IN THE COURT OF APPEAL, FIJI
[CIVIL APPELLATE JURISDICTION]

CIVIL APPEAL NO. ABU 0047 of 2015
(High Court File No. HBJ 011 of 2014)

BETWEEN : **SAVERIO BALEIKANACEA**

Appellant

AND : **PUBLIC SERVICE COMMISSION**

Respondent

CORAM : **Lecamwasam, JA**
Almeida Guneratne, JA
Mutunayagam, JA

COUNSEL : **Mr. K. Maisamoa with Mr. N. Bulisea for the Appellant**

Ms. S. Taukei with Mr. V. Chauhan for the Respondents

Date of Hearing : **1st February, 2017**

Date of Judgment : **23 February, 2017**

JUDGMENT

Lecamwasam, JA

[1] This is an appeal filed by the appellant against the judgment of the Learned High Court Judge at Suva dated 15th June, 2015, in which both leave to apply for judicial review and summons for leave to file judicial review out of time were dismissed.

[2] The grounds of appeal of the appellant are:-

APPLICATION TO FILE JUDICIAL REVIEW OUT OF TIME

(1) THAT the learned Trial Judge erred in law and fact in misdirecting himself on the operation of the provisions of Order 53. Rule 4 of the High Court Rules 1988.

(2) THAT the learned Judge erred in law in failing to properly analyse steps involved in dealing with the application under Order 53.Rule4 of the High court Rules 1988.

(3) THAT the learned Judge erred in law and fact in relying solely on undue delay as the basis of dismissing the application out of time under Order 53.Rule 4 of the High Court Rules 1988.

(4) THAT the learned Judge erred in law and fact in misdirecting himself in failing to consider that undue delay under Order 53 .Rule 4 of the High Court Rules 1988 could only be considered if the Court is considering to grant reliefs to the Appellant and that the relief if so granted would likely to cause substantial hardship or prejudice to any person and also that the granting of the reliefs would be detrimental to good administration.

(5) THAT the learned Judge erred in law and fact in failing to consider that the granting of reliefs will only come about after the hearing of the substantive hearing of the issues in the judicial review.

(6) THAT the learned Judge erred in law and fact in failing to conduct and hear substantive issues before dismissing the application to file judicial review out of time.

(7) THAT the learned Judge erred in law and fact in failing to consider that delay was caused by the unsuccessful attempts to find a lawyer who could file for judicial review and the application for judicial review was not practices by most lawyers in Fiji. Only a few lawyers could do the judicial review procedures and one of the reasons of the delay was finding the lawyer by October, 2014.

(8) THAT the learned Judge erred in law and fact in placing emphasis in the filing of application promptly and within three (3) months. The Judge failed to consider that the application for judicial review is against the decision to make the Appellant redundant and

this will require compiling documents to show that the Appellant should not have been made redundant.

(9) THAT the learned Judge erred in law and fact in failing to realize and consider that judicial review is a procedure based on documents and the reliance and promptness and filing within three months should not be a bar to filing judicial review out of time.

(10) THAT the learned Judge erred in law and fact in failing to take into account and consider that the right of the Appellant under the provisions of Section 15(2) of the Republic of Fiji Constitution 2013. The reliance of the learned Judge on undue delay and failure to conduct the hearing on substantive issues has prevented the Appellant from having his application for judicial review from being determined by a court of law.

(11) THAT the learned Judge erred in law and fact when he failed to consider that the right of the Appellant to have his Application determined by a Court of law has breached the Appellant's constitutional right under Section 15(2) of the Republic of Fiji Constitution 2013.

(12) THAT the learned Judge erred in law and fact in failing to recognize and consider that the Appellant's right under Section 15(2) of the Republic of Fiji Constitution 2013 is a constitutional right and is superior to the concept of procedure of undue delay under Order 53.Rule 4 of the High Court Rules 1988.

(13) THAT the learned Judge erred in law and fact in failing to consider the effect of Section 2 of the Republic of Fiji Constitution 2013 that any law inconsistent with any provisions of the said constitution is valid in regard to that inconsistency.

APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

(14) THAT the learned Judge erred in law and fact in ruling that there was no unjustifiable case for judicial review. The learned judge failed to refer at all to the provisions of Regulation 13 of the Public Service Regulations 1999.

(15) THAT the learned Judge erred in law and fact in that he failed to consider that Regulation 13 aforesaid where it requires twenty eight (28) days notice to be issued to the Appellant before being transferred as provided under Regulation 13(a) of the Public Service Regulation 1999.

(16) *THAT the learned Judge erred in law and fact in failing to consider the failure of the Respondent to give the Appellant an opportunity to state his views about the transfer as required under Regulation 13(b) of the Public Service Regulation 1999.*

(17) *THAT the learned Judge erred in law and fact in failing to recognize that failure to comply with the provisions of Regulation 13 of the Public Service Regulation constitutes an act ultra vires the said regulation and also breach of the rules of natural justice because the Appellant was denied the opportunity to put his views about the one (1) day transfer.*

(18) *THAT the learned Judge erred in law and fact in failing to recognize that Clause 7 of the Letter of Appointment on the 15th day of December, 1988 has been overridden by the provisions of Regulation 13 of the Public Service Regulation 1999.*

(19) *THAT the learned judge erred in law and fact in ruling that Employment Relations Promulgation 2007 does not apply to the Appellant because of Section 2(2) of the Employment Relations (Amendment) Decree 2011. There is no section 2(2) of the Employment Relation (Amendment) Decree 2011.*

(20) *THAT the learned Judge erred in law and fact in failing to consider and recognize that the Employment Relation (Amendment) Decree 2011 is in breach of the following provisions of the Republic of Fiji COnsitution 2013 as from the 7th day of September, 2013.*

(i) Section 26
(ii) Section 15(2)
(iii) Section 100(3)

(21) *THAT the learned Judge erred in law and fact in failing to consider and recognize the Employment Relations (Amendment) Decree 2011 was invalid by the 7th day of September, 2013 as the same is inconsistent with the provisions of Section 26, Section 15(2) and Section 100(3) of the Republic of Fiji Constitution 2013.*

(22) *THAT the learned Judge erred in law and fact in failing to apply Section 2(2) , 2(3) and 2(4) of the Republic of Fiji Constitution 2013.*

(23) THAT the learned Judge erred in law and fact in failing to consider and recognize that section 107 of the Employment Relation Promulgation 2007 is valid and applies to the Appellant.

(24) THAT the learned Judge erred in law and fact in failing to consider that breaches of the provisions of Section 107 of the Employment Relations Promulgation 2007 are also breaches of the rules of natural justice.

[3] The facts in brief are:-

(i) The Appellant since 1988 was an employee of the Respondent, the Public Service Commission (PSC).

(ii) He is a graduate of the University of the South Pacific. Having joined the service in 1988, as an Administrative Officer in the Industrial Relations Division of the PSC, he had served in different capacities up to 2010, in which year he was posted to the Ministry of Local Government, Housing and Environment as their Deputy Secretary.

(iii) In 2014, by a letter dated 1st April, 2014, he was transferred to the PSC with immediate effect. Having reported for work at the Public Service Commission, by a letter dated 24 April, 2014, his services were terminated with effect from 3rd May, 2014 on the ground of redundancy.

(iv) Thereafter, he had written a letter to the Honorable Prime Minister with no favourable reply. Later, on the 18th December, 2014, he filed relevant papers before the High Court at Suva seeking leave to apply for judicial review and summons seeking leave to file judicial review out of time.

[4] The Learned High Court Judge dismissed both applications on the following grounds:-

(i) No good reason has been provided by the Applicant to convince Court to extend time for leave for a judicial review (paragraph 25 of the Judgment).

(ii) The Respondents decision was not ultra-varies 'on his decision to terminate the applicant' (paragraph 40 of the Judgment).

(iii) The Applicant has failed to establish "a case sufficiently arguable to merit investigation at a substantive hearing" (paragraph 43 of the judgment).

[5] Based on the dismissal of the Applicant's application, the applicant filed this appeal. Its common ground that the application to the High Court was four (4) months late.

[6] As far as this Court is now concerned, my obligation is to see whether the criteria necessary for the granting of leave to apply for judicial review were present before the learned High Court Judge. These criteria may be classified as follows:

(a) mandatory statutory requirements;

(b) other requisites developed largely judicially given the fact that, as opposed to a direct appeal, judicial review is a remedy that is subject to the exercise of judicial discretion.

This may be examined seriatim as follows:

Mandatory Statutory Requirements

These requirements are spelt out in Rule 3(2) and Rule 3(5) of Order 53 of the High Court Rules (Cap.13A).

Rule 3(2) states that *"an application for leave must be commenced by originating motions and must be supported by affidavits stating the facts relied on".*

It is apparent that the Appellant had complied with this requirement.

Rule 3(5) lies down that *"the court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates".*

[7] Unlike in application filed by pressure groups or by representatives, in this case the application had been filed by the Appellant himself, therefore sufficient interest in the matter is obvious, as the Appellant has been directly affected by the Respondent's decision. Accordingly, I hold the view that the appellant has the sufficient interest to seek leave to apply for judicial review against the decision of the Respondent as

contemplated by Rule 3(5) of the High Court Rules (Cap. 13A). Consequently, I hold that the Appellant has cleared the mandatory hurdles laid down in Rule 3(2) and Rule 3(5).

Other Requisites to be Looked into at the Leave Stage

[8] I now move on to deal with the other requisites which ought to be looked into at the stage of seeking leave to apply for judicial review. These requisites may be noted as follows:-

(i) Was there any inordinate delay and if so could be it excused?
(ii) Does that decision emanate from the exercise of statutory power by a public body.
(iii) What relief has been sought by an applicant in his application for leave to apply for judicial review and against whom?

Regarding the Delay

[9] I will deal with this heading separately later.

Does that Decision emanate from the exercise of Statutory Power by a Public Body?

[10] It is obvious in this case that the Public Services Commission is a public body and any decision by the PSC which perse attracted an application for leave for a judicial review.

The Reliefs sought by the Appellant and Against Whom?

[11] It is apt in that regard to refer to the Notice of Motion and the grounds urged by the Appellant respectively for leave to apply for judicial review. In **State v Connors**, ex-parte Shah (2008) FJ365, Scutt J, correctly observes the process to be adopted at the leave stage: *"At this stage a full review of the facts is unnecessary. Nonetheless a Court is obliged to sufficiently peruse the material provided to determine whether an applicant*

raises an issue are arguably involving an error in law, a serious error in fact, the violation of natural justice or procedural fairness or an excess of jurisdiction by the decision maker the subject of the application."

The Delay and the Reasons Adduced for the same by the Appellant

[12] According to the Appellant the main reason for the delay, was that he could not find a lawyer who deals with "Judicial Review" matters and hence he had to move earth and heaven in search of a lawyer who works in "judicial review" field and as such it took time. The Appellant further says in addition to the above he had to obtain various documents, some of those from the respondent, the PSC itself and that also was not easy and took time. As such the delay was inevitable.

[13] The learned Judge in his judgment at paragraph 21 if I may reproduce it,

> *"21. Here in the instant case although difficulty in obtaining documents was proffered as the excuse for the delay, I saw no evidence for this in the Affidavit of the Applicant in support of his Application for extension of time, sworn on 16 December 2014."*

[14] It seems that the Learned Judge had not adverted his mind to paragraph 8 of the Appellant's affidavit dated 16 December 2014 (page 92 of the HCR) which reads as follows:

> *"8. THAT it took me several weeks seeking documents from the Public Service Commission and once I had provided certain documents my legal representative finally advised me that he will help me with my case."*

[15] Therefore there may be/may not be practical difficulties in securing the services of a lawyer in this specialized field and in obtaining the relevant documents especially from the PSC itself. Hence whatever doubt that there can be, must be treated in favour Appellant. True enough these are common excuses you find in most cases. Yet if it happens to be true what would be the plight of the Appellant, having lost his means of livelihood (employment), failure to secure the documents would place him in a

precarious position. Therefore we have to have a more sympathetic and fair approach in matters of this nature especially considering the relief sought in the substantive application. However this does not mean that this is a licence to file belated applications in future. Appellants are warned to take extra care in filing applications and to file them promptly.

[16] There are examples of leave to file an appeal 'out of time' having been granted even though the delays have been considerable and explanations unsatisfactory where the grounds of appeal should be considered in the interest of justice. As per Byrne AP in **Atul Narayan v Navedetal Ashwini Narayan and Apradeta Ashwini Narayan** (*supra*). Considering the plight of the Appellant even if there was undue delay the requirement of meting out justice overrides or supersedes the elements of undue delay and reasons adduced for the delay, even if the said reasons are not fully convincing.

[17] Therefore failure to get the services of a Counsel promptly and failure to obtain the documents in time can be considered in favour of the Appellant and I would allow the application for leave to file judicial review out of time.

[18] Adverting to the leave to apply for 'judicial review' aspect of this case, it is apparent that the learned High Court Judge had summarily dismissed the judicial review application with costs (as per paragraph 27 of his Judgment).

[19] The learned High Court Judge had failed to consider the following facts, which in my view could constitute a breach of natural justice on the part of the respondents viz:

(1) the sudden transfer from the Local Government Ministry even without following the requirements of Section 13 of PSC Regulations 1999.

(2) impact of the non compliance of the above regulations;

(3) Redundancy claimed by the Respondent;

(4) whether the services of the Appellant were in fact redundant in view of "SB 15" Fiji Public Service Circular.

(5) Whether there was an element of 'mala-fide' or otherwise in relation to the termination and the termination itself without affording an opportunity to the Appellant to be heard.

(6) Whether there was procedural ultra-vires or procedural impropriety as opined by Professor Wade – *"If an authority does the right thing in the wrong way then it would amount to procedural ultra-vires"*, etc.

[20] I am also mindful of the rule that the Appellate Court should not substitute its own view for that of the primary judge exercising discretionary power, as observed by the Supreme Court in **Merit Timber Products Ltd v Native Lands Trust Board** (Civil Appeal CRV 0008 1994; 24 November 1995).

[21] However the exception to that rule is where such discretion has not been properly exercised and / or where there has been failure to exercise the discretion.

[22] For the aforesaid reasons, I would set aside the order of the High Court in refusing leave to apply for Judicial Review in as much as the Appellant prima facie appears to have an arguable case and other meritorious grounds to have sought leave to apply for a Judicial Review out of time.

Almeida Guneratne, JA

[23] I agree with the reasons and the conclusion reached in His Lordship Justice Lecamwasam's Judgment.

Mutunayagam, JA

[24] I too agree with the reasoning and conclusion of Lecamwasam, JA.

Consequently the Orders of this Court are:

1. *The judgment of the learned High Court Judge delivered on the 15th June 2015, is set aside.*
2. *Leave to apply for Judicial Review out of time is granted.*
3. *Although this court is aware of the principle that costs must follow the event in all the circumstances of this case there shall not be any costs.*
4. *The Chief Registrar is directed to list the case for mention on a call over date in order to fix a date for hearing.*

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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

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Hon. Justice A.B. Mutunayagam
JUSTICE OF APPEAL