IN THE FIJI COURT OF APPEAL
(Judicial Review No. 11 of 1989)
CIVIL APPEAL NO. 8 OF 1990

Between:

THE NATIONAL FARMERS' UNION — Appellant

- and -

SUGAR INDUSTRY TRIBUNAL — First Respondent
THE FIJI SUGAR CORPORATION — Second Respondent
THE SUGAR CANE GROWERS' COUNCIL — Third Respondent

Mr. J.R.F. Fardell with Mr. J.R. Reddy for the Appellant
Nominal appearances for Respondents (Mr. J.R. Flower - First Respondent
Mr. B. Sweetman - Second Respondent
Mr. S.M. Koya - Third Respondent)

Date of Hearing : 4th June, 1990
Delivery of Decision: 7th June, 1990

DECISION

This is an appeal against the Ruling given by Byrne J. in the High Court at Suva on 24th January, 1990 whereunder the learned Judge granted limited leave to appellant on its ex parte Motion for leave to apply for judicial review of the Master Award which was made by the Sugar Industry Tribunal on 20th November, 1989 and gazetted on 23rd November, 1989.

Leave was sought under the ex parte Motion to enable the appellant to seek the following relief:

> *"Firstly in the form of a Declaration that the decision of the SUGAR INDUSTRY TRIBUNAL ("the Tribunal") purporting to be the final draft Master Award under part VI of the Sugar Industry Act dated the 29th day in August 1989, and the Master Award published in an extraordinary issue of the Fiji Republic Gazette on the 23rd day of November 1989 under Section 68 of the Sugar Industry Act (Chapter 206) is unlawful, unreasonble and was made in breach of the rules of natural justice;*
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> *And Secondly for an order of Certiorari to move into this Honourable Court the said purported draft final Master Award dated the 29th day of August 1989 and the Master Award published in an extraordinary issue of the Fiji Republic Gazette on the 23rd day of November 1989 under Section 68 of the Sugar Industry Act (Chapter 206) and to quash the same;*
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> *And Thirdly for an order of Prohibition restraining the Respondents or any one of them from proceeding further or carrying into effect the said purported final draft Master Award and/or the Master Award published in an extraordinary issue of the Fiji Republic Gazette on the 23rd day of November 1989 under Section 68 of the Sugar Industry Act (Chapter 206) or any part of the Sugar Industry Act (Chapter 206) or any part or parts thereof."*

The grounds for the relief sought were as follows:-

> *"(a) That the decision of the First Respondent constituting the draft final Master Award and the Master Award is unlawful, and was made in breach of the rule of natural justice, particulars whereof are as follows:*
>
> *(i) the First Respondent refused to allow the applicant the opportunity to present its case by denying it the right to call evidence on all issues in respect of which it had filed objections.*

(ii) *in publishing the Master Award and backdating it, and by adopting an extraordinary gazette procedure for this purpose without notification to interested parties the Tribunal has shown bias and acted in bad faith.*

(iii) *by denying it access to exhibits and evidence presented to it by the Second and Third Respondents.*

(iv) *by denying it the opportunity to cross-examine witnesses called on behalf of the Second and Third Respondents on matters in respect of which it had filed objections.*

(v) *by breaching the provisions contained in Section 66 of the Sugar Industry Act.*

(vi) *by taking advice from the accountant of the Tribunal, Mr. D. Aidney, a person who had a vested interest in the outcome in circumstances where that interest was not disclosed to the Applicant.*

(b) *That in making the draft final Master Award and the Master Award the Tribunal reached conclusions inconsistent with the conclusions contained in the Third Draft without giving the Applicant the opportunity to be heard which was in breach of the rules of natural justice.*

(c) *That in reaching its decision and/or making the draft final Master Award and the Master Award the Tribunal took into account irrelevant matters and failed to consider relevant matters.*

(d) *That in making its decisions and/or making the draft final Master Award and the Master Award the Tribunal showed bias by pre-determining issues without proper evidence being presented to it.*

(e) *That in making the draft final Master Award and the Master Award the Tribunal acted unlawfully in prescribing the standard provisions governing the rights and obligations of a registered grower but omitting to prescribe the obligations of the Second Respondent with respect to the manufacture, storage, marketing, delivery and sale by the Second Respondent of sugar, molasses and other by-products made from cane delivered by the grower to the Second Respondent.*

(f) That the draft final Master Award and/or the Master Award is invalid and/or unlawful and/or unauthorised as either the Tribunal failed to take proper advice in respect of expert accountancy matters or took, advice from Mr. D. Aidney who had a vested interest in the outcome of the proceedings and that interest was not disclosed to the Applicant."

After discussing and dealing with several issues raised in the application for leave to apply for judicial review Byrne J. in his Ruling at pages 14 and 15 of the record decided as follows:-

"However in view of what I have said in the course of this Ruling I consider that such leave must be limited. In my judgment, on the hearing of the substantive Motion the Court should be asked to answer the following questions:

(1) Did the First Respondent err in law in making or issuing on 29th August 1989 a document titled "Final Draft of the Master Award?"

(2) Did the First Respondent err in law in making or issuing and publishing in an Extraordinary Fiji Republic Gazette on 23rd day of November 1989 the document titled "Sugar Industry Tribunal Master Award and Report 1989"? and

(3) What is the effect if any in law of Section 64(3) of the Sugar Industry Act Cap. 206 on the document titled "Sugar Industry Master Award"? "

The effect of this Ruling was to preclude issues which were obviously important to the appellant's case for judicial review from being canvassed in the substantive hearing of the case.

Appellant has appealed on the following grounds:-

"1. *That the learned Judge erred in law in limiting the issues for determination by the Court when granting the Appellant limited leave to apply for Judicial Review.*

2. *That the learned Judge erred in law by refusing the Appellant leave to apply for Judicial Review upon the basis that the Tribunal acted ultra vires in breach of the requirements of natural justice by gazetting the Master Award earlier than the previously publicised date.*

3. *That the learned Judge erred in law by refusing the Appellant leave to apply for Judicial Review upon the grounds that the Tribunal had erred in breaching the provisions of section 66 of the Sugar Industry Act (Chapter 206).*

4. *That the learned Judge erred in law by refusing the Appellant leave to apply for Judicial Review upon the grounds that the Tribunal had breached the rules of natural justice in making the "draft final Master Award" and the Master Award under the Sugar Industrial Act.*

5. *That the learned Judge erred in law by refusing the Appellant leave to apply for Judicial Review upon the grounds that the Tribunal had breached the rules of natural justice in refusing the application full rights of audience and participation at the hearing before the Tribunal.*

6. *That the learned Judge failed to apply the correct legal principles in considering and adjudicating upon the Appellant's application for leave to apply for Judicial Review.*

7. *That the learned Judge's decision granting the Appellant leave to apply for Judicial Review is unreasonable and unlawful."*

The main contention argued by Mr. Fardell in relation to this appeal is that the learned Judge had no jurisdiction to limit the grounds of judicial review in the manner in which he

did. He advanced two reasons in respect of his contention:-

(i) first, that in so limiting the grounds of review of the appellant in the way he did, the Court disregarded the rationale for, and principles of, the granting of leave - the more so, having already held, correctly that the appellant had a sufficient interest in the matter to allow it to apply for judicial review;

(ii) alternatively, the learned Judge, having considered the principles to be exercised by the Court in granting leave, wrongly applied those principles in limiting the leave of the appellant in the manner in which he did.

Reference was made to the Supreme Court Practice 1988 (the White Book) at page 802 where the following note appears:-

"Leave to apply for judicial review

... The purpose of the requirement of leave is to eliminate at an early stage any applications which are either frivolous, vexatious or hopeless...

Leave should be granted if on the material then available the Court thinks, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant."

Mr. Fardell said that the intention in prescribing the requirement for leave was clear. It was a process to weed out time-wasting or "misguided or trivial complaints of administrative error" and to provide public officers with a degree of certainty as to the validity of their actions vis a vis challenge through the Courts. Conversely, those matters which were serious and substantial and which disclosed on their face errors by administrative officers prejudicial to the rights of those persons affected by their actions, clearly warranted the supervision of the Courts.

Mr. Fardell submitted that it was not the purpose of requiring leave that the Court should consider the matter before it in depth. All that was required was an arguable case. He cited in support a passage from the case of IRC v. National Federation of Self-employed and Small Business Limited (1981) 2 All ER 93 where at page 106 Diplock L.J. observed as follows:-

> *"The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the Court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the Court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the Court is exercising at this stage is not the same as that which it is called on to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application."*

Mr. Fardell also made the point that it was not for the Judge on the leave application to determine whether or not this ground had been made out. That was to be determined at the substantive hearing. The function of the court at the leave stage was to determine, on a quick perusal of the material then available, whether that material disclosed what might on further consideration turn out to be an arguable case in favour of granting to the appellant the relief claimed. Clearly it was not for the Judge to make a finding on the ground itself. Otherwise, there would be no need for a substantive hearing.

After listening to Mr. Fardell's argument on the appeal for more than an hour and having also perused his well-presented written submissions we indicated that we did not wish to hear him any further.

The reason is that in the course of the argument we were left in no doubt that this was a case in which leave should not have been restricted or curtailed in the manner it was done.

We accept that at the leave stage of an application for judicial review the Court is not required to do more than decide whether the applicant (leaving aside the questions of locus standi and delay which are not in issue here) has shown prima facie an arguable case on the merits on each ground for relief.

It appears clearly to us that the learned Judge's approach to the question of leave sought by the appellant was quite inappropriate inasmuch as he had taken upon himself to discuss and adjudicate the merits of the various grounds advanced in support of the case for judicial review. This was clearly premature at that stage. With respect the proper approach should have been for the learned Judge to decide whether the grounds were on their face arguable on the merits and fit to be considered in the substantive hearing. A ready test for deciding this question is whether any particular ground could properly and reasonably be characterised as frivolous, vexatious or hopeless in the sense of being patently devoid of merit. We do not think that the rejected grounds in the application fell within that description.

In the circumstances we are satisfied that the learned Judge had exercised his discretion wrongly by limiting in the manner he did the leave granted to appellant.

We will therefore allow the appeal and order that the limited leave granted by the learned Judge be set aside and in lieu thereof grant leave in terms of the ex parte Motion filed by the appellant on 27th November, 1989.

T.A. Tuivaga

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(Sir Timoci Tuivaga)
President, Fiji Court of Appeal

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(Sir Moti Tikaram)
Justice of Appeal

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(M.D. Jesuratnam)
Justice of Appeal