IN THE FIJI COURT OF APPEAL
(Judicial Review No. 11 of 1989)
CIVIL APPEAL NO. 8A 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
Mr. J.R. Flower for the First Respondent
Mr. I.V. Gzell QC with Mr. B. Sweetman for the Second Respondent
Mr. S.M. Koya for the Third Respondent

Date of Hearing: 19th June, 1990
Delivery of Decision: 27th June, 1990

DECISION

This is an appeal against the Ruling given by Byrne J. in the High Court at Suva on 9th April, 1990 in which the learned Judge made an Order setting aside the interlocutory injunction which he had granted to both the appellant and Third Respondent on 24th January, 1990 in the following terms:

> *"That until the final determination of this Motion for Judicial Review the 1st Respondent be restrained from enforcing or acting under the document titled "Sugar Industry Tribunal Master Award and Report 1989" until further order and that until further order "The Contract of General Application" referred to in Section 71 of the Act continue in force."*

In his Ruling on 9th April, 1990 on a Motion filed on 13 March, 1990 by Second Respondent to set aside the aforesaid injunction, the learned Judge granted the Motion for the following reasons:

> *"It is interesting to observe that on the hearing of the substantive motion for Judicial Review between the Third Respondent and the First and Second Respondents the Third Respondent specifically withdrew its previous allegations that the First Respondent acted in bad faith in issuing the "Sugar Industry Tribunal Master Award and Report 1989" earlier than he had previously indicated he would do so. However I note that the present Applicant maintains its allegations of bad faith against the First Respondent. Rightly or wrongly, I still remain unpersuaded that this allegation has been made out, although of course, the Court of Appeal may yet disagree with me.*
>
> *It has to be borne in mind when referring to Australian cases on the question of privative clauses that in Australia the Constitution specifically provides that Mandamus and prohibition directed to an officer of the Commonwealth cannot be ousted by a private clause, and there is no such provision in Fiji.*
>
> *It seems to me quite clear that if I were to refuse the Order sought by the Second Respondent today I would be acting inconsistently with my judgment in Judicial Reviews Nos. 10 and 12 of 1989 and Originating Summons No. 12 of 1990. I would, so it seems to me, be saying in effect that I had doubts about my judgment of 30th March, and that therefore it were proper that I should continue the Restraining Orders which I made against the First Respondent on the 24th January last.*
>
> *Again, rightly or wrongly, I must let the judgment speak for itself. In my view it would be a contradiction to grant any continuation of my Order of 24th January as sought by the Applicant.*
>
> *It was then suggested by Mr. Nagin that if I were still of that view it would be better for me not to hear the present application but to refer it to another Judge. I do not accept this suggestion. Were I to do so, in my opinion, it would amount to asking another single Judge*

of this Court to review my Judgment of the 30th March and I am satisfied to do so would be wrong. In my view no other single Judge could entertain such an application but would have to refer it by way of case stated to the Court of Appeal.

For these reasons I grant the relief sought in the Summons of the 13th March, 1990 and make an Order against the Applicant in the terms sought by that Summons."

The grounds of appeal are as follows:-

"1. That the learned Judge erred in law and in fact in setting aside the interlocutory injunction and other orders made on 24th January, 1990.

2. That the learned Judge erred in law and in fact in not treating Judicial Review No. 11 of 1989 as different from judicial Review Nos. 10 and 12 of 1989.

3. That the learned Judge erred in law and in fact in not disqualifying himself when he felt constrained to decide consistently in Judicial Review No. 11 of 1989 as he had already decided Judicial Review Nos. 10 and 12 of 1989."

The appellant's main contention in this appeal is that the learned Judge exercised his discretion wrongly in deciding to set aside or discharge the injunction as he did on 9th April, 1990 on the application of the Second Respondent.

The contention is based on the alleged defective reasoning of the learned Judge in discharging the ex parte injunction. According to the appellant there were three main aspects to the learned Judge's Ruling which were not supportable. They were as follows:-

"(a) First, that notwithstanding the appellant's position in maintaining allegations of bad faith against the first respondent ("the Tribunal"). "I still remain unpersuaded that this allegation has been made out .....";

(b) Second, that Australian cases on the question of privative clauses such as those submitted by Counse. for the appellant, were coloured by the fact that the Australian constitution specifically protects mandamus and prohibition from ouster by privative provisions, "and there is no such provision in Fiji";

(c) Third, that if he were not to revoke the order granted to the appellant, he would be ruling inconsistently, having revoked the order granted to the Council. "I would, so it seems to me, be saying in effect that I had doubts or reservations about my judgment of 30 March and that therefore it were proper that I should continue the restraining orders which I made against the first respondent on 24 January last."

As regards (a) appellant argued that the learned Judge's reasoning was coloured by the fact that the Third Respondent withdrew its own similar allegations. The learned Judge should have reviewed the allegations of bad faith and bias independently of the course taken by the Third Respondent.

As regards (b) the appellant claimed that the learned Judge misconstrued the overall effect of the Australian cases on the application of privative clauses and in particular the case of R. v. Murray and Others: ex parte Proctor (1949) 77 CLR 397 which indicated that errors going to jurisdiction would of themselves oust the privative provisions contrary to the views of the learned Judge.

As regards (c) the appellant submitted that the learned Judge erred in treating the appellant's case for judicial review and that of the respondent as if they were the same. It was claimed that the two cases were different but that the learned Judge failed to take congizance of this thereby vitiating the exercise of his discretion in the case before him.

In addition it was submitted that the learned Judge failed to consider the submissions on the balance of convenience to the parties and the possible injury to be suffered by the group of cane farmers represented by the appellant. We were told

that their number was substantial and could get up to 90% though there was no hard evidence of this.

The correctness or otherwise of the learned Judge's exercise of his discretion to discharge the ex parte injunction in question has to be assessed in the light of events prevailing at the time he was called upon to exercise his discretion.

The subject matter of the dispute which gave rise to the respective applications by the appellant and Third Respondent for leave to apply for Judicial Review (Judicial Reviews Nos. 10, 11 and 12 of 1989) was the Sugar Industry Tribunal's Master Award which was published in the Fiji Republic Gazette of 23 November, 1989.

The learned Judge dealt with both applications for leave to apply for Judicial Review in a 15 page Ruling dated 24 January, 1990, the operative part of which reads as follows:-

> *"In my opinion both applications raise important questions of law concerning the interpretation of certain sections of the Sugar Industry Act, but particularly Sections 64(3) and 67. Accordingly I am prepared to grant both applicants leave to judicially review both the decision of the Sugar Industry Tribunal made on 29th August 1989 to issue a document titled "Final Draft of Master Award" and the decision made on 20th November 1989 to make or issue the document titled "Sugar Industry Tribunal Master Award and Report 1989" and to publish the same under an Extraordinary Fiji Republic Gazette on 23rd day of November 1989. 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"?

In reaching the above conclusions the learned Judge dealt with and rejected the several allegations which were made against the conduct of the inquiry by the Sugar Industry Tribunal and its publication of the Master Award. He found the allegations to be without any merit whatsoever. They included allegations of bias and bad faith on the part of the Sugar Industry Tribunal as well as breaches of natural justice. Consequently, the learned Judge rejected the allegations from going forward to be judicially reviewed in the substantive judicial review hearing.

In the result however the appellant chose to appeal the Ruling against the grant of limited leave while the Third Respondent proceeded to Judicial Review pursuant to the limited leave granted by the learned Judge.

The substantive judicial review hearing on the Third Respondent's case was duly held on 19th, 20th, 21st and 22nd March, 1990 and the judgment given on 30th March, 1990 which resulted in the learned Judge holding in essence that the Sugar Industry Tribunal's Master Award was valid as being made intra vires the powers of the Tribunal under the Sugar Industry Act. Indeed he also held that the jurisdiction of the Court was ousted by section 64(3) of the Sugar Industry Act.

Thus in point of fact, at the time the learned Judge came to deal with the Second Respondent's Motion to set aside the ex parte injunction i.e. on 9th April, 1990 he had adjudicated on the judicial review issues on the Third Respondent's case which in substance were similar to Appellant's case.

It was against the background of such a set of events that the learned Judge exercised his discretion to discharge the ex parte injunction.

In retrospect it appears that when the learned Judge granted the ex parte injunction to appellant and Third Respondent he was more concerned to maintain the status quo in the sugar industry until such time he was able to adjudicate the substantive judicial review issues before him. In this he followed the well-recognized approach in such circumstances in that his first consideration was to preserve the status quo in order to enable him to investigate the substantial questions that have been raised so that they may finally be disposed of. The learned Judge was correct in granting the injunction as there were in fact serious questions to be decided by him.

It would appear that it was only after the learned Judge had tried the substantive judicial review issues with the benefit of full argument from Australian Counsel (Mr. I.V. Gzell QC and Mr. N. Moshinsky QC) and decided them that he realised he could not sustain the ex parte injunction any further on the grounds of preserving the original status quo. Indeed so far as he was concerned and as a direct result of his adjudication of the judicial review issues he could see no proper justification for continuing the injunction.

In a sense and as the learned Judge probably realised afterwards that after the contract of general application which had governed the operation of the sugar industry since 1971 expired on the 31 March, 1990, the status quo in the sugar industry in terms of his Ruling had shifted in favour of the Sugar Industry Tribunal's Master Award as the now operative contractual document for the industry.

Viewed in that light the learned Judge may be regarded as doing no more than what he felt judicially bound to do and that was to discharge the injunction in the exercise of his discretion.

The general principles on which this Court must act in dealing with and disposing of this appeal are, as may be expected, well summarised in 37 Halsbury's (4th Edition), paragraph 656 and for ease of reference are set out below:-

> *"Where the order of a judge in chambers is made within his discretion, the appellate court, whether it be the Court of Appeal or the House of Lords, will not interfere with its exercise unless it is shown that the discretion has been exercised on a wrong principle or not at all, or that there has been a miscarriage of justice.*
>
> *The appellate court is not to exercise an independent discretion of its own, but must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised it differently.*
>
> *The appellate court may, however, set aside the judge's discretion on the ground that it was based on a misunderstanding of the law or a mistake of law, or in disregard of principle, or on a misunderstanding or misapprehension of the facts or on an erroneous inference drawn from the available facts, or on a failure to take account of or give due weight to relevant matters or the taking into account of irrelevant matters, or that the order would result in injustice, or that the decision is so aberrant that no reasonable judge could have reached it.*
>
> *It is only if and after the appellate court has concluded that the judge's exercise of his discretion must be set aside for good reason that it becomes entitled to exercise an original jurisdiction of its own.*
>
> *The court may also intervene on the ground that the judge failed to exercise his discretion at all.*
>
> *However, the appellate court is not entitled simply to refuse to review an interlocutory order made by a judge who had jurisdiction and had all the facts before him unless he is shown to have applied a wrong principle.*

If necessary the court must examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order.

Otherwise, in interlocutory matters the judge might be regarded as independent of supervision."

The real issue before this Court is whether it can reasonably and properly be said that the learned Judge exercised his discretion to discharge the ex parte injunction on a wrong principle or having regard to all the circumstances of the case there has been a miscarriage of justice by the exercise of his discretion. Only then may this Court interfere with the exercise by the learned Judge of his judicial discretion.

On the appellant's argument that the learned Judge should have reviewed the allegations of bias and bad faith independently, it will be noted that the learned Judge had adverted to the matter again on the 9 April, 1990 after what may be said as mature consideration given the lapse of time since his adjudication on those same allegations and affirmed that he was unpersuaded that they had validity. He found no reason therefore to readjust his earlier thinking on those matters.

The appellant's other argument related to the claim that the learned Judge misconstrued the true effect of Murray's case in holding that the privative clauses in the Act were binding on him. The proper construction of the Australian cases to which the learned Judge had referred has been a matter of much debate before us between the opposing leading counsel (Mr. R. Fardell and Mr. I.V. Gzell). As this Court is presently advised no conclusive or definitive ruling can be given one way or the other in as much as the matter is again pending before another Judge of the High Court. Certainly this is not the occasion to consider the differences of opinion on the

interpretation of the privative clauses in the Act. That belongs to another time if it comes to that.

A further argument for the appellant was that the learned Judge did not treat the appellant's case in any way different from Third Respondent's case. As a result, it is claimed, there has been a miscarriage of justice.

As an issue in this appeal we do not accept that the learned Judge was not cognizant of the differences between the two cases. In his Ruling of 24 January, 1990 on the respective applications of the appellant and Third Respondent for leave to apply for Judicial Review, the learned Judge had said:-

> *"Although in many respects there is much common ground in the reasons advanced by the Counsel and the Union for leave to review both Awards, in other respects as will be seen in the course of this Ruling there are differences between the two applications."*

Furthermore, we do not think that the decision of this Court of 7th June, 1990 allowing the appellant's appeal against the grant of limited leave by the learned Judge would have affected in any way his perspectives on the self-same allegations of bias, bad faith and breaches of natural justice which were made against the Tribunal. This Court's decision on that occasion should not be taken as giving any particular endorsement one way or the other to the allegations that have been allowed to go to judicial review. They still have to be judicially tested for validity or otherwise before a differently constituted High Court.

Complaint was also made on behalf of the appellant that the learned Judge did not consider or advert to the issue of

balance of convenience notwithstanding the fact that he was handed a 7-page submissions which also touched on the issue. As Mr. Gzell has submitted, rightly in our view, that it is wrong to place too much weight on the argument. In his Ruling on 9th April, 1990 the learned Judge had acknowledged receiving the 7-page submissions so that it could not properly be said that he did not read or give them sufficient consideration.

At the hearing of the appeal we were addressed at length by counsel for appellant on the balance of convenience and related questions which it was claimed distinctly favoured the appellant's case for preservation of the original status quo, that is, for the reviving or reinstating of the Contract of General Application which expired on 31st March, 1990. This Court was asked to do this by the imposition of a mandatory injunction which we may say at once is an exceptional and rare relief and may be granted only in the clearest of cases.

Given the full circumstances of the case as known to the learned Judge and in particular in regard to his own perceptions of the state of affairs in the judicial review proceedings at the time i.e. on the 9th April, 1990 he was in our view perfectly entitled as a matter of judicial discretion to discharge the injunction.

In the result we find ourselves in the very situation envisaged by the general principles set out in 37 Halsbury's (4th Edition) paragraph 656 to which reference has already been made but in particular to the following passages:

> *"The appellate court is not to exercise an independent discretion of its own, but must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised it differently.*
>
> *It is only if and after the appellate court has concluded that the judge's exercise of his discretion must be set aside for good reason that it becomes entitled to exercise an original jurisdiction of its own."*

However, the exercise of discretion, i.e. the exercise of original jurisdiction, may devolve on the Court of Appeal in consequence of additional evidence being admitted before it which had not been before the Judge (See footnote 10 to paragraph 656 of Halsburys cited above).

The question now arises whether there is any fresh evidence before us which would entitle this Court to exercise original jurisdiction whereby instead of dismissing the appeal, we should allow it on the basis of fresh evidence tendered. The powers of the Court of Appeal in these circumstances are clearly set out in M. v. M. (Minor Custody Appeal (1987) 1 W.L.R. 404 wherein it was held (inter alia) -

> *"that where, on an appeal from an order made in the exercise of a judge's discretion, the Court of Appeal admitted fresh evidence the court should first consider, withough reference to the fresh evidence, whether the judge below, on the evidence which had been before him, had been plainly wron or had misdirected himself in some material respect; tha if the court thereupon concluded that the judge had so erred the appeal should be allowed unless, in exceptional case,*

the fresh evidence led to a different conclusion; but that if the judge had not so erred the court could allow the appeal and exercise an original discretion of its own only if the facts disclosed by the fresh evidence invalidated the reasons given by the judge for his decision (post, 409G-410B), 413A).

Dictum of Lord Diplock in Hadmor productions Ltd. v. Hamilton (1983) A.C. 191, 229, H.L. (E.) and G. v. G. (Minors: Custody Appeal) (1985) 1 W.L.R. 647, H.L. (E.) applied."

On 6th June 1990, Mr. Gzell with the leave of this Court filed an affidavit by Mr. Moosad. In reply the Appellant Union filed two affidavits - one by Mr. Poona Sami and the other by Mr. Mahendra Pal Chaudhary. We have carefully examined the contents of the three affidavits and have come to the conclusion that they do not tilt the balance of convenience one way or the other in favour of or against any of the two main opposing parties in this appeal. Likewise our decision of 7th June, 1990 does not for the reasons already given impel us to exercise our original jurisdiction. There is no fresh evidence before us of a nature to invalidate the reasons upon which the learned Judge discharged the injunction.

If the appellant desired the continuance of the injunction or other similar interim measures in so far as the "other grounds" were concerned it was open to the appellant to have moved this Court or a single Judge of the Court of Appeal soon after the order of Byrne J. under section 20(f) of the Court of appeal Act "to make any interim Order to prevent prejudice to the claims of any party pending an appeal". The appellant did not do so. Furthermore, no attempts were made by the appellant to amend its Notice of Appeal to seek a mandatory injunction in the exercise of this Court's original jurisdiction. As the Notice of Appeal stands all that it seeks is to set aside the Order of discharge made by Byrne J. on 9th April, 1990.

In our view nothing irreversible, irrevocable or irretrievable has happened to make the appellant feel that its ultimate success, if any, will be a phyrric victory. Any hardship or inconvenience caused to the appellant will be basically economic and can therefore be compensated.

For the reasons we have already given we are unable to uphold this appeal.

We therefore dismiss the appeal with costs to the Second Respondent and make no further Order.

T. A. Tuivaga

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(Sir Timoci Tuivaga)
President, Fiji Court of Appeal

Moti Tikaram

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(Sir Moti Tikaram)
Justice of Appeal

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(M.D. Jesuratnam)
Justice of Appeal