

[2] Order 53 Rule 3(1) of the High Court Rules provides:

“No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.”

[3] The appellant sought leave in the High Court to commence a judicial review of the decision of the Tribunal. On 20 October 2006 Finnigan J refused leave to commence judicial review. The appellant by Notice of Appeal dated 16 November 2006 seeks to set aside and quash the ruling of Finnigan J.

[4] The grounds of appeal are that Finnigan J erred in refusing leave which he did so firstly because the appellant had no arguable ground for judicial review with a realistic prospect of success and secondly because the Tribunal had provided *“reasonableness and fairness of the process which it adopted”* and had made a decision of fact after assessing evidence in which it is expert.

The Test for Leave for Judicial Review

[5] The test for leave for judicial review is whether the judge is satisfied that the material before her discloses that there is an arguable case, and that only a brief hearing, often ex parte, is required: *Inland Revenue Commissioners v National Federation of Self-employed* [1982] AC 617 at 644.

Leave to the Court of Appeal

[6] Section 12(2)(e) of the Court of Appeal Act provides that in civil cases no appeal shall lie without the leave of the judge or of the Court of Appeal from an interlocutory order or interlocutory judgment made or given by a judge of the High Court, except in certain specified cases.

- [7] The respondent properly took the point that it was beyond doubt, following the decision of this Court in *Goundar v Minister of Health* [2008] ABU0075 of 2006S, that a decision by the High Court to grant or refuse leave, whether leave for judicial review or otherwise, is an interlocutory decision and therefore any appeal to the Court of Appeal from such High Court decision requires the leave of the Court of Appeal.
- [8] The appellant sought leave in Court and was granted leave on the grounds that when the appeal was commenced he was entitled to take the view, relying on the earlier Court of Appeal authority *Jetpacker Works (Fiji) Ltd v The Permanent Secretary for Works & Energy & Ors* [2004] Vol 1 Fiji CA 213, that the decision of Finnigan J was not interlocutory and that leave was therefore not required. *Jetpacker Works* was overruled by *Goundar v Minister for Health* and the law of Fiji was restored to its pre-*Jetpacker* position.

The Tribunal's Decision

- [9] The Chairman and two other members of the Tribunal met on ten occasions. On one of those occasions they visited the village and listened to those involved in the conflict.
- [10] The issue before the Tribunal was a genealogical one and in a sense a strictly factual one. As the Tribunal observed, a chief is revered because he is God Almighty's choice, and to appoint a chief other than through a direct bloodline would be to challenge God's authority and bring God's wrath upon the land.
- [11] The first chief was Keni Tuitoga ("the first chief"). The appellant claimed a bloodline from the first chief through the first chief's brother Emosi Vunibola who he said was the father of Mosese Luma. Mosese Luma was the appellant's grandfather.

[12] RST claimed a bloodline from the first chief through the first chief's uncle, Waqatabu. Waqatabu is RST's great-great grandfather.

[13] The Tribunal found that Mosese Luma's mother was Sereima Ca, a woman from Navuavau in Rakiraki who came to perform household duties for the first chief. It found that she *"was pregnant at the time she arrived in Raviravi and gave birth to Mosese Luma whose father is unknown."* It found that the appellant *"made a blatant lie when he undertook an oath claiming that Emosi Vunibola was Mosese Luma's father."* Further the Tribunal was doubtful that Emosi Vunibola ever existed.

Challenging Tribunal Decisions

[14] Section 7(5) of the Native Lands (Appeals Tribunal) (Amendment) Act, 1998 ("the Act") provides that *"Decisions of the Appeals Tribunal are to be final and conclusive and cannot be challenged in a court of law"*.

[15] The Courts have held that the effect of this section is that decisions of the Tribunal are unimpeachable provided that they are valid decisions, reached in accordance with the principles of natural justice: *Natauniyalo v Native Land Commission* [1998] FJCA 41.

[16] The appellant claimed that the Tribunal had denied him natural justice by allowing RST to give oral evidence but then refusing to allow the appellant and his supporters to give oral evidence.

[17] The trial judge however found that the affidavits of the parties revealed a unified picture of the process followed by the Tribunal and referred to paragraphs 4(q), (r) & (s) of an affidavit filed by the respondents. The trial judge said *"I regard these statements of fact as unchallenged by the applicant. There is no serious challenge to them."*

- [18] However those paragraphs don't specifically state that the appellant was permitted to give oral evidence. The opportunity to give evidence is dealt with in subparagraphs (h)-(m) where it is said that RST was allowed to give additional evidence and that supporters of the appellant were questioned by the Tribunal and, it is implied, given the opportunity to give evidence.
- [19] These paragraphs were put in issue by the appellant in his affidavit in reply where he said that even his submission to the Tribunal was stopped because he could not produce documentary evidence that Emosi Konakona existed.
- [20] The appellant's evidence that he was not permitted to give oral evidence at the Tribunal hearing was maintained from the beginning and has not been seriously challenged. The question is, was the Tribunal obliged to allow him to give oral evidence.

Section 7(3) of the Act

- [21] The appellant says that the refusal to allow him to give oral evidence was in breach of section 7(3) of the Act. However although the section empowers the Tribunal to hear further evidence it does not oblige it to do so. Section 7(3) of the Act does not assist the appellant.
- [22] However it seems to the Court that the Tribunal, in allowing RST to give oral evidence, but in refusing oral evidence from the appellant, did deny the appellant natural justice.
- [23] This does not mean that in every case where a Tribunal allows oral evidence from one side it must allow unrestricted oral evidence from the other but rules of natural justice would require the other side to at least begin to give oral evidence so that

the Tribunal could determine whether the evidence was relevant or of any assistance.

- [24] In this case it was unfair of the Tribunal to prevent the appellant giving oral evidence because (1) there was not a complete documentary record which would allow the Tribunal to determine authoritatively whether Emosi Vunibola was Luma Mosese's father (or whether or not Emosi Vunibola existed) (2) Mosese Luma's Certificate of Death records that when he died in 1932 his father was recorded as Emosi Konakona (and oral evidence might have gone to showing, as the appellant contends, that Emosi Konakona and Emosi Vunibola were the one and the same person) and (3) the Tribunal has itself relied on oral evidence in determining the question against the appellant.
- [25] Further it was unfair of the Tribunal to restrict the appellant to documentary evidence given the Tribunal's findings (1) that Mosese Luma's father was unknown contradicts the 1932 Death Certificate; (2) that his mother was pregnant some decades prior to 1932 a matter that could not possibly be sourced from any document.
- [26] The Chairman of the Tribunal says that his uncle used to tell him that Mosese Luma was an arrogant man and that *"Even my grandfather, Keni Tuitoga was wrong in entering Moses Luma's name in the Register of Native Landowners under Naisogoliku because he does not qualify by blood."*
- [27] If the Tribunal is going to consider ancient hearsay, and allow one party to give oral evidence, it would be a clear denial of natural justice to confine the other party to documentary evidence and deny them the opportunity to give oral evidence.

The Decision is Discretionary

[28] The decision of the trial judge to refuse leave for judicial review was a discretionary one.


[29] An appellate court ought not to interfere with the exercise of a discretionary order by a trial judge unless it appears that some error has been made in exercising of the discretion and a substantial wrong has occurred: *House v The King* [1936] 55 CLR 499.

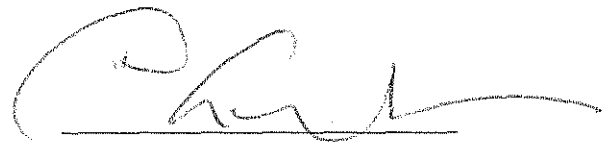
[30] In this case, for the reasons set out at paragraphs 16-20 above the trial judge has erred in finding that the Tribunal afforded the appellant fair and reasonable process.

[31] It is not for this Court or any Court to determine the issue of who is to succeed to the title of Tu Navatu and the Court can express no opinion on that question but in being denied natural justice a substantial wrong has occurred. The trial judge ought to have given leave for judicial review for the reasons set out above and in light of those reasons the High Court would have been obliged to grant judicial review.

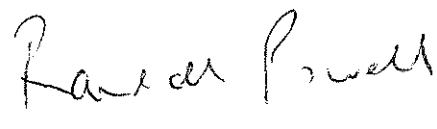
[32] The orders of the Court are:

1. The appeal is allowed;
2. Leave for judicial review is granted;
3. Judicial review is granted;
4. The Tribunal, differently constituted, is directed to rehear the appeal in conformity with the reasons of this Court;
5. The respondents are to pay the appellant's costs as taxed or otherwise agreed.


Byrne, JA


Goundar, JA




Powell, JA

Solicitors:

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