

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0002 OF 2003S
(High Court Civil Action No.240 of 1999)

BETWEEN:

1. THE COMMANDER OF THE REPUBLIC OF FIJI MILITARY FORCES
2. THE ATTORNEY GENERAL OF FIJI

Appellants

AND:

THE AUDITOR GENERAL

Respondent

Coram: Eichelbaum, JA
Tompkins, JA
Penlington, JA

Hearing: Thursday 21 August 2003, Suva

Counsel: Mr. W. Calanchini and Lt. Colonel A. Mohammed
for the 1st Appellant
Ms. N. Basawaiya for the 2nd Appellant (Leave to withdraw)
Mr. P. Knight for the Respondent.

Date of Judgment: Tuesday 26th August 2003, Suva

JUDGMENT OF THE COURT

This appeal concerns the question of whether the Auditor-General is required to audit various funds maintained by the Commander of the Republic of Fiji Military Forces (RFMF) and for that purpose have access to the accounts of those funds.

Background

The Commander of the RFMF is appointed by the President of the Republic and Commander in Chief on ministerial advice.

For many years the Commander has maintained certain funds within the armed forces under the authority of Standing Orders which have been promulgated pursuant to sections 66 and 67 of the Republic of Fiji Military Forces Act (Cap.81).

The funds are commonly known within the RFMF as non-public money accounts. They are for a wide variety of purposes. They provide for activities in the armed forces which the government does not provide for in the annual appropriation of public funds by Parliament. Similar funds are maintained in the armed forces of other Commonwealth countries. See for example section 58 of the Defence Act 1971 in New Zealand. The funds derive their income from different sources such as voluntary deductions from the pay of service members, voluntary contributions, fund raising and commercial trading.

Three examples of these funds will suffice.

- The Regimental Fund which is for the general welfare of the forces. It is funded from the voluntary annual deduction of one day's pay from all serving members paid by way of a half day's pay in the first 6 months and the remaining half in the second 6 months
- The Canteen Fund which is for canteen facilities, sports equipment, financial assistance to sports clubs and social functions. It is even entitled to make small loans to service members. It derives its income from canteen takings and donations
- The Benevolent Fund which is for financial assistance to servicemen and dependants of disabled ex-servicemen. It derives its income from fund raising.

There are a number of Standing Orders and Instructions which have been made by the Commander concerning the funds. They lay down the responsibilities of the Commander and his sub-ordinate commanders in respect of the procedures for the administration, management and internal audit of these funds.

Up until the time of these proceedings the various funds had not been the subject of audit by the Auditor General or his predecessors.

The dispute started in 1997. In the Auditor General's inspection and audit of the public accounts of the RFMF in that year he became aware of these funds. He indicated to the then Commander, Brigadier General E.G. Ganilau that he desired to inspect these funds. The Commander, however, refused to give his permission for the inspection on the ground that it was outside the responsibility of the Auditor General.

The High Court

That refusal led to the Auditor General commencing proceedings in the High Court by way of originating summons. The questions posed for the determination of the Court were:

1. Is the Auditor-General legally required to audit the records and accounts of various funds ("the Funds") maintained by the Commander of the Republic of Fiji Military Forces ("the Commander") namely the Regimental Fund, the Canteen Fund, the Benevolent Fund, the Health and Life Scheme and the RFMF Welfare Fund, or any one or more of them?
2. Is the Commander legally required to allow the Auditor-General access for audit purposes to the records and accounts of the Funds or of any one or more of them?

The originating summons came before Byrne J. In a reserved judgment delivered on 28 January 2000 the Judge found in favour of the Auditor General. The basis of the Judge's decision was section 6 of the Audit Act (Cap. 70) and the definitions of "accounting officer" and "public moneys" in that Act. The Judge found that the Commander was a "public officer;" that the funds which he held were "public moneys" under an extended definition of that term in the Audit Act; that as such he was an "accounting officer"; and that as a result the Auditor-General was required to audit the funds. The Judge rejected the submission of the Commander that the extended definition of "public moneys" in the Audit Act was ultra vires the Constitution. The Judge answered both questions in the affirmative.

The Commander now appeals to this Court.

The Competing Arguments on Appeal

The foundation of the Commander's Case on appeal is Section 167(1) of the Constitution which appears in Part 3 of Chapter 11 under the heading "Auditor-General".

Section 166 establishes the office of Auditor-General. Section 167 sets out his functions and section 168 prescribes the manner of his appointment.

Section 167, in so far as it is relevant to this appeal, provides:

- (1) *At least once in every year, the Auditor-General must inspect and audit, and report to the Parliament on:*
 - (a) *the public accounts of the State;*
 - (b) *the control of public money and public property of the State;*
and
 - (c) *all transactions with or concerning the public money or public property of the State.*

- (2) *In the report, the Auditor-General must state whether, in his or her opinion:*

- (a) *transactions with or concerning the public money or public property of the State have been authorised by or pursuant to this Constitution or an Act of the Parliament; and*
 - (b) *expenditure has been applied to the purpose for which it was authorised.*
- (3) *The Parliament may make further provision in relation to the office of the Auditor-General and may confer further functions and powers on the Auditor-General.*
- (4) *In the performance of his or her duties, the Auditor-General or a person authorised by him or her has access to all records, books, vouchers, stores or other government property in the possession or control of any person or authority.*

Mr. Calanchini for the Commander submits that section 167(1) sets out the parameters or limits of the Auditor-General's authority and that section 167 is more specific than the provisions concerning the Auditor-General in the previous Constitutions. He contends that the Auditor-General's authority is restricted to the inspection and audit of and the reporting on, at least once a year, of:

1. the public accounts of the State;
2. the control of public money of the State;
3. the control of public property of the State;
4. all transactions with or concerning the public money of the State; and
5. all transactions with or concerning the public property of the State.

The appellant's counsel points out that the terms "public accounts", "public money" and "public property" are not defined in the Constitution. On the other hand, "State" is defined in section 194(1). It means "the Republic of Fiji Islands". Mr. Calanchini accordingly contends that in the absence of definitions in the Constitution the undefined words should be given their plain ordinary meaning which is to be determined in accordance with the guidance set out in section 3, and especially section 3(1) of the Constitution. Section 3(1) provides:

In the interpretation of a provision of this Constitution:

- (a) ***a construction that would promote the purpose or object underlying the provision, taking into account the spirit of this Constitution as a whole, is to be preferred to a construction that would not promote that purpose or object.***

Adopting this approach Mr. Calanchini submits "public" is used in section 167(1) in the sense that it is the opposite of "private" and that it means "of or concerning the people as a whole". And as to the terms "accounts", "money" and "property" he submits that they are the "accounts, money and property" which belong to the "State", that is the Republic of Fiji Islands, which would necessarily exclude any private money, accounts and property, such as the funds in issue.

At this stage of Mr. Calanchini's argument we drew his attention to the wording of section 167(3):

The Parliament may make further provision in relation to the office of the Auditor-General and may confer further functions and powers on the Auditor-General.

Mr. Calanchini submits that section 167(3) is limited to the supplementation of the powers granted by the Constitution in section 167(1), that is, the power to inspect, audit and report on the five matters set out above. In elaboration of this submission counsel gave us some examples: requiring the Auditor-General to carry out all or some of his functions of inspecting, auditing and reporting more than once in the year; giving the Auditor-General power to seize and retain records for the purpose of carrying out the functions set out in section 167(1); authorising the Auditor-General to conduct an inquiry for the purpose of carrying out those functions; authorising the Auditor-General to report to the Director of Public Prosecutions on matters arising out of such inspecting, auditing and reporting.

Mr. Calanchini expressly disavows a construction of section 167(3) which authorises Parliament to go beyond the functions set out in section 167(1) and invest the Auditor-

General with additional powers and functions, that is powers and functions beyond those described in section 167(1). For Parliament to do otherwise, so counsel submits, would be to widen the scope of the Auditor-General's authority in a way not authorised by the Constitution and that would be an amendment of the Constitution which can be only be achieved by Parliament acting in accordance with Chapter 15.

In the High Court the Auditor-General relied on section 6(1) of the Audit Act (Cap.70) and the definitions of "accounting officer" and "public moneys" in section 2 of the that Act. As we have stated earlier that argument prevailed. They are again the foundation of Mr. Knight's contentions in this Court.

Section 6(1) provides:

The Auditor-General shall, on behalf of Parliament, and in such manner as he deems necessary, examine, inquire into and audit the accounts of all accounting officers.

(emphasis added).

In section 2, the interpretation section, "accounting officer" is defined to include:

every public officer who is charged with the duty of collecting, receiving or accounting for, or who in fact collects, receives or accounts for, any public moneys or who is charged with the duty of disbursing, or who does in fact disburse, any public moneys.....

(emphasis added)

While the term "public officer" is not defined in the Audit Act it is defined in section 2 of the Interpretation Act (Cap.7) in the following way:

"officer" or "public officer" means a person in the permanent or temporary employment of the Government of Fiji.....

It was common ground that the Commander comes within the definition of a “public officer” as defined in the Interpretation Act. Any other view would be an affront to common sense.

Also in section 2 of the Audit Act “public moneys” is defined as follows:

“public moneys” means all revenue, loan, trust and other moneys and all stamps, bonds, debentures and other securities whatsoever raised or received by or on account of the Government; and for the avoidance of doubt includes moneys received or held on trust by the Public Trustee, the Official Receiver or any public officer for purposes other than the purposes of Government.

(emphasis added)

The initial steps in the Auditor-General’s argument are:

First that by virtue of section 6(1) of the Audit Act, the Auditor-General is under a duty to examine, enquire into and audit the accounts of all accounting officers; and

Secondly that an accounting officer by virtue of the definition of that term includes every “public officer” who collects, receives accounts or disburses any “public moneys”. In other words the combination of a “public officer” handling “public moneys” (as defined) makes him an “accounting officer”;

The Auditor-General then relies on the last words of the definition of the term “public moneys” in the Audit Act where it is given an extended meaning. These words are critical to the Auditor-General’s case. For clarity we isolate them:

.....and for the avoidance of doubt (public moneys) includes moneys received or held on trust byany public officer for purposes other than the purposes of Government.

In respect of these words, the Auditor-General contends that the Commander is a “public officer”; that he receives or holds on trust in the various funds moneys in issue for purposes other than the purposes of Government; that the Commander is therefore an “accounting officer” in respect of these funds; that the accounts of the funds are subject to audit by the Auditor-General; that the Auditor-General, for his part, is under a duty to audit those accounts; and that the Commander, for his part, is under a duty to make the accounts of the funds available for audit.

The Commander’s response to the Auditor-General’s reliance on the extended definition of “public moneys” is that those words are repugnant to the Constitution and ultra vires. This argument did not find favour in the High Court. The Commander repeats that argument in this Court. It rests on the contention that the powers and functions of the Auditor-General are only exercisable in relation to the public accounts of the state, the public money of the state and the public property of the state as prescribed by section 167(1) of the Constitution. This is the restricted construction of section 167(1) referred to earlier. The Commander contends that “moneys received or held on trust by any public officer for purposes other than the purposes of Government”, being the last words of the definition of “public moneys” in the Audit Act – such as the funds in issue - are not “public money” under the Constitution in that they are private moneys which do not belong to the State and therefore fall outside the scope of the Auditor-General’s functions as prescribed by section 167(1). Assuming the validity of this proposition, Mr. Kalanchini contends that at least since the 1998 Constitution became the Supreme Law of Fiji the last words in the definition of “public moneys” in the Audit Act have been repugnant to and ultra vires the Constitution.

Mr. Knight’s response to this argument is based on section 167(3) of the Constitution to which we have already referred. He submits that giving that subsection a sensible and common sense construction it clearly authorises Parliament to extend the powers and functions of the Auditor-General beyond those prescribed in section 167(1) and that accordingly Parliament is entitled by the Constitution to extend the Auditor-General’s powers and functions to the moneys described in the last words of the definition

of “public moneys” in the Audit Act. As a result that provision is not repugnant to and ultra vires the Constitution.

Consideration of the Competing Arguments

We now consider the competing arguments of the Auditor-General and the Commander.

We are unable to accept the construction of section 167(1) of the Constitution contended for by the Commander. That restricted construction is not warranted by the words used. Section 167(1) gives the Auditor-General the functions set out in the subsection. The subsection does not, however, expressly limit the functions of the Auditor-General to those stated therein; and in our view such a limitation cannot be implied into the subsection. Rather in our view, section 167(1) sets out a list of minimum requirements for the Auditor-General. Section 167(2) sets out the minimum requirements of the Auditor-General’s report to Parliament once a year. Otherwise it does not assist in the construction of section 167(1).

Section 167(1) does not preclude the Auditor-General having other functions and powers. That view is supported by section 167(3) which, we note, is not qualified by such words as “in respect of section 167(1)” or other words to the same effect. We agree with Mr. Knight’s submissions. We do not accept that section 167(3) is restricted to Parliament giving the Auditor-General powers which are only supplemental to those in section 167(1). Section 167(3) speaks in clear and unequivocal terms. It authorises Parliament to:

.....make further provision in relation to the office of the Auditor-General and may confer further functions and powers on the Auditor-General.

(emphasis added)

The use of the word “further” in two places is significant. It clearly means “additional”. In our view the Constitution is here authorising Parliament to create

additional duties for the Auditor-General and to invest him with additional functions and powers to carry out those duties. On the plain meaning of the words used in section 167(3) Parliament if it so decides can give the Auditor-General functions and powers in relation to accounts, moneys and property which are not of the State. Those functions and powers would be within the Constitution.

Section 167(4) is an enabling provision. It enables the Auditor-General to carry out his (or her) duty which must mean the duties prescribed in section 167(1) and any further duties created by Parliament under section 167(3).

Once this point is reached then it follows that Parliament is within the Constitution and is authorised to require the Auditor-General to examine and audit records and accounts relating to moneys received or held by any public officer on trust for purposes other than the purposes of Government. This conclusion means that the Auditor-General is under a duty to examine and audit the various funds maintained by the Commander and the Commander for his part is under a duty to make the accounts and records of those funds available to the Auditor-General. That conclusion is sufficient to dispose of the appeal in favour of the Auditor-General.

Before leaving the case however we wish to make an observation in respect of the words extending the definition of "public moneys" in the Audit Act. We consider that by necessary implication they must be qualified by the words:

"but relating to the public office".

We do not consider that Parliament intended that the Auditor-General should inspect and audit any fund which does not have a purpose related to the public officer and the discharge of that officer's duties and functions in that office. Here in this case the various funds are related to the public office of the Commander in the discharge of his duties as the head of the armed forces of Fiji. The qualification which we consider must be made does not affect the outcome of this appeal.

Conclusions

In summary we therefore conclude:

1. Section 167(1) of the Constitution does not bear the restricted meaning contended for by the Commander. Rather it sets out minimum requirements for the Auditor-General.
2. By virtue of section 167(3) of the Constitution, Parliament is authorised to give the Auditor-General further powers and functions.
3. The power given by Parliament to the Auditor-General to examine and audit moneys received or held on trust by a public officer for the purposes other than the purposes of Government is within the Constitution.
4. As a result the various funds maintained by the Commander being moneys within the scope of the extended definition of "public moneys" in the Audit Act must be examined and audited by the Auditor-General and for that purpose the accounts and records must be made available by the Commander to the Auditor-General for such examination and audit.
5. It is implicit in the extended definition of "public moneys" in section 2 of the Audit Act that the words "but relating to the public office" appear at the end thereof.

Having reached these conclusions we find that the Judge in the High Court correctly answered the two questions posed. The appeal must fail.

Result

Appeal dismissed. Costs to the respondent of \$1,000.00 plus all necessary disbursements as fixed by the Registrar.

Eichelbaum
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Eichelbaum, JA



Tompkins
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Tompkins, JA

Penlington
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Penlington, JA

Solicitors

Directorate Army Legal Services, Suva for the 1st Appellant
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