

TIMOCI SILATOLU v STATE (HBM 33 of 2004)

HIGH COURT — CIVIL JURISDICTION

5 PATHIK J

26 February 2007

10 **Constitutional law — application for constitutional redress — breaches of Bill of Rights provision — whether application has reasonable cause of action — whether application was scandalous, frivolous and vexatious — Applicant’s complaints administrative in nature — Applicant’s complaints properly addressed by authorities — Constitution ss 21(1), 25, 27(1)(f), 29(1), 38(1), 41(1)(4).**

15 **Practice and procedure — abuse of process — whether Applicant exhausted all available remedies before coming to court for constitutional redress — convicted person’s rights bound to be curtailed — prisoner’s rights governed by Prisons Regulations — complaints were administrative in nature — complaints were satisfactorily considered and diligently attended to by authorities — Applicant had not stated that he exhausted alternative remedies available to him.**

20 The Applicant was serving life imprisonment for treason at Naboro Maximum Security Prison. He lodged an application for constitutional redress for breaches of his rights under the Bill of Rights provision of the Constitution.

25 The Respondent filed a notice for an order to strike out the Applicant’s application for redress. The Respondent opposed the Applicant’s motion on the ground that it disclosed no reasonable cause of action and it was an abuse of the process of the court.

Held — (1) The court found there was no merit in the Applicant’s assertion that there was breach of his rights under the Constitution. The court found that the Applicant’s sentence was quite clear but should it be found to be incorrect then it could be corrected but not through application for redress as correction was an administrative matter.

30 (2) The court found that the Applicant’s other complaints were satisfactorily considered and diligently attended to by the authorities. In the absence of any evidence to support his rights as a detained person there were no breaches of the Applicant’s rights under ss 25, 38 and 27(1)(f) of the Constitution.

35 (3) The court found that the Respondent’s ground on abuse of process of the court was made out. The Applicant has not complied with the provisions of s 41(4) of the Constitution in regard to “alternative remedies” as the Applicant had not stated that he had exhausted alternative remedies available to him.

Application dismissed.

Cases referred to

40 *Aiyaz Ali v State* Civil Action No HBM 0079/2004; [2005] FJHC 50; *Eliki Lasarusa v State* Civil Action No HBM 27D/2005; *Josefa Nata v Director of Public Prosecutions and Anor* HBM 35/2005; *Lasarusa Rakula v Attorney-General of Fiji and Anor* HBM 0063D/2004S; [2005] FJHC 423, cited.

45 *Abhay Kumar Singh v DPP and Anor* AAU 0037/2003S; [2004] FJCA 37; *Makario Anisimai v State* Civil Action No HBM 0035D/2004S; [2005] FJHC 125, considered.

V. Vosarogo for the Applicant

50 *S. Sharma* and *S. Serulagilagi* for the Respondent

N. Billimoria for Human Rights Commission as *amicus curiae*

Pathik J. The *Applicant Timoci Silatolu* lodged an application for constitutional redress. The matter first came before the court on 13 September 2004. It was adjourned from time to time for numerous reasons. A lot of time was taken up to decide representation for the Applicant by the *Legal Aid Commission* (LAC).

Background to the case

Chronology of events

On 25 November 2004, the *Human Rights Commission* (the commission) was asked by the court to assist the Applicant for putting his constitutional redress application (the application) in this case No HBM 33/04 properly before the court. The order was filed on 1 December 2004.

The notice of motion and affidavit of the Applicant was filed on 1 June 2005 and 16 March 2005 respectively in this action.

The Respondent filed a summons to strike out the application supported by an affidavit deposed by one *Orisi Vuki Katonibau*, Investigating Officer of the Prisons Department on 20 July 2005.

On 26 October 2005, the Applicant sought legal representation from the LAC on his application by filing a notice of motion. The notice of motion was supported by an additional affidavit filed by the Applicant on 17 October 2005.

The LAC in response to the affidavit of 17 October 2005 filed an affidavit in reply on 13 December 2005.

The notice of motion filed on 26 October 2005 was listed for hearing on 2 February 2006.

On 2 February, the court heard oral submissions from the Applicant, Respondent and the commission (whose role remained *amicus curiae*). By consent the court made an order to hold the application for legal representation from LAC in abeyance and stay the State's summons to strike out until the hearing of an appeal filed by the Applicant in the Supreme Court.

On 25 May 2006, the Applicant's application was re-listed for mention but due to the restructuring of the LAC's internal management no appearance could be entered by LAC. The application was adjourned to 13 June 2006 for further mention.

On 13 June 2006, appearance was entered by LAC and it highlighted to the court the following:

(a) Formal application was made by the Applicant for legal assistance which was in process.

(b) Certain issues raised in the affidavit of the Applicant filed on 16 March 2005 had been addressed by the Commissioner of Prisons but some pending issues still remained unattended.

(c) Amend the affidavit of the Applicant filed on 16 March 2005.

The court ordered an amended affidavit by the Applicant to be filed and served and opportunity given to the Respondent to respond to it and the Applicant to further respond to the reply of the Respondent.

On 14 July 2006, the Applicant filed an amended affidavit, and a reply from the Respondent was filed on 11 August 2006.

On 30 August 2006 the Applicant informed the court that it did not require to further respond to the affidavit in reply by the Respondent which was filed on 11 August 2006. The LAC informed the court that the Applicant's application satisfied the requirements for legal assistance under a scheme for legal aid and the LAC would represent the Applicant in his application.

Strike out application by the Respondent

The Respondent filed a notice of motion dated 20 July 2005 for an order to strike out the Applicant's motion herein of 1 June 2005 on the grounds that: (a) it discloses no reasonable cause of action, (b) it is scandalous, frivolous and vexatious, (c) it may prejudice, embarrass or delay the fair trial of the action and (d) it is an abuse of the process of the court.

The Applicant's case

The Applicant is a serving prisoner at the Naboro Maximum Security Prison. His sentence is fixed to 9 years.

In his affidavit sworn 15 March 2005 the Applicant raised a number of issues seeking constitutional redress. These issues are set out in considerable detail therein and I merely refer to them. In those issues he says that there are breaches of his rights under the Bill of Rights provision of the Constitution.

In his amended affidavit filed 14 July 2006 the Applicant says that he is seeking redress under s 41 of the Constitution.

The issues on which he wants a decision are as follows (as contained in the said affidavit of the Applicant filed 14 July):

- (i) not knowing early or late release dates; and
- (ii) not being taken to court despite court orders; and
- (iii) being handcuffed unnecessarily as an additional punishment and a portrayal of indignity and condemnation in public; and
- (iv) the delay in issuance of spectacles as prescribed by optician until today;
- (v) the denial of procedural promotion for stage gratuity without acknowledging due merits; and
- (vi) deliberate omission of dutiful notations of hospital appointments; and
- (vii) non-fulfilments of Section 115 applications; and

By his motion in this matter (HBM 33/04) the Applicant Silatolu is seeking the orders and/or reliefs as follows:

1. A Declaration that in not specifying the time to be served in my life sentence, the State — is thereby breaching my right under section 25(1) of the Constitution as this constitutes disproportionately harsh treatment or punishment.
2. A further Declaration that I am being adversely treated by the Prison authorities in terms of prison applications and other administrative remedies and this breaches my right to equality before the law under section 38 of the Constitution.
3. A declaration that my right as a detained person to be treated with humanity and with respect for my inherent humanity pursuant to section 27(1)(f) of the Constitution has been breached by the Prison authorities.
4. An Order for appropriate damages in light of the above breaches alleged by the Applicant.

The learned counsel from the Legal Aid Commission submitted during the hearing of this motion on 5 September 2006 that none of the ground advanced by the Respondent can stand. He said that the power to strike out should be exercised sparingly.

He submitted that counsel should show that there is no cause of action; merely saying that the case is weak is not good enough. He says that there is need for a substantive hearing.

He says that there are serious allegations of breaches of human rights affecting a person's liberty and freedom.

Consideration of the application to strike out

I shall now consider the application to strike out.

The application by the Applicant is lodged pursuant to s 41(1) of the Constitution for redress citing violations of his rights and in particular: s 21(1) —
5 Bill of Rights applies to all arms of government and persons performing functions of any public office; s 27(1)(f) — right for detained persons to be treated with dignity; s 29(1) — right to access to courts or tribunals; s 38(1) — right to equality before law.

10 The Applicant's claim for constitutional redress is primarily for alleged breaches of his rights as a prisoner incarcerated at Naboro Prison. He is currently serving life imprisonment for treason. These sections, which guarantee the rights of every person provided in the Constitution are central to the allegations raised by the Applicant.

15 It is for the court to assess the redress application as it raises some fundamental issues. The fundamental issue that the court needs to determine is whether the breaches of the above sections are central to the alleged claims by the Applicant.

Under s 41(4) of the Constitution it is provided that:

20 The High Court may exercise its discretion not to grant relief in relation to an application or referral made to it under this section if it considers that an *adequate alternative remedy* is available to the person concerned. (emphasis mine)

The onus is on the Applicant to choose the *adequate alternative forum* as the court is the *principal forum*.

25 Looking at the facts of this case can it be said that the alleged breaches in Silatolu's application for redress fall to be decided under the Bill of Rights provisions of the Constitution.

I agree with the State/Respondent in its submission that it does not. The allegations relate more to be resolved administratively rather than through constitutional redress application for alleged breach of rights.

30 I am further in agreement with the Respondent that the Applicant has adequate *alternative remedies* available to him that he can pursue.

I have before me for my consideration the affidavit of the said *Orisi Vuki Katonibau*, sworn 14 July 2005 in support of the Respondent's present motion. There is another affidavit of his sworn 11 August 2006 in reply to the Applicant's
35 amended affidavit filed on 14 July 2006.

The Respondent/State has based its submission to strike out on the facts and information contained in these affidavits.

40 As for the Applicant's assertions that he does not know his early date of release and his late release date and his right under s 25(1) of the Constitution has been breached, I find that there is no merit in them. It is quite clear what his sentence is, but should it be found to be incorrect then it could be corrected but not through application for redress as it is an administration matter. I hold that s 25 does not apply here.

45 All his other complaints in his affidavit as already stated hereabove have been satisfactorily considered by Mr Katonibau. All his requests were diligently attended to by the Authorities and rescheduled in some of his requests. There have been no breaches under s 38 of the Constitution. In the absence of any evidence to support his rights as a detained person there is no breach of s 27(1)(f).

For these reasons there is no reasonable cause of action in this case.

50 The second ground that the application is *scandalous, frivolous and vexatious*; it has been established by the Respondent.

TIMOCI SILATOLU v STATE (HBM 33 of 2004)

HIGH COURT — CIVIL JURISDICTION

5 PATHIK J

26 February 2007

10 **Constitutional law — application for constitutional redress — breaches of Bill of Rights provision — whether application has reasonable cause of action — whether application was scandalous, frivolous and vexatious — Applicant’s complaints administrative in nature — Applicant’s complaints properly addressed by authorities — Constitution ss 21(1), 25, 27(1)(f), 29(1), 38(1), 41(1)(4).**

15 **Practice and procedure — abuse of process — whether Applicant exhausted all available remedies before coming to court for constitutional redress — convicted person’s rights bound to be curtailed — prisoner’s rights governed by Prisons Regulations — complaints were administrative in nature — complaints were satisfactorily considered and diligently attended to by authorities — Applicant had not stated that he exhausted alternative remedies available to him.**

20 The Applicant was serving life imprisonment for treason at Naboro Maximum Security Prison. He lodged an application for constitutional redress for breaches of his rights under the Bill of Rights provision of the Constitution.

25 The Respondent filed a notice for an order to strike out the Applicant’s application for redress. The Respondent opposed the Applicant’s motion on the ground that it disclosed no reasonable cause of action and it was an abuse of the process of the court.

Held — (1) The court found there was no merit in the Applicant’s assertion that there was breach of his rights under the Constitution. The court found that the Applicant’s sentence was quite clear but should it be found to be incorrect then it could be corrected but not through application for redress as correction was an administrative matter.

30 (2) The court found that the Applicant’s other complaints were satisfactorily considered and diligently attended to by the authorities. In the absence of any evidence to support his rights as a detained person there were no breaches of the Applicant’s rights under ss 25, 38 and 27(1)(f) of the Constitution.

35 (3) The court found that the Respondent’s ground on abuse of process of the court was made out. The Applicant has not complied with the provisions of s 41(4) of the Constitution in regard to “alternative remedies” as the Applicant had not stated that he had exhausted alternative remedies available to him.

Application dismissed.

Cases referred to

40 *Aiyaz Ali v State* Civil Action No HBM 0079/2004; [2005] FJHC 50; *Eliki Lasarusa v State* Civil Action No HBM 27D/2005; *Josefa Nata v Director of Public Prosecutions and Anor* HBM 35/2005; *Lasarusa Rakula v Attorney-General of Fiji and Anor* HBM 0063D/2004S; [2005] FJHC 423, cited.

45 *Abhay Kumar Singh v DPP and Anor* AAU 0037/2003S; [2004] FJCA 37; *Makario Anisimai v State* Civil Action No HBM 0035D/2004S; [2005] FJHC 125, considered.

V. Vosarogo for the Applicant

50 *S. Sharma* and *S. Serulagilagi* for the Respondent

N. Billimoria for Human Rights Commission as amicus curiae

Pathik J. The *Applicant Timoci Silatolu* lodged an application for constitutional redress. The matter first came before the court on 13 September 2004. It was adjourned from time to time for numerous reasons. A lot of time was taken up to decide representation for the Applicant by the *Legal Aid Commission* (LAC).

Background to the case

Chronology of events

On 25 November 2004, the *Human Rights Commission* (the commission) was asked by the court to assist the Applicant for putting his constitutional redress application (the application) in this case No HBM 33/04 properly before the court. The order was filed on 1 December 2004.

The notice of motion and affidavit of the Applicant was filed on 1 June 2005 and 16 March 2005 respectively in this action.

The Respondent filed a summons to strike out the application supported by an affidavit deposed by one *Orisi Vuki Katonibau*, Investigating Officer of the Prisons Department on 20 July 2005.

On 26 October 2005, the Applicant sought legal representation from the LAC on his application by filing a notice of motion. The notice of motion was supported by an additional affidavit filed by the Applicant on 17 October 2005.

The LAC in response to the affidavit of 17 October 2005 filed an affidavit in reply on 13 December 2005.

The notice of motion filed on 26 October 2005 was listed for hearing on 2 February 2006.

On 2 February, the court heard oral submissions from the Applicant, Respondent and the commission (whose role remained *amicus curiae*). By consent the court made an order to hold the application for legal representation from LAC in abeyance and stay the State's summons to strike out until the hearing of an appeal filed by the Applicant in the Supreme Court.

On 25 May 2006, the Applicant's application was re-listed for mention but due to the restructuring of the LAC's internal management no appearance could be entered by LAC. The application was adjourned to 13 June 2006 for further mention.

On 13 June 2006, appearance was entered by LAC and it highlighted to the court the following:

(a) Formal application was made by the Applicant for legal assistance which was in process.

(b) Certain issues raised in the affidavit of the Applicant filed on 16 March 2005 had been addressed by the Commissioner of Prisons but some pending issues still remained unattended.

(c) Amend the affidavit of the Applicant filed on 16 March 2005.

The court ordered an amended affidavit by the Applicant to be filed and served and opportunity given to the Respondent to respond to it and the Applicant to further respond to the reply of the Respondent.

On 14 July 2006, the Applicant filed an amended affidavit, and a reply from the Respondent was filed on 11 August 2006.

On 30 August 2006 the Applicant informed the court that it did not require to further respond to the affidavit in reply by the Respondent which was filed on 11 August 2006. The LAC informed the court that the Applicant's application satisfied the requirements for legal assistance under a scheme for legal aid and the LAC would represent the Applicant in his application.

Strike out application by the Respondent

The Respondent filed a notice of motion dated 20 July 2005 for an order to strike out the Applicant's motion herein of 1 June 2005 on the grounds that: (a) it discloses no reasonable cause of action, (b) it is scandalous, frivolous and vexatious, (c) it may prejudice, embarrass or delay the fair trial of the action and (d) it is an abuse of the process of the court.

The Applicant's case

The Applicant is a serving prisoner at the Naboro Maximum Security Prison. His sentence is fixed to 9 years.

In his affidavit sworn 15 March 2005 the Applicant raised a number of issues seeking constitutional redress. These issues are set out in considerable detail therein and I merely refer to them. In those issues he says that there are breaches of his rights under the Bill of Rights provision of the Constitution.

In his amended affidavit filed 14 July 2006 the Applicant says that he is seeking redress under s 41 of the Constitution.

The issues on which he wants a decision are as follows (as contained in the said affidavit of the Applicant filed 14 July):

- (i) not knowing early or late release dates; and
- (ii) not being taken to court despite court orders; and
- (iii) being handcuffed unnecessarily as an additional punishment and a portrayal of indignity and condemnation in public; and
- (iv) the delay in issuance of spectacles as prescribed by optician until today;
- (v) the denial of procedural promotion for stage gratuity without acknowledging due merits; and
- (vi) deliberate omission of dutiful notations of hospital appointments; and
- (vii) non-fulfilments of Section 115 applications; and

By his motion in this matter (HBM 33/04) the Applicant Silatolu is seeking the orders and/or reliefs as follows:

1. A Declaration that in not specifying the time to be served in my life sentence, the State — is thereby breaching my right under section 25(1) of the Constitution as this constitutes disproportionately harsh treatment or punishment.
2. A further Declaration that I am being adversely treated by the Prison authorities in terms of prison applications and other administrative remedies and this breaches my right to equality before the law under section 38 of the Constitution.
3. A declaration that my right as a detained person to be treated with humanity and with respect for my inherent humanity pursuant to section 27(1)(f) of the Constitution has been breached by the Prison authorities.
4. An Order for appropriate damages in light of the above breaches alleged by the Applicant.

The learned counsel from the Legal Aid Commission submitted during the hearing of this motion on 5 September 2006 that none of the ground advanced by the Respondent can stand. He said that the power to strike out should be exercised sparingly.

He submitted that counsel should show that there is no cause of action; merely saying that the case is weak is not good enough. He says that there is need for a substantive hearing.

He says that there are serious allegations of breaches of human rights affecting a person's liberty and freedom.

Consideration of the application to strike out

I shall now consider the application to strike out.

The application by the Applicant is lodged pursuant to s 41(1) of the Constitution for redress citing violations of his rights and in particular: s 21(1) —
5 Bill of Rights applies to all arms of government and persons performing functions of any public office; s 27(1)(f) — right for detained persons to be treated with dignity; s 29(1) — right to access to courts or tribunals; s 38(1) — right to equality before law.

10 The Applicant's claim for constitutional redress is primarily for alleged breaches of his rights as a prisoner incarcerated at Naboro Prison. He is currently serving life imprisonment for treason. These sections, which guarantee the rights of every person provided in the Constitution are central to the allegations raised by the Applicant.

15 It is for the court to assess the redress application as it raises some fundamental issues. The fundamental issue that the court needs to determine is whether the breaches of the above sections are central to the alleged claims by the Applicant.

Under s 41(4) of the Constitution it is provided that:

20 The High Court may exercise its discretion not to grant relief in relation to an application or referral made to it under this section if it considers that an *adequate alternative remedy* is available to the person concerned. (emphasis mine)

The onus is on the Applicant to choose the *adequate alternative forum* as the court is the *principal forum*.

25 Looking at the facts of this case can it be said that the alleged breaches in Silatolu's application for redress fall to be decided under the Bill of Rights provisions of the Constitution.

I agree with the State/Respondent in its submission that it does not. The allegations relate more to be resolved administratively rather than through constitutional redress application for alleged breach of rights.

30 I am further in agreement with the Respondent that the Applicant has adequate *alternative remedies* available to him that he can pursue.

I have before me for my consideration the affidavit of the said *Orisi Vuki Katonibau*, sworn 14 July 2005 in support of the Respondent's present motion. There is another affidavit of his sworn 11 August 2006 in reply to the Applicant's
35 amended affidavit filed on 14 July 2006.

The Respondent/State has based its submission to strike out on the facts and information contained in these affidavits.

40 As for the Applicant's assertions that he does not know his early date of release and his late release date and his right under s 25(1) of the Constitution has been breached, I find that there is no merit in them. It is quite clear what his sentence is, but should it be found to be incorrect then it could be corrected but not through application for redress as it is an administration matter. I hold that s 25 does not apply here.

45 All his other complaints in his affidavit as already stated hereabove have been satisfactorily considered by Mr Katonibau. All his requests were diligently attended to by the Authorities and rescheduled in some of his requests. There have been no breaches under s 38 of the Constitution. In the absence of any evidence to support his rights as a detained person there is no breach of s 27(1)(f).

For these reasons there is no reasonable cause of action in this case.

50 The second ground that the application is *scandalous, frivolous and vexatious*; it has been established by the Respondent.

I accept the Respondent's argument that the declarations sought by the Applicant pertain to "administration matters" and that they do not raise breaches of rights stipulated in ss 25, 27(1)(f) and 38.

I agree with the Respondent on the third ground that this is an *abuse of the process* of the court. The Applicant has not complied with the provisions of the said s 41(4) in regard to "alternative remedies". He has not stated that he has exhausted alternative remedies available to him.

In recent past the courts have been inundated with constitutional redress applications particularly under s 41(1).

A good number of these applications (listed here) were made when alternative remedies were still available to the Applicants and as a result upon applications made by Respondents they were struck out or dismissed and this is one such case: [Lasarusu Rakula v Attorney-General of Fiji and Anor HBM 0063D/2004S; [2005] FJHC 423 — Jitoko J; Aiyaz Ali v State Civil Action No HBM 0079/2004; [2005] FJHC 50 — Jiten Singh J; Elike Lasarusu v State Civil Action No HBM 27D/2005 — Jitoko J; Josefa Nata v Director of Public Prosecutions and Anor HBM35/2005 — Jiten Singh J].

In the instant case it is my view that procedure by way of writ of summons if applicable would have been more appropriate to the concerns raised by the Applicant rather than by motion and affidavit for constitutional redress. Here there are disputed facts such as the attendance at Lautoka Court, the missing of his hospital appointments etcetera. These matters call for the summoning of witnesses and the giving of evidence. Procedure by way of motion and affidavit is not appropriate or proper for determination of issues raised by the Applicant. In this regard the following passage from the judgment of Jitoko J in the case of *Makario Anisimai v State Civil Action No HBM 0035D/2004S*; [2005] FJHC 125 is pertinent:

The use by the Applicant of Motion or Originating Summons to seek declarations from this Court is which there are clearly disputes as to facts is clearly an abuse of the Court process. This process is usually for the determination of a legal issue without contested evidence. This action should be by a Writ of Summons.

At any rate the Applicant has not clearly exhausted all avenues of relief that are open to him.

The Respondent has quite properly brought this application to strike out under O 18 r 18. The following extract from the Court of Appeal judgment in *Abhay Kumar Singh v DPP and Anor AAU 0037/2003S*; [2004] FJCA 37 is pertinent:

An application for constitutional redress even if it pertains to a criminal matter should be filed in the civil jurisdiction of the High Court. Rule 7 of the High Court (Constitutional Redress) Rules 1998 is plain in its terms. The jurisdiction to deal with a constitutional redress application is to be in accordance with the practice and procedure of the High Court in relation to civil proceedings. It necessarily follows that the High Court Rules 1998 also apply to such an application. In turn, it necessarily follows that in a proper case (and the Attorney-General argues that this was one) the court is empowered to summarily dismiss an application for constitutional redress if one of the grounds set out in O 18 r 18 can be satisfied. The rule authorises a summary dismissal of a proceeding where:

- (a) the proceeding does not disclose a reasonable cause of action;
- (b) the proceeding is scandalous, frivolous or vexatious;
- (c) the proceeding may prejudice, embarrass or delay the fair trial of the proceeding; and
- (d) the proceeding is otherwise an abuse of the process of the Court.

I accept the Respondent's argument that the declarations sought by the Applicant pertain to "administration matters" and that they do not raise breaches of rights stipulated in ss 25, 27(1)(f) and 38.

I agree with the Respondent on the third ground that this is an *abuse of the process* of the court. The Applicant has not complied with the provisions of the said s 41(4) in regard to "alternative remedies". He has not stated that he has exhausted alternative remedies available to him.

In recent past the courts have been inundated with constitutional redress applications particularly under s 41(1).

A good number of these applications (listed here) were made when alternative remedies were still available to the Applicants and as a result upon applications made by Respondents they were struck out or dismissed and this is one such case: [Lasarusu Rakula v Attorney-General of Fiji and Anor HBM 0063D/2004S; [2005] FJHC 423 — Jitoko J; Aiyaz Ali v State Civil Action No HBM 0079/2004; [2005] FJHC 50 — Jiten Singh J; Elike Lasarusu v State Civil Action No HBM 27D/2005 — Jitoko J; Josefa Nata v Director of Public Prosecutions and Anor HBM35/2005 — Jiten Singh J].

In the instant case it is my view that procedure by way of writ of summons if applicable would have been more appropriate to the concerns raised by the Applicant rather than by motion and affidavit for constitutional redress. Here there are disputed facts such as the attendance at Lautoka Court, the missing of his hospital appointments etcetera. These matters call for the summoning of witnesses and the giving of evidence. Procedure by way of motion and affidavit is not appropriate or proper for determination of issues raised by the Applicant. In this regard the following passage from the judgment of Jitoko J in the case of *Makario Anisimai v State Civil Action No HBM 0035D/2004S*; [2005] FJHC 125 is pertinent:

The use by the Applicant of Motion or Originating Summons to seek declarations from this Court is which there are clearly disputes as to facts is clearly an abuse of the Court process. This process is usually for the determination of a legal issue without contested evidence. This action should be by a Writ of Summons.

At any rate the Applicant has not clearly exhausted all avenues of relief that are open to him.

The Respondent has quite properly brought this application to strike out under O 18 r 18. The following extract from the Court of Appeal judgment in *Abhay Kumar Singh v DPP and Anor AAU 0037/2003S*; [2004] FJCA 37 is pertinent:

An application for constitutional redress even if it pertains to a criminal matter should be filed in the civil jurisdiction of the High Court. Rule 7 of the High Court (Constitutional Redress) Rules 1998 is plain in its terms. The jurisdiction to deal with a constitutional redress application is to be in accordance with the practice and procedure of the High Court in relation to civil proceedings. It necessarily follows that the High Court Rules 1998 also apply to such an application. In turn, it necessarily follows that in a proper case (and the Attorney-General argues that this was one) the court is empowered to summarily dismiss an application for constitutional redress if one of the grounds set out in O 18 r 18 can be satisfied. The rule authorises a summary dismissal of a proceeding where:

- (a) the proceeding does not disclose a reasonable cause of action;
- (b) the proceeding is scandalous, frivolous or vexatious;
- (c) the proceeding may prejudice, embarrass or delay the fair trial of the proceeding; and
- (d) the proceeding is otherwise an abuse of the process of the Court.

As I have already stated there are disputed questions of fact and as the Appeal Court in *Singh* case (above at 21) said that this “requires resolution in accordance with well established common law procedures. An application for constitutional redress is not a suitable vehicle for the disposal of such issues” and in that case
5 the court said “the proper forum is the criminal trial” as it was a criminal case. Finally, one comment before I conclude, the Applicant must understand that as a convicted person certain of what he considers are his rights, are bound to be curtailed or suspended. In his position as a prisoner he has to be governed by Prison Regulations and there is machinery to deal with a prisoner’s complaint.
10 Without exhausting all other remedies and coming straight to court for constitutional redress is not accepted as I have already stated.

In the outcome, for these reasons the Applicant’s attempt to establish his alleged breach of rights through the procedure of filing of motion and affidavit evidence alone and the fact that he has not fully complied with the provisions of
15 this said s 41(4), I hold in favour of the Respondent in its application by striking out the Applicant’s action with no order as to costs.

Application dismissed.

20

25

30

35

40

45

50