TEKAIE TABUARIKI & OTHERS

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v

ATTORNEY-GENERAL & OTHERS

[HIGH COURT, 1993 (Fatiaki J), 31 March]

Civil Jurisdiction

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Local Government- Rabi Island Council of Leaders- whether validly dissolved- Dissolution of the Rabi Island Council of Leaders Decree 16/1992.

The Applicants challenged the legality of the 1992 Decree. The High Court HELD: (a) the President had the power to enact the Dissolution Decree even though there was at the time no Parliament (b) the President's action was non-
C justiciable and was not subject to the rules of natural justice (c) the dissolution was reasonably necessary.

Cases cited:

Afasio Mua & Seven Others v. DPP (Civ. Action 370 of 1988)
Ayr Collieries Ltd. v. Lloyd - George [1943] 2 All E.R. 546
D *Burmah Oil Co. Ltd v Lord Advocate* [1965] A.C. 75
CCSU v. Minister for the Civil Service [1985] 1 A.C. 374
Durayappah v. Fernando [1967] 1 A.C. 337
Laker Airways v. Department of Trade [1977] 1 Q.B. 643
Ningkan v. Government of Malaysia [1970] A.C. 381
E *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997
Sabally v. N'Jie and Attorney-General [1965] 1 Q.B. 273

Action for declaratory Judgment in the High Court.

T. Fa for the Plaintiffs
G.E. Leung for the Respondents

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Fatiaki J:

In the substantive action the plaintiffs who are elected representatives of the Rabi Council of Leaders seek to challenge the legality of Decree No. 16 of 1992 made on the 26th day of February 1992.

The decree which is entitled the Dissolution of the Rabi Island Council of
G Leaders Decree 1992 (hereafter referred to as the Dissolution Decree) dissolved the Rabi Island Council of Leaders and appointed in its place 3 interim administrators to administer the affairs of the Rabi Island Council pending the findings of a committee of inquiry appointed to investigate the affairs of the Council.

The Dissolution decree also sets out in broad terms in its preamble the circumstances that gave rise to and the intention and purposes behind its making. In particular the 4th and 6th preambles read respectively:

> "WHEREAS the present Council has been prevented from exercising its functions and powers through administrative difficulties as well as amidst allegations of abuse of office;
>
> AND WHEREAS it is deemed expedient to move quickly to resolve the present crisis of the Council : to avoid lawlessness and illegal activities on the island of Rabi and thereby ensure that normalcy orderliness and good government return to the Banaban Community".

This present application however seeks and injunction against the 3 named administrators appointed under the Dissolution Decree and whilst the application is interlocutory in nature the issues raised once decided would effectively dispose of the substantive action. Additionally the issues raised constitutional questions of some complexity which ought not to be decided summarily. In the circumstances the motion was ordered inter partes.

The defendants in opposing the application have filed an affidavit detailing the various events that led to the promulgation of the Dissolution Decree. Written submissions have also been filed in which it is sought to affirm the constitutionality of the Dissolution Decree; the justiciability of the issues raised in the substantive action and the doctrine of necessity.

I propose to deal with each in turn under the headings:

(1) Constitutionality;
(2) Justiciability; and
(3) Necessity

(1) CONSTITUTIONALITY

In seeking to deal with this heading several undisputed facts may be set out in order to better appreciate the factual context in which the matter arises. These are:

(1) That the Dissolution decree post-dates the Constitution by 2 ½ years;

and

(2) That at the date of the Dissolution Decree there was no elected Parliament in existence.

(3) The Banaban Settlement Act (Cap. 123) is an entrenched enactment in terms of Section 78(1) of the

> Constitution requiring special voting majorities before it can be altered in any way.

A In the circumstances it is clear that the legality or constitutionality of the Dissolution decree depends entirely on whether or not the President is empowered by what may be termed transitional or continuing provisions to promulgate the Dissolution decree in the absence of an elected Parliament.

In this regard learned State Counsel's submission is a simple one based upon
B an examination of the devolution of the executive authority of Fiji in the President since the coups in 1987 and up until the Constitution of the Sovereign Democratic Republic of Fiji which was promulgated on the 25th of July 1990 (hereafter referred to as the Constitution) and more particularly the transitional provisions of the Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree (hereafter referred to as the Promulgation Decree).

C At the outset it should be noted that the Dissolution Decree itself sets out the enabling powers of the President as follows:

> "in exercise of the powers vested in me as President of the Sovereign Democratic Republic of Fiji ... and pursuant to the
> D executive authority of Fiji vested in me by Section 5 of the Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990 and acting in accordance with the advice of the Prime Minister and Cabinet I hereby decree as follows:
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> E (3) The Council of Leaders established under Section 3 of the Act is hereby dissolved and the offices of the members vacated."

Further Section 5 (2) of the Promulgation Decree provides:

> "(2) The President shall continue to exercise the
> F executive authority of Fiji and all the powers that are vested in him under the Appointment of Head of State and Dissolution of Fiji Military Government Decree until a Parliament is convened in accordance with the Constitution."

One such power vested in the President by that earlier Decree was:

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> "4(ii) ... the power to make laws for the peace order and good Government of Fiji <u>by decree</u>, acting in accordance with the advice of the Prime Minister and the Cabinet." (The underlining is mine)

More particularly however Counsel referred to the provisions of Section 8 (2) of the Promulgation Decree and submits that the Dissolution Decree deals with a matter which under the Constitution falls to be prescribed by Parliament and the effect of the above subsection is to treat the Dissolution Decree as if it had been made under the Constitution by Parliament. A

I cannot agree. Section 8(2) is to be found under the sub-heading Existing Laws and in clear grammatical terms deals with existing laws and amendments of such laws which occur before the appointed day. In my considered view the subsection is retroactive in its effect not proactive. The answer in my view is the simple one that Section 5(2) of the Promulgation Decree empowers the President to enact and promulgate the Dissolution Decree. B

Learned Counsel for the plaintiffs however argues that no power existed in the President to alter a law which the Constitution itself had doubly entrenched. This argument however would make it impossible to pass any laws until a Parliament was elected. I cannot accept that the Constitution was ever intended in the absence of a Parliament to divest the President of his law-making powers implicitly recognised in the Promulgation Decree. C

Indeed the Promulgation Decree recognises that in the absence of an elected Parliament there exists a void which was clearly filled by enacting in the Promulgation Decree itself the provisions of Section 3 which expressly provides the necessary legal framework within which "the continuance of the governance of Fiji" may be effected. D

Section 39 of the Constitution provides that Parliament shall consist of three arms a President, a House of Representative and a Senate. Further Section 61 empowers Parliament as so-constituted to make laws for the peace, order and good Government of Fiji and Section 62 describes how that legislative power is to be exercised generally through the medium of bills passed by both Houses and assented to by the President. E

It will be seen from the above that the President plays an integral role in the legislative process envisaged by the Constitution. The question then arises - What if there is no House of Representatives and Senate? Does that preclude altogether the exercise of the legislative power of Parliament? and can no laws be passed in the absence of both Houses however vital they may be for the peace, order and good government of Fiji? I would think not. F

Recently the learned Chief Justice in Civil Action 370 of 1988 Afasio Mua and Seven Others v. D.P.P. (Cyclostyled Judgment) in answering the question as to what happens when the political and constitutional structure of a country are completely overturned by unprecedented revolutionary events said, at pp 7 and 8: G

"I would think that there is no alternative but to regard as over-

riding the de facto situation as presently obtains. This follows from the principle that the legal relations of the people in any well ordered society cannot be left in a vacuum, so to speak ... This approach to the problem ... is necessitated by the very concept of State sovereignty."

and later at p. 10:

"I believe the conclusion I have arrived at accords fully with the legal doctrine embodied in the classic maxim - *salus populi suprema lex* (regard for the public welfare is the highest law)."

Viewed in that context the answer I am easily and inevitably driven to on my reading of the Constitution is one which favours the exercise of Parliament's legislative power by its subsisting arm namely the President exercising the executive authority vested in him by virtue of Section 82 of the Constitution and more especially Section 5 of the Promulgation Decree.

(2) JUSTICIABILITY

The defendants argument under this heading may be briefly summarised. The Dissolution Decree is an exercise of executive authority and prerogative powers vested in the President and as such non-justiciable.

Counsel for the plaintiffs however whilst accepting that that may be the traditional view of the matter nevertheless submits that since Padfield v. Minister of Agriculture, Fisheries and Food [1988] A.C. 997 the Courts have shown a greater willingness to examine the nature and exercise of prerogative powers.

In this latter regard Lord Denning M.R. in Laker Airways v. Department of Trade [1977] 1 Q.B. 643 said at p. 705:

"The prerogative is a discretionary power exercisable by the executive government for the public good, in certain spheres of government activity for which the law has made no provision ... The law does not interfere with the proper exercise of the discretion by the executive in those situations: but it can set limits by defining the bounds of the activity : and it can intervene if the discretion is exercised improperly or mistakenly. This is a fundamental principle of our Constitution."

and later the learned Master of the Rolls said:

"Seeing that the prerogative is a discretionary power to be exercised for the public good, it follows that its exercise can be examined by the Courts just as any other discretionary power which is vested in the executive."

(See also: the judgment of their Lordships in CCSU v. Minister for the Civil Service [1985] 1 A.C. 374).

I am not persuaded however that this is an instance of an exercise of prerogative powers in which this Court ought either to set limits to the exercise of the prerogative or examine the wisdom or appropriateness of its exercise. A

In this case the power could not be wider or more unfettered being one "to make laws for the peace, order and good government of Fiji" nor in my view are the limitations or purposes of such laws namely, for "peace", "order" and "good government" reviewable by the Courts. B

The power as worded does not require the President to be personally satisfied nor need he have reasonable cause for his belief nor need it be made to appear to him necessary to make the law. He is required however "to act in accordance with the advice of the Prime Minister and the Cabinet". C

In this latter regard the Dissolution Decree sets out that in making the decree the President was acting "in accordance with the advice of the Prime Minister and Cabinet".

It is noteworthy that Section 88(3) of the Constitution expressly provides: D

> "(3) Where the President is required by this Constitution to act in accordance with the advice of ... any person or authority, the question whether he has in any matter so acted shall not be called in question in any court of law." (My underlining)

Yet in a somewhat indirect way learned counsel for the plaintiffs seeks to question that very matter by his submission that the factual circumstances as disclosed in the affidavits "did not require or justify the intervention of the President. E

I reject the submission as incompetent and as raising non-justiciable matters.

In Ayr Collieries Ltd. v. Lloyd - George [1943] 2 All E.R. 546, Lord Greene M.R. in rejecting a similar argument to that raised before this Court by learned counsel for the plaintiffs said at p. 547: F

> "If one thing is settled beyond the possibility of dispute, it is that, in construing regulations of this character expressed in this particular form of language, it is for the competent authority ... to decide as to whether or not a case for the exercise authority to judge of the adequacy of the evidence before it. It is for the competent authority to judge whether or not it is desirable or necessary to make further investigations before taking action. It is for the competent authority to decide whether the situation requires an G

> immediate step, or whether some delay may be allowed for further investigation and perhaps negotiation ... One thing is certain and that is that those matters are not within the competence of this Court. It is the competent authority that is selected to come to the decision, and, if that decision is come to in good faith, this Court has no power to interfere provided, of course, that the action is one within the four corners of the authority ..."

More recently in Ningkan v. Government of Malaysia [1970] A.C. 381 the Privy Council in rejecting a similar argument said at p. 390:

> "The onus of proof on any one challenging a proclamation of emergency may well be heavy and difficult to discharge since the policies followed and the steps taken ... may be founded on information and apprehension which are not known, and cannot always be made known to, these who seek to impugn what has been done."

In this latter regard the plaintiffs affidavits falls well short in my view (assuming that the question is justiciable) of raising probable grounds for challenging the Dissolution Decree.

Indeed I am satisfied from the affidavit of the Chief Assistant Secretary in the office of the Prime Minister who is the officer responsible for the affairs of Rabi Island, that a grave situation did exist on the Island wherein disturbances and strikes had occurred and extra police had been placed on duty and the continued administration of the affairs of the Rabi Island Council of Leaders was being seriously hindered and obstructed to the detriment of stability within the community and the preservation of law and order on the island of Rabi.

Learned counsel for the plaintiffs has also raised an argument on the basis of the plaintiff's legitimate expectation that upon being elected as councillors on the Rabi Island Council of Leaders they would continue to hold office for the full period of their election and that nothing would be done to abolish or deprive them of their positions before they were given an opportunity to be heard (i.e. the *audi alteram partem* principle).

In Durayappah v. Fernando [1967] 1 A.C. 337 Lord Upjohn said of the application of the principle at p. 349:

> "In their Lordship's opinion there are three matters which must always be borne in mind when considering whether the principle should be applied or not. These three matters are: first, what is the nature of the ... office held ... by the complainant; secondly, in what circumstances is the person claiming to be entitled to exercise the measure of control

> entitled to intervene; thirdly, once a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other. It is only upon a consideration of those matters that the question of the application of the principle can properly be determined."

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In my view having regard to my observations on the earlier questions of the constitutionality and justiciability of the Dissolution Decree I have no hesitation in saying that applied to the present circumstances the three matters enumerated by Lord Upjohn are not supportive of the plaintiff's case.

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In my considered opinion the very high policy and political content involved in the exercise of the law-making powers vested in the President under the Promulgation Decree are such as would militate against the application of the rules of natural justice.

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(3) NECESSITY

I need only briefly to deal with the submissions under this head:

In Burmah Oil Co. Ltd. v. Lord Advocate [1965] A.C. 75 at p. 118 Viscount Radcliffe described the essence of prerogative power as:

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> "Not merely to administer the existing law - but to act for the public good, where there is no law, or even to dispense with or override the law where the ultimate preservation of society is in question."

Earlier in his judgment at p. 115 Viscount Radcliffe recognised one such prerogative of the Sovereign as the leader of the people and the chief executive instrument for protecting the public safety and that the prerogative was exercisable by the Crown in circumstances of "sudden and extreme emergency which put that safety in peril".

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More particularly he recognised that besides the "imminence or outbreak of war":

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> "Riot, pestilence and conflagration might well be other circumstances in which that prerogative could be invoked."

In Sabally v. N'Jie and Attorney-General [1965] 1 Q.B. 273 the plaintiff unsuccessfully challenged the validity of elections held on the basis of an unauthorised register of voters which was retrospectively validated by an Order in Council.

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In upholding the Order in Council Lord Denning M.R. said:

> "If the legislative institutions set up by the Crown cease to exist, or are for any reason incapable of functioning, then

> the Crown must be able to resolve the impasse. It can in that event resort to its prerogative power to amend the Constitution or set up a new one."

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Similarly in this case the Rabi Council of Leaders which was set up by an Act of Parliament was considered incapable of functioning by officials charged with administering the Act, and in order to resolve the impasse given the absence of an elected Parliament it was necessary to resort to the President's executive and prerogative powers.

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Needless to say since the promulgation of the Dissolution Decree an elected Parliament and a Senate have come into existence and there can be no doubting in my mind that if Parliament had been so-minded the Dissolution Decree could have been repealed. The fact that this has not occurred speaks volumes as to the appropriateness of the measures taken by the President.

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CONCLUSION:

In respect of all three heads I uphold the submissions of the defendants and hold that the plaintiffs claim raises no arguable questions of law and accordingly the application for an injunction is refused.

D *(Application dismissed)*

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