appointed, he will ensure that my Tenancy Agreement will be terminated.

11. That on 1st November 2023, I was issued with a Notice to terminate my Tenancy Agreement with the Nausori Town Council and this was signed by the newly appointed Acting Chief Executive Officer Ms Saidi Nazrana. Annexed hereto and marked “MD-4” is a copy of the Notice dated 1st November 2023.

12. That Ms Saidi Nazrana terminated my Tenancy Agreement dated 31st January 2023 referring to the complaints made against me which were already addressed by the former Chief Executive Officer Ms Anurashika Bari on 8th September 2023. Ms Saidi Nazrana, who was then [at 8th September 2023] the Nausori Town Council Manager Corporate Services was part of the meeting. Annexed and marked “MD-5” is a copy of

the Nausori Town Council Minutes of the Meeting which took place on 8th September 2023.

13. That complaints that were discussed in the meeting with the former Chief Executive Officer Ms Anurashika Bari were allegations from Ms Triza Singh, the market post officer, and Mr Bhan Pratap. Mr Pratap accused me of spitting on his face after an argument. He had also reported this alleged incident to the Market Post Officer Ms Triza Singh. However, after investigations carried out by the police officer's I wasn't charged as I had not committed the offence. Ms Triza Singh accused me of damaging her vehicle by throwing white chemicals. Again, this was investigated by the police officers who brought in a Forensic Specialist to test the chemical. After investigations I was not charged as I did not throw any chemical on Ms Singh's car. Every morning as part of religious practice I sprinkle holy ashes which are sold in the supermarket mixed with turmeric and salt outside my Bakery shop and because Ms Singh's car was parked close to my Bakery some residue may have settled on her vehicle.

14. That other complaints which were discussed with the former Chief Executive Officer Ms Anurashika Bari, was to have my tax, health and business license renewed. That in about August 2023. I did provide the Nausori Town Council with a copy of my new Business Registration Certificate. The complaints regarding my tax, business and health licenses were also reported to FRCS, FCCC and Consumer Council of Fiji. I was interviewed by all three of these Authorities. After investigations, again no action was taken against me as I had met all requirements to operate my Business.

15. That after the meeting concluded on 8th September 2023, on 12th September 2023, Ms Tupou the Market Master, came to my Bakery Shop and handed me an addendum to the Tenancy Agreement dated 31st of January 2023 whereby the Bond and Rent was increased and the Tenancy was renewed for 12 months. The Addendum was in the name of my Business, Pacific Bakery and Investment. I executed the Addendum and it was witnessed. Annexed and marked "MD-6" is a copy of the Addendum to the Tenancy Agreement dated 31st January 2023 which I signed on 12th September 2023.

16. That after meeting on 8th September 2023 and after the renewal of the term of my Tenancy Agreement on 12th September 2023, I did not hear from the Nausori Town Council nor were there any other issues raised by anyone else.

17. That without any reason, on 1st November 2023 I received from the Nausori Town Council a Notice advising that my tenancy had been terminated and directing me to vacate the premises no later than 1st December 2023.

18. That without any cause or fault of mine, the newly appointed Nausori Town Council acting Chief Executive Office, Ms Saidi Nazrana, by Notice dated 1st November 2023, terminated my tenancy for Bakery No 1 outside Nausori Market, which resulted in my business closed and this will affect my ability to earn income.

19. That the Notice to Vacate dated 1st November 2023 is addressed to my former business name Pacifica Bakery and not to my current operational business name Pacific Bakery & Investments.

20. I am advised and verily believe that the Respondent has acted unlawfully, unreasonably, in breach of Natural Justice, in excess of its jurisdiction, with bias, and in breach of my Legitimate Expectations. I pray that the Leave be granted to apply for judicial review and the remedies as prayed for in the Application be granted,

21. The Respondents decision to terminate my tenancy has been designed to completely close down my Business as the Nausori Market in my primary place of business operations. I have been running my Bakery Shop from this premises since about April 2019; as a result, I have established a customer base, it will be very difficult for me to find another location to operate my business.

22. That I will suffer irreparably damage if the Decision of the Respondent is not quashed.”

PART C: THE LAW ON LEAVE FOR JUDICIAL REVIEW

7. The Applicant has relied upon Order 53 (3) of the High Court Rules. Sub-Rules (1), (2) and (5) states:

“3 (1) No Application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.

(2) An application for leave must be made ex parte and must be supported –

(a) by a statement, setting out the name and description of the applicant, the name and address of his barrister and solicitor (if any), the relief sought and the grounds which it is sought, and

(b) by affidavit, to be filed before the Application is made, verifying the facts relied upon.

(5) The Court shall not grant leave unless it considers the applicant has a sufficient interest in the matter to which the application relates”.

8. In Reg –v- I.R.C, Ex P Fed. Of Self Employed (H.L. (E.) [1982] AC 653 it was held that-

“The one legal principle, which is implicit in the case law and accurately reflected in the rule of court, is that in determining the sufficiency of an applicant’s interest it is necessary to consider the matter to which the application relates. It is wrong in law, as I understand the cases, for the court to attempt an assessment of the sufficiency of an applicant’s interest without regard to the matter of his complaint.”

If he fails to show, when he applies for leave, a prima facie case, or reasonable grounds for believing that there has been a failure of public duty, the court would be in error if it granted leave. The curb represented by the need for an applicant to show, when he seeks leave to apply, that he has such a case is an essential protection against abuse of legal process. It enables the court to prevent abuse of legal process. It enables the court to prevent abuse by busybodies, cranks and other mischief makers. I do not see any further purpose served by requirement for leave."

9. In the case of Proline Boating Company Ltd -v- Director of Lands [2014] FJCA 159; ABU 0020.2013 (25 September 2014) Gunaratne JA, Kotigalage JA and Mutunayagam JA held that :

"[29] The English decisions reveal a vast range of situations in which an applicant has been held to have a sufficient interest in applying for leave to seek judicial review. Of these it is what I would like to call the direct consequences test that would be applicant in the instant case, for example, if the decision sought to be reviewed interferes directly with the applicant's personal rights then the applicant would have "sufficient interest.

[37] It is not any other legal interest whether an interest in property or other that is envisaged in Rule 3 (5). Rather it is the threshold interest in moving Court for leave to apply for judicial review being affected by an adverse decision."

10. Other requisites for the court to be satisfied with in a leave application were identified in Proline Boating Company Ltd -v- Director of Lands (Supra) are as follows:

"(i) What is an inordinate delay in seeking judicial review against the decision that is complained off by an applicant?

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

(iii) What reliefs have been sought by an applicant in his/her application for leave to judicial review against whom?"

PART D: WRITTEN SUBMISSIONS

11. Counsel submissions that the Council had refused to grant them a licence and hence their exercise of these powers rendered them susceptible to judicial review. The Town Council is empowered to issue a licence in accordance with By-law 34 of the Nausori Town Council By-Laws 1966.

PART E: ANALYSIS

Sufficient Interest

12. The decision for which the Applicant seeks relief from pertains to the decision of the CEO of Nausori Town Council to terminate the Tenancy Agreement of the Applicant on the basis that there was no proper reason for such termination.
13. The Applicant is a signatory to the Tenancy Agreement for her initial business Bakery No. 1 Shop for which a Notice to Quit was issued. The Applicant argued that her renewed Tenancy Agreement was issued for her new business Pacific Bakery Investments and not Bakery No. 1 Shop.
14. The Applicant is directly affected by the decision of the CEO on behalf of the Nausori Town Council and thus has sufficient interest in this case.

Inordinate Delay

15. There is no inordinate delay in the relief sought as the Applicant filed their application within 3 months from when the decision was made.

Public policy decision

16. Nausori Town Council is a local government established under the Local Government Act to govern and administer Nausori town.
17. The Nausori Town Council entered into a tenancy agreement with the Applicant for the lease of the commercial space outside of the Market for her bakery shop.
18. In the **Praveen Prakash Palani and Fiji Electricity Authority Executive Officers Association and Fiji Electricity Authority** CA No. ABU No. 0028 of 1996 (HBJ 11 of 1993) Sir Moti Tikaram JA, Scott JA and Dillion JA held that :

“It must be remembered judicial review is not a cause of action. It is a procedure by which a person may apply to the High Court for an order of mandamus, prohibition or certiorari and if such an application has also been made, and the Court considers it would be just and convenient, it may also grant a declaration and injunction. It is fundamental however that some person must have grounds on which to seek the orders of mandamus certiorari and prohibition. Thus judicial review procedure to be invoked as it were, in a vacuum. It is no doubt the case that all administrative decisions and discretion of statutory bodies are made or exercised by them are subject to review by the Courts in some circumstances. But anyone who seeks to challenge such decision or administrative action must establish some ground relevant to the decision or action challenged and have the status to challenge it. In respect of the decision to hold an internal inquiry to the learned judge in the Court below held that the Authority had acted in good faith and in accord with the general purpose of the Electricity Act. It does not appear to us that the rules of natural justice requiring individuals to be given opportunities to be heard or raising issues of bias having any bearing on the question of the decision

to hold an internal inquiry....It may well have been that the decision to hold an internal inquiry was open to challenge by way of judicial review if some person could show that he was affected and he had some ground for challenging the decision, such as that it was ultra vires the statutory powers of the Authority or was otherwise unlawful. No such situation arises in this case. But it certainly does not follow that because the decision to hold an internal inquiry was open to challenge by way of judicial review if there was a ground for making such a challenge and someone entitled to make it, that other actions of the Authority consequent upon the decision thereby become open to challenge by judicial review by other persons. Every application for judicial review has to be considered in relation to the particular circumstances applicable to it."

19. In Pravesh Palani (Supra) the Court of Appeal held that the master servant relationship fell strictly within the ambit of private law and was not susceptible to within judicial review.
20. The issue before this court is the termination of the Tenancy Agreement with the Applicant. The Applicant alleges she had a legitimate expectation that her Tenancy Agreement had been renewed when in fact it was terminated. That by virtue of the powers exercised by the Town Council in accordance with the Nausori Town Council Bylaws to issue licenses, the termination of the Tenancy Contract was a termination of the licence.
21. The termination of the Tenancy Contract was a commercial arrangement between the Town Council and the tenant. That arrangement is bound by Contract Law. In that arrangement, there were complaints against the Tenant from different authorities and investigations were independently carried out. Any breach of the contract thereof is determined in accordance with the Agreement between the parties in any court of law.
22. The Applicant has not sort the Courts jurisdiction to examine the procedures adopted to investigate the Applicant. The application is to stay the Termination of Tenancy and to examine the basis for which the Termination was conducted.
23. The issues of termination of tenancy is an issue of contract law and hence falls within the ambit of private law. Although the Town Council exercised its powers, this was exercised in accordance with contract law. Hence the reliefs sort fall within the ambit of private law and not public law.
24. Since a termination of tenancy has nothing to do with issuance of licences, the Application is therefore misconstrued.
25. The Court therefore finds that the decision reached fell within the ambit of private law.

Reliefs sort by the Applicant

26. The Applicant seeks a leave and stay of the decision by the Respondent. These cannot be granted as the Applicant has not satisfied the Court that the application falls within the ambit of a public policy decision.

Costs

27. Costs to the court of \$300.

Orders of the Court:

28. The Court orders as follows:

(a) That Leave for Judicial Review is refused.

(b) That costs of \$300 against the Applicant.




Mrs Senileba LWTT Levaci
Acting Puisne Judge