IN THE FIJI COURT OF APPEAL
AT SUVA
APPELLATE JURISDICTION

Civil Appeal No. ABU 0078 of 2000
[On Appeal from Lautoka High Court
Civil Action No. 217/2000]

BETWEEN : THE REPUBLIC OF FIJI

1st Appellant/Applicant

AND : THE ATTORNEY-GENERAL OF FIJI
of Suva, Fiji

2nd Appellant/Applicant

AND : CHANDRIKA PRASAD
father's name Prabhu of Lautoka

Respondent/Respondent

In Court for Chambers: The Rt Hon Sir Maurice Casey, Justice of Appeal

Counsel: Messrs A.P. Molloy QC, M. Scott, J.J. Udit and S. Banuve for Appellants

Messrs G.M. Illingworth, Anu Patel and N. Shivam for Respondent

Hearing: 15 January 2001
Decision: 17 January 2001

DECISION

On 15 November 2000 Gates J. delivered judgment in the High Court at Lautoka in favour of the respondent in which he made a number of declarations generally to the effect that the 1997 Constitution remains the supreme law of Fiji and that the Parliament as

constituted prior to the events of May 2000 still held office. The appellants have appealed against this judgment, and it is to be heard on 19 February 2001. They apply to this Court for a stay of execution of the declaratory orders made by His Lordship, who refused a similar application on 20 December 2000. They also seek leave to adduce affidavit evidence in support of their appeal. Both these applications came before me to be dealt with as a single Judge of the Court under s20 of the Court of Appeal Act (Cap 12) as amended in 1998.

Stay application

This can be dealt with briefly. Mr Molloy recognised the logical problems inherent in the concept of staying declaratory orders, which in this case are no more than judicial statements of the law. His Lordship's opinion at the end of his judgment of what should happen as a result does not have any legally co-ercive effect. Short of setting aside the judgment (which can only be done on appeal) there is no way that the declarations themselves can be nullified, either temporarily or permanently. While there is jurisdiction to intervene against specific predictable effects of a declaratory judgment in appropriate circumstances (see Registration Officer v Ah Koy (CA 23/1992; 5 January 1994), there is in this case no evidence of activities or proposed conduct flowing from the judgment in respect of which a stay order could effectively operate. Accordingly the application for stay of execution must be refused. I am not prepared to accede to Mr Molloy's request that I indicate that any pending litigation based on His Lordship's judgment should be deferred until the appeal is decided. This is a matter for the parties and the Courts concerned to consider.

Leave to adduce evidence

The proposed evidence consists of thirteen affidavits by those principally concerned with the administration of Fiji Islands, said to contain facts or matters arising prior and subsequent to the judgment of 15 November. Provision for the admission of further evidence

is contained in Rule 22 (2) of the Court of Appeal Rules as follows:-

> *"(2) The Court of Appeal shall have full discretionary power to receive further evidence upon questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner:*
>
> *Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter upon the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds."*

I have no doubt that evidence as to matters which have occurred after the date of hearing on 23 August 2000 should be admitted in the appeal. A major factor in assessing the legality of the present administration is said to be the extent to which it is effectively governing the country and receiving public support. This Court cannot close its eyes to any relevant developments over the months following the hearing.

In addition to this general view of the situation, there are some special features justifying the admission of further evidence of matters which arose before the hearing. It is clear from the judgment under appeal that His Lordship had problems with the paucity of the affidavits and found it necessary to take a "more generous approach" to notorious facts than might normally be appropriate. The respondent's summons was taken out on 30 June 2000, barely one month after the attempted coup of 19 May when events were (as described by His Lordship) "fast flowing and fluid". On 14 July a timetable was laid down for the filing of supplementary affidavits. The respondent complied, but the appellants did not. Mr Molloy informed me that the interim civilian government capable of dealing effectively with the case was not sworn in until 28 July, four days after the date fixed for filing the appellants' affidavits, and only 25 days before the hearing on 23 August.

Instead of filing affidavits in reply, the appellants moved to have the summons struck out on the grounds that Mr Prasad had no standing, and on 23 August they sought to have this heard first, with a view to filing affidavits in the event of a decision against them. His Lordship

ruled that both matters should proceed to an immediate hearing and in his judgment of 15 November he dismissed the strike-out summons, as well as making the declarations sought by Mr Prasad. In the meantime, on 19 September the appellants sought leave from the High Court to appeal against His Lordship's decision to hear both summonses on 23 August, and that application was refused in a separate judgment delivered on 15 November.

In support of the last-mentioned summons for leave to appeal, the appellants filed an affidavit by Mr Tuilevuka sworn on 19 September 2000. In it he complained that as a result of His Lordship's decision to proceed with both summonses on the same day, the appellants were deprived of the opportunity to adduce evidence in reply. (This assertion was roundly rejected in His Lordship's judgment.) He exhibited copies of affidavits filed on their behalf in another action raising similar issues sworn on 14 September by the Attorney General in the Interim Military Government and by the Commander of the Fiji Military Forces respectively. They set out in abbreviated form some of the material which the appellants now seek to adduce in evidence in considerably greater detail.

On 13 October 2000 the summons for leave to appeal was heard by His Lordship, who ruled, over the respondent's objections, that Mr Tuilevuka's affidavit and exhibits would be accepted to show the Court what evidence would have been available, not to inform it on the substantive matter (i.e. the summons for declaratory orders, still under consideration). Nevertheless, in his judgment on that matter he recorded that he had considered those affidavits in the wider national interest, notwithstanding that Mr Prasad's counsel had been deprived of the opportunity of addressing the Court on them.

From this account taken from the High Court record it is clear that whether due to the misjudgment of appellants' counsel, or for reasons such as those outlined by Mr Molloy, the material available to His Lordship was nowhere near as complete as that which can now be furnished by the admission of the proposed evidence, and by the opportunity for the respondent to reply to it.

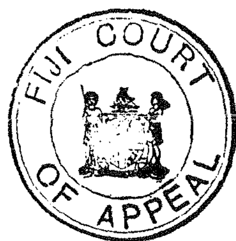
I need not stress the importance of this Court having as much material as possible in order to determine the appeal with its overwhelming public interest, even if it means subjecting Mr Prasad to a virtual rehearing of the case. That public interest, together with the deficiencies in the evidence which caused His Lordship such concern, constitute special grounds under the proviso to s22(2) for the admission of evidence of matters occurring before the hearing date, as well as those occurring afterwards.

Result

1. The summons for stay of execution of the declaratory orders is dismissed.

2. Leave is granted to the appellants to adduce the affidavit evidence of the thirteen deponents referred to in para 4 of the affidavit of Nainendra Nand sworn on 10 January 2001 in support of their Motion to adduce further evidence.

3. Costs on both applications are reserved for consideration in the appeal.



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Sir Maurice Casey
Justice of Appeal

Solicitors:

Office of the Attorney-General's Chambers, Suva for the Applicants
Messrs S.B. Patel & Co., Lautoka for the Respondent