

THE STATE

v.

A

THE ARBITRATION TRIBUNAL OF FIJI

ex parte

PORTS AUTHORITY OF FIJI

B

[HIGH COURT, 1998 (Byrne J) 22 May]

Revisional Jurisdiction

Constitution- parliamentary procedure and the powers of the Parliament pendente lite.

C

Although judicial review proceedings were already pending in the High Court an adjournment motion relating to the subject matter of the proceedings was moved in the House of Representatives. While rejecting an application relying on the outcome of the motion to terminate the proceedings the High Court explained (i) during the pendency of legal proceedings the subject matter of the proceedings should not, save by means of a Bill, be brought before the Parliament and (ii) that other than by legislation the Parliament has no power to decide the outcome of pending legal proceedings.

D

Cases cited:

Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 AC 147
Minister for Information, Broadcasting, Television & Telecommunications v. Fiji Television Ltd (Civil Appeal No. ABU0024 of 1998S)
Pearlman v. Harrow School Governors [1979] Q.B. 56.

E

Interlocutory application in the High Court.

B.N. Sweetman for the Applicant
K. Bulewa for the Interested Party

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Byrne J:

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On the 8th of August 1996 I gave the Applicant leave to apply for Judicial Review of an Award of the Arbitration Tribunal of the Republic of Fiji No. 15/95 made on 27th February 1996 which held that the Applicant as a Government-owned corporation was obliged to pay Lautoka Casual Dockworkers an amount of \$500.00 per employee for each of the years 1988, 1989, 1990 as compensation due to the introduction of bulk importation of fertiliser to replace the system previously in force of manual unloading of bags of fertiliser from ships calling at the port of Lautoka. From evidence later tendered in the form of supplementary affidavits by the parties it appears that the Minister of Infrastructure and Public Utilities had in January 1991 requested the Applicant to pay any dockworker affected a much higher amount than \$520.00 then proposed somewhat reluctantly by the Applicant.

Eventually the matter went to Arbitration and the Arbitration Tribunal handed down its Award on the 27th of February 1996 broadly speaking in the terms I have mentioned above.

A

The Motion for Judicial Review was fixed for hearing on the 1st of October 1997 when Mr. Bulewa announced that he was appearing for the Respondent. This is not correct because to date there has been no appearance on behalf of the actual Respondent which is the Arbitration Tribunal. This is a matter which will have to be attended to by the Attorney-General before the hearing of the substantive motion, a date of which I shall fix after the delivery of this Ruling.

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Mr. Bulewa's brief is to appear for the Port Workers and Seafarers Union of Fiji whose members will benefit if the Award of the Tribunal is upheld and Judicial Review of the Award is refused by this Court.

C

On the 1st of October 1997 Mr. Bulewa sought and was given leave to file a supplementary affidavit referring to a resolution by Parliament on the 6th of December 1996 which he said concludes the matter and renders the Applicant liable to pay the amounts stated in the Tribunal's Award. I adjourned the matter to the 3rd of November 1997 by which time the Port Workers Union had filed an affidavit by its General Secretary, Josaia Diani annexing to it various documents including a copy of the Hansard Report of the proceedings of Parliament on 6th December 1996 p.2787. I consider the other documents annexed to Mr. Diani's affidavit are irrelevant for the purpose of Mr. Bulewa's submission.

D

On the 6th of December 1996 the Leader of the Opposition (Mr. J.R. Reddy) moved an adjournment motion concerning the matter the subject of this Judicial Review. As such, in my judgment the Speaker of the House should not have accepted the motion as it related to a matter pending judicial decision.

E

Erskine May, Parliamentary Practice, 18th Edition, 1971 states the following at page 362:

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"Matters pending judicial decision. A matter, awaiting or under adjudication by a court of law should not be brought before the House by a motion or otherwise (see p.416). This rule applies to motions for leave to bring in Bills, but not to other proceedings on Bills."

At pages 416-417:

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"Matters pending judicial decision; Matters awaiting the adjudication of a court of law should not be brought forward in debate (except by means of a Bill; see p.362)."

These passages are repeated in the 21st Edition 1989, at pp.326 and 377. There are certain exceptions to these Rules which do not apply here.

A It is surprising to me therefore that the Leader of the Opposition, himself a well-known lawyer in Fiji, should have moved such a motion. I can only presume that he was unaware of the present proceedings which had been issued on the 24th of May 1996.

B Similarly I must presume the Speaker of the House was unaware but, interestingly, counsel for the Port Workers and Seafarers Union was a Member of Parliament on 6th December 1996 (and still is) and is a former Attorney-General. I would have thought in those circumstances Mr. Bulewa should have drawn the attention of the Speaker to the present litigation but there is no record that he did.

C According to the full report of proceedings in the House of Representatives on the 6th of December 1996 which is annexed to a written submission on behalf of the Applicant dated 12th January 1998, all members were present in the House when it met at 10.30 a.m. except five, none of whom was counsel for the Union.

D Returning now to the motion by the Leader of the Opposition, summarised, this expressed the Leader's concern about the effect mechanised bulk fertiliser unloading at Lautoka Wharf was having on port workers there since its introduction in 1988. The Leader referred to a claim for compensation made by these workers for loss of income for the years 1988, 1989, 1990 and expressed his concern that almost eight years later the claims of the workers remained unsatisfied by the Ports Authority of Fiji. Mr. Reddy urged all those responsible to expedite payment to the workers concerned.

E In reply the Attorney-General, the Hon. Ratu E.V. Tavai said this:

F "Mr. Speaker, Sir, I am grateful to the honourable and learned Leader of the Opposition for having raised this issue this morning and I also declare my interest being also the local Member of the area. Nevertheless, I speak on behalf of my colleague, the honourable Minister for Public Works, that we will look into the matter promptly on whether payments will be able to be made before Christmas. It is not in our hands, Sir, but we will try and see that the authorities concerned, who are sitting on this particular matter, be informed of the resolution of this House."

G I pointed out to counsel for the Union that my first impression, reading the Attorney-General's reply to the Leader of the Opposition was that:

- (a) there had been no resolution of the House directing payment of the amounts claimed by the Union; and
- (b) the Attorney-General had, it seemed to me, been very guarded in his response.

The most he said was that he and his colleague the Minister for Public Works

would look into the matter promptly on whether payments could be made before Christmas.

I then referred Mr. Bulewa to the concluding words of the Attorney-General's response and suggested to him that the Government through the Attorney-General and the Minister for Public Works was there not giving an undertaking that the amounts claimed by the Union would be paid though of course the Attorney-General used the word "resolution" in his response.

Counsel for the Union was not to be deterred however and at his request I gave him leave to make written submissions on the question of whether there had been a Parliamentary Resolution on the 6th of December 1996 governing the matter at present before me.

I likewise gave the Applicant leave to deliver a written submission in reply and I have now read both these submissions. I see nothing in the submissions on behalf of the Port Workers and Seafarers Union to make me resile from the view I tentatively expressed to counsel on the 3rd of November 1997 for the following reasons:

The full report of proceedings in the House of the Representatives on the 6th of December 1996 shows that adjournment motions are treated differently from other motions before the House and resolutions resulting therefrom, in that motions for adjournment lack the usual pre-requisite of an ordinary motion, namely a seconder.

On ordinary motions, according to Erskine May, after any debate on the motion the question is put and the House's agreement or disagreement with the motion is recorded in Hansard.

The record of the proceedings on the 6th of December contains no such recording and I therefore reject the submission by the Port Workers and Seafarers Union.

However as this matter is of some constitutional importance I consider it desirable to say something about the rights of Parliament in matters of Judicial Review because it is possible there is some misunderstanding in the community about this, and certainly it would appear on the part of counsel for the Union.

At page 737 of the Seventh Edition of *Administrative Law* by Wade and Forsyth dealing with Protective and Preclusive Clauses the authors say this:

"The *Anisminic* case and its sequels were the culmination of the judicial insistence, so often emphasised in this work, that administrative agencies and tribunals must at all costs be prevented from being sole judges of the validity of their own acts. If this were allowed, to quote Denning LJ again, 'the rule of law would be at an end'. ...

In order to preserve this policy the courts have been forced to

A rebel against Parliament. ... The intention of Parliament was clear in both cases. In refusing to enforce it the court was applying a presumption which may override even their constitutional obedience, namely that jurisdictional limits must be legally effective. This is tantamount to saying that judicial review is a constitutional fundamental which even the sovereign Parliament cannot abolish. ...”

B The two cases the authors refer to are the landmark decision of the House of Lords in Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 AC 147 and Pearlman v. Harrow School Governors [1979] Q.B. 56.

C In fundamental terms the law of Fiji in this respect is not different from that in the United Kingdom. Here, Parliament may make laws, subject to the provisions of the Constitution for the peace, order and good Government of Fiji, and Section 62 of the Constitution expresses the mode in which that legislative power may be exercised, namely by the passage of a Bill through both Houses of Parliament and the assent of the President.

Similarly, the Courts of Fiji recognise Judicial Review as a basic principle of constitutional law which even Parliament cannot abolish.

D The Applicant is a Statutory Authority which by virtue of its governing Act (Cap. 181) can act independently of the Executive and with an independent mind subject only to the right of the Minister under Section 13 after consultation with the Authority to give it certain directions, not inconsistent with the provisions of the Act, as to the policy to be followed by the Authority in relation to any matter appearing to the Minister to affect the interests of Fiji as a whole.

Clearly in my judgment the issue in the instant case is not such a matter.

F Summarised, Parliament has no power other than by means of legislation to decide that a claim for compensation is payable. The Award of the Permanent Arbitrator is before this Court on Judicial Review and Parliament has no authority to decide that compensation will be paid regardless of the application for Judicial Review of the Award nor can the Government be directed by Parliament to attend to such payment in an adjournment motion.

G In my opinion the Union’s submission is wholly misconceived and has no merit in law or in fact. The Union in my judgment has wasted the Court’s time and as a result the hearing of the substantive motion has been delayed by at least nine months. This is wrong. Only recently in the Court of Appeal in Civil Appeal No. ABU0024 of 1998S Minister for Information, Broadcasting, Television and Telecommunications v. Fiji Television Limited Thompson JA in a decision dated 12th May 1998 said at page 3 of his decision in words which I respectfully endorse:

“The public interest in judicial review proceedings being heard expeditiously is even greater than it is in respect of private law actions. The governance of the country is affected, and also in many instances the personal interests of citizens.”

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The Union must therefore pay for its action and I order it to pay the Applicant's costs which I fix at \$350.00.

(Application dismissed.)

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