STATE v NATIVE LANDS COMMISSION and Anor (JR0032 of 2000)

HIGH COURT — CIVIL JURISDICTION

FATIAKI J

25 August 2004

Administrative law — judicial review — Native Lands Commission — Native Lands Appeal Tribunal — absence of locus standi and arguable case — whether dismissal of appeal not founded on law — High Court Rules O 53 r 3(5) — Native Lands Act (Cap 133) ss 7(5), 17, 17(1), 17(3) — Native Lands (Amendment) (Appeals Tribunal) Act 1998.

This was a contested application for leave to issue judicial review against a decision of the Native Lands Commission (NLC) appointing Luisa Lewatu to the position of Turaga ni Mataqali and Turaga ni Yavusa, Namacuku and a decision of the Native Lands Appeal Tribunal (NLAT) refusing the Applicant's appeal. The dispute concerned as to who was the rightful successor to the headship of the Mataqali Namacuku in the village of Nasolo, Ba. The claimants to the title were Ratu Meli Bavatu No 1 and Luisa Ratoto Lewatu. Subsequently, the NLC held public hearings in Nasolo Village. The Respondent filed a notice of opposition and raised the following grounds: (1) that the applicant had no locus standi in bringing the case; and (2) that there was no arguable case to justify the grant of leave.

In 1999, the NLC declared Luisa Ratoto Lewatu the rightful successor of the headship to the Mataqali and Yavusa Namacuku. The losing claimant, Meli Bavatu, appealed to the NLAT against the decision but unfortunately died. As a consequence, the appeal lapsed. Discontented members of the Mataqali including the Applicant challenged the decisions of the NLCs and the NLAT and the Applicant was appointed to represent the Tokatoka Navicavaki on all the legal proceedings involving the Mataqali and/or Yavusa.

The NLAT responded to the Applicant's counsel stating that will only entertain an appeal from the original claimant. A judicial review application was lodged 5 months after NLAT's letter and 14 months after the NLC's decision on the title dispute.

Held — (1) On the ground of absence of locus standi the Applicant neither had personal nor in a representative capacity, sufficient interest on the matter before it. Section 7 of the Native Lands (Amendment) (Appeals Tribunal) Act 1998 (the Act) provides that even after the commencement of an inquiry into a title dispute, the claimants and their supporters always have the power to amicably resolve the dispute before a final determination is made by the NLC. The decision of the NLC was that of a public body exercising statutory functions and is plainly open to judicial review and not a decision that has the consequences affecting the Applicant and/or his principals personally either by altering their rights and obligations or depriving them of some benefit or advantage.

(2) The Applicant's submission that Tokatoka Navicavaki was an aggrieved party and was entitled to an appeal pursuant to s 17(3) of the Act was rejected. The statutory right of appeal was not unlimited or granted "in vacuo", nor did it extend to a group of people or their representative.

Application dismissed.

Cases referred to

Inland Revenue Commissioners v National Federation of Self-Employed & Small Businesses Ltd [1982] AC 617; [1981] 2 All ER 93; *Naimisio Dikau No 1 v Native Land Trust Board* (1986) 32 FLR 179, considered.

Mesulame Narawa v Native Land Trust Board [2002] FJCA 9, distinguished.

T. Fa for the Applicant

S. Banuve for the Respondents

Fatiaki J. This is a contested application for leave to issue judicial review against a decision of the Native Lands Commission (NLC) delivered on 20 August 1999 and a decision of the Native Lands Appeal Tribunal (NLAT) contained in a letter dated 2 May 2000.

The exact nature of the challenged decisions are succinctly set out in the applicant's submissions as follows:

> First the decision of the Native Lands Commission appointing Luisa Ratoto Lewatu to the position of Turaga ni Mataqali and Turaga ni Yavusa, Namacuku; Secondly the decision of the Native Lands Appeal Tribunal refusing to entertain an appeal by the Applicant as a representative of the majority members of Mataqali and Yavusa Namacuku.

In its notice of opposition the Respondents raise two (2) principal grounds:

(1) the absence of *locus standi* in the Applicant; and

(2) the absence of an arguable case to justify the grant of leave.

It is common ground that a dispute had arisen in regard to who was the rightful successor to the headship of the Mataqali Namacuku in the village of Nasolo, Ba. The claimants to the title were Ratu Meli Bavatu No 1 and Luisa Ratoto Lewatu. In exercise of its statutory functions the NLC held public hearings in Nasolo Village in April 1998 and later in July 1999.

On 20 August 1999 the NLC determined the dispute in favour of Luisa Ratoto Lewatu as the proper head of the Mataqali and Yavusa Namacuku. The losing claimant allegedly appealed to the NLAT against the decision but unfortunately he died on 9 September 1999 and the appeal presumably lapsed.

Undeterred, dissatisfied members of the Mataqali (including the Applicant) met and resolved to challenge the NLC's and the NLAT's decisions. In that regard the applicant was appointed to represent the Tokatoka Navicavaki "*on all legal proceedings involving … our Mataqali and/or Yavusa*".

In response to a letter from the Applicant's counsel enquiring after the appeal the NLAT wrote:

> … your appeal on behalf of Kaiava Morawa as a representative of the majority members of Mataqali and Yavusa Namacuku in relation to the appointment of Luisa Ratoto on 22.9.99 by the Commission, has been carefully considered by the Tribunal and regret to advise that they are unable to entertain it. They will only entertain an appeal from the original claimant to the title, Meli Bavatu if he had survived to-date.

The judicial review application was eventually lodged on 13 October 2000 some 5 months after NLAT's letter and 14 months after the NLC's decision on the title dispute. In neither instance can it be said that the Applicant and/or his principals had acted with any urgency or promptitude.

Having set out the background it is convenient to deal at once with the Respondent's first ground of opposition namely, absence of *locus standi*:

Order 53 r 3(5) of the High Court Rules provides that:

> The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

In this regard, after referring to s 17 of the Native Lands Act (Cap 133), counsel for the applicant writes:

> The "dispute" *(in the present cases)* is between the Mataqali *(Tokatoka?)* Navicavaki *(of which the applicant is the designated representative)* and any other claimant. It is not a dispute between *(named individuals)* and other claimants — Therefore when the NLC

> adjudicated on the two candidates … it was adjudicating on the sponsored Mataqali *(Tokatoka?)* Navicavaki candidate Ratu Meli Bavatu No 1 and the other candidate Luisa Ratoto Lewatu.

Respondent's counsel in his submissions lays emphasis however on the narrow ambit of NLC's statutory power to enquire into a native title dispute viz "*after hearing evidence and the claimants shall decide who is the proper head*". In this regard counsel writes:

> … it is important to bear in mind that there were only 2 disputants *(claimants)* to the enquiry … Luisa Ratoto Lewatu and Ratu Meli Bavatu No 1. The relevant decision complained about is that of the *(NLC)* after an enquiry into a title dispute conducted pursuant to s 17 involving these 2 claimants only.

While there can be no doubting the natural "*interest*" and concern of the members of a Mataqali as to who among them should be appointed their leader, the question remains, is that, without more, a "*sufficient interest*" for the purposes of a grant of leave to issue judicial review proceedings in the present case?

With due regard to the rather disingenuous submission of the Applicant's counsel, I cannot agree that the Applicant has, either personally or in his representative capacity, a "*sufficient interest*" in the matter to which the application relates. I am of course not unmindful of the "*proviso*" to s 17 which indicates that even after the commencement of an enquiry into a title dispute, the claimants (and arguably their supporters) always have it within their power to amicably resolve the dispute before a final determination is made by the NLC.

Undoubtedly the decision of the NLC was that of a public body exercising statutory functions and, as such, is plainly susceptible to judicial review but was it a decision that had consequences that affected the Applicant and/or his principals personally either by altering their rights and obligations or depriving them of some benefit or advantage?

After careful consideration of the competing submission, the answer I am driven to is a negative one. The decision that the Applicant seeks to impugn was necessarily and strictly confined to the two (2) competing claimants who were the individuals directly interested and affected by it. No part of that decision required the Applicant either personally, or in his representative capacity, to do anything nor did it deprive him or any other member of the Mataqali of some existing collective or communal right, benefit, or advantage.

Needless to say I remain unimpressed by Applicant counsel's suggestion that a traditional chiefly title can or ought to be subjected to some form of popular electoral process *or* indeed, that a traditional title holder (as opposed to a parliamentary candidate), should or must have the support of a majority of his/her subjects however desirable.

What's more the suggestion that a traditional chiefly title can be the subject-matter of a group "*sponsored*" claimant (whatever that may mean) whether or not such a group or claimant is personally qualified or entitled to make a claim seems to introduce an alien concept unrelated to either the "*letter or spirit of the* Native Lands Act" *or* the statutory process provided for the resolution of a title dispute. As respondent's counsel observes:

> In Fijian tradition, the title of chief is an individual one and his position is quite separate from the rest of the people, it is not one that anyone can simply aspire to.

Much less, in my view, can it be the subject of a group claim that is, a claim to a traditional chiefly title being an individual entitlement cannot be transformed or elevated into a group right merely by aggregating a number of entitled

individuals. In similar vein Rooney J observed in *Naimisio Dikau No 1 v Native Land Trust Board* (1986) 32 FLR 179 at 184C:

> A mataqali cannot be equated with any institution known and recognised by common law or statute of general application. The composition, function and management of a mataqali and the regulation of the rights of members in relation to each other … are governed by customary law separate from and independent of the general law administered in this Court.

I am aware that the first sentence in this dictum was recently deprecated by the Court of Appeal in *Mesulame Narawa v Native Land Trust Board* [2002] FJCA 9 (*Narawa*) where the court in upholding a representative action commenced by two individual mataqali members said (at 8):

> Rooney J was wrong in holding that a tokatoka or mataqali are institutions alien to and not recognised by the common law.

The *Narawa* case however is readily distinguishable, in that the present Applicant for judicial review was *not* a party or claimant in the underlying title dispute out of which the alleged reviewable error is said to have arisen. Indeed the Applicant only acquired his representative capacity after the NLC's decision.

Further the rather unhelpful grounds advanced in support of the application viz "*contrary to the letter and spirit of the* Native Lands Act Cap 133" and purportedly verified by affidavit evidence does *not* challenge in any material or substantial way either the manner or enquiry process which was undertaken by the NLC in arriving at its decision.

For instance, there is *no* suggestion that an enquiry was not undertaken by the NLC in arriving at its determination; *or* that relevant evidence was overlooked or ignored by the NLC; *or* that a claimant to the title was denied a hearing. Instead the principal complaint appears to be that the NLC arrived at the wrong decision in determining the dispute in favour of Luisa Ratoto Lewatu.

It is trite that judicial review is primarily concerned with the manner or process by which a decision is made or reached and *not* with the merits or the wisdom of the decision. Plainly the Applicant and his principals disagree with the NLC's decision but that in itself, is not enough to raise an arguable case.

A further reason for refusing leave in the present case is that the legislature has provided a statutory appeal process against determinations of the NLC and this has not been exhausted in the case of the unsuccessful claimant Ratu Meli Bavatu No 1 albeit that he is now deceased. The primacy of a right to appeal a reviewable decision is reinforced by O 53 r 3(6) which empowers the court to "*adjourn the application for leave* (to issue judicial review) *until the appeal is determined* (where one has been lodged) *or the time for appealing has expired*". Needless to say the inclusion of a new privative clause [as s 7(5)] making the (appellate) decisions of the NLAT "*final and conclusive and cannot be challenged in a court of law*" reinforces not only the specialist function and nature of the statutory bodies created to deal with native land and native title disputes, but also the need for the court to exercise a degree of caution where the statutory right of appeal has not been exhausted.

The Applicant also complains "that the dismissal of the appeal is not founded on law". This ground is rather inelegantly worded in so far as the correspondence makes plain that the NLAT was "*unable to entertain it*" because the Appellant had died. Quite simply the appeal was neither heard nor dismissed.

Be that as it may the Applicant's complaint regarding the NLAT's handling of the appeal appears to be based on the wording of the "*right of appeal*" granted in terms of s 17(3) of the Native Lands Act as inserted by the Native Lands (Amendment) (Appeals Tribunal) Act 1998 and which reads:

> A person aggrieved by a decision of the Commission under this Section may appeal against it to the Appeals Tribunal constituted under Section 7.

Applicant counsel's simple submission is: "*Tokatoka Navicavaki is an 'aggrieved party' and is entitled to do an appeal*". I cannot agree.

The statutory right of appeal is *not* unlimited or granted "*in vacuo*", nor in my view, does it extend to a group of people or their representative however aggrieved they may be with the decision. The appeal is necessarily confined to "*A* (*not* 'any') *person*" and to "*a decision of the Commission under this Section*" which, in terms of subs (1) of s 17, is a decision as to "*who* (among competing claimants) *is the proper head of (a) division or subdivision*".

As was said by Lord Fraser of Tullybelton in *Inland Revenue Commissioners v National Federation of Self-Employed & Small Businesses Ltd* [1982] AC 617; [1981] 2 All ER 93 at AC 646 All ER 108:

> The correct approach *(where there is doubt)* …, in my opinion, to look at the Statute under which the duty arises, and to see whether it gives any express or implied right to persons in the position of the applicant to complain of the alleged unlawful act or omission.

On that approach it is not difficult to see that the legislature in providing a *new* statutory right of appeal against decisions of the NLC in native title or headship disputes under s 17 of the Native Lands Act (Cap 133) must have intended to limit the right to the immediate parties to the dispute and/or to the unsuccessful claimant(s) to the title.

For the foregoing reasons leave to issue judicial review proceedings is refused with costs to be taxed if not agreed.

Application dismissed.