IN THE HIGH COURT OF FIJI
AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO. HBM 27D OF 2005S

BETWEEN : ELIKI LASARUSA OF Naboro Medium Security Prison — PLAINTIFF

AND : THE STATE — DEFENDANT

Eliki Lasarusa	:	In Person	:	Applicant
Counsel for Defendant	:	Sulaiman	:	Attorney-General's Chambers
	:	N. Billimoria	:	Fiji Human Rights Commission (Amicus)
Date of Decision	:	17 February, 2006		
Time of Decision	:	9.30 a.m.		

DECISION

This is an O.18 r.18 application made by the Defendant. Specifically, it relies on O.18 r.18 (1) (d) that is that the action be struck out because the Appellant has failed to first exhaust all alternative remedies, and it is an abuse of the process of the Court.

The Applicant was arrested on 2 July 2002 at Nadi, detained and questioned by the Nadi police over a period of six days. He alleged that he was assaulted by police

officers on 4 July 2002. He was eventually taken to the Nadi Hospital where he was examined and later on to Lautoka Hospital. Has medical reports from both these examinations and are attached to the Applicant's affidavits.

The Applicant is presently serving a prison term of 5 years 3 months over assorted of offences ranging from robbery with violence to housebreaking to larceny.

On 28 February 2005, the Applicant wrote to the Chief Registrar purporting to invoke Rule 3 (2) of the Constitution Redress Rules. The letter, which I quote in full, says:

"Sir,

re: CONSTITUTIONAL REDRESS

Attached herewith a copy of my medical report to prove injuries sustained in the course of public interview.

I am given to understand section 41 of our Constitution had given me the right to seek redress hence this application."

By itself, the letter and its attachment, do not in any form or substance come close to complying with the requirements of Order 1 of the High Court Rules. While circumstances of a particular case may allow a certain latitude for departure from the strict requirements of what the Order prescribes, it certainly does not envisage it to extend into allowing one to begin an action or proceedings as the Applicant did in this instance.

The Registry should not have accepted the letter as constituting an application under Rule 3 (2) of the Constitutions Redress Rules or that it was in compliance with Order 1. Instead, it should have referred it, if it wished to assist the Applicant, to an agency that was informed and able to file the proper documents in proper form. In

this case, the Court had to request the assistance of the Fiji Human Rights Commission, not only to appear as amicus curae, but in the first instance, to help the Applicant in filing his documents in compliance with the requirements of the Court.

On 24 June 2004 the Appellant filed his Notice of Motion seeking declaratory orders from the Court that the Nadi Police officers, in assaulting him on 4 July 2002 and subjecting him to degrading treatments, had:

> (ii) contravened section 25 (1) of the Constitution which provision guarantees an individual's right to freedom from torture and from cruel, inhumane, degrading or disproportionately severe treatment or punishment,
>
> (iii) contravened section 27 (1) (f) of the Constitution guaranteeing the right of an individual to be treated with humanely and with respect for his inherent dignity.

The Appellant further sought an order finding the State liable for the conduct of the police officers and for payment of damages.

Alternative Remedies

The individual's right to constitutional redress is contained in section 41 of the Constitution. Section 41 (1) states that any person who considers that his or her rights under Chapter 4 (Bill of Rights) has been or likely to be contravened, he or she may apply to the Court for redress. How and when the application can be made is set out in the Chief Justice's Constitution Redress Rules.

However a person's right to do so is subject to the provision of sub-section (4) of S.41. This allows the Court discretion not to grant relief ***"if it considers that an***

adequate remedy is available to the person concerned." This means that the Court must be satisfied that there still exists to the Applicant, alternative remedies to pursue. But alternative remedies alone is not enough. They should not only be available, they must, in the Court's View, be adequate to satisfy the reliefs sought by the Applicant.

In this case, the Defendant argues that the Applicant still has alternative remedies. In the first place, he still can pursue personal action against the police officers and/or their employer. In this regard, the Court notes that the Applicant had, pursuant to his filing a formal complaint to the Police Internal Affairs Unit, which I presume is responsible for such matters, a Police report into the alleged assault on the Applicant, which according to the latter, admitted the assault and implicated the officers concerned, had been obtained and is in the possession of the Applicant's solicitors. It would appear therefore that the Applicant has indeed sufficient evidentiary materials to go ahead and bring civil action against the police officers.

There are also in addition the offices of the Ombudsman and the Visiting Magistrates who have powers to investigate and report on abuse of rights and freedoms of the individual by those in authorities. The Applicant, according to the Respondent has not sought the assistance of these offices nor indeed file any complaints in them.

As the Court had stated in In the Matter of An Application for Constitutional Redress by Aiyaz Ali CA HBM 79/2004, it is not for every offence under the Penal Code that gives rise to constitutional redress in substitution for normal processes available to the complainant. In his judgment, Singh J said:

> ***"..... To use the constitutional redress process as a substitute for normal procedures is to devalue the utility of this constitutional remedy. The applications under the Redress Rules are not a short cut or a system to bypass existing mechanisms in law."***

In Kemrajh Harrikissoon -v- Attorney-General of Trinidad and Tobago [1979] 3 WLR 62, the Privy Council dealt with a constitutional redress application under section 6 of the Trinidad and Tobago Constitution which is very similar to our own Section 41 (1). The applicant, a teacher, had been ordered by the Public Service Commission transferring him to another school without giving him the required 3 months notice. Rather than availing himself of the procedure of judicial review, the applicant applied to the High Court for constitutional redress under section 6 of the Constitution for a declaration that the human rights and fundamental freedoms guaranteed to him under the Constitution had been violated. Lord Diplock delivering the unanimous decision of their Lordships said, at p.64:

> *"The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law thus necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6 (1) the mere allegation that a human right or fundamental freedom is or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the Court under the sub-section if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the Court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for*

unlawful administrative action which involves no contravention of any human right or fundamental freedom."

In this case, the applicant had filed his complaints of being assaulted and subject to degrading treatment and abuse by police officers, whose identities are known. There exists a report to these complaints compiled according to the applicant, by the Police Internal Affairs Unit, a copy of which was obtained by him and is with his solicitors. Surely, it is up to the applicant to pursue civil proceedings for an action in torts against the perpetrators. This redress is available to him and I believe it is more than adequate to compensate him for any damages or loss he may have suffered.

In respect therefore of the argument of alternative remedies, I agree with the Respondent's Counsel that the applicant has these available to him, which he still has to pursue and furthermore, the Court is satisfied that they are adequate.

Time Limitation

The Respondent also argues that the application should not be entertained because the applicant has fallen foul of the requirement of Rule 3 (2) of the Redress Rules. This states that an application will not be allowed or entertained ***"after 30 days from the date when the matter at issue first arose."***

This requirement however, the Respondent conceded, is subject to the decision of this Court in Metuisela Railuni -v- Commander RFMF HBM 81/2002 where the Court held that the 30 days requirement was unconstitutional, and until the Rule is amended to reflect a more appropriate time, the Court will grant any application provided it is made within a reasonable time.

The applicant in this instance was allegedly subjected to assault and abuse on 4 July 2002 and only filed his application on 17 July 2005, almost 3 years later. The

Respondent argues that this period cannot be regarded as ***"reasonable"***, even in the context of the Metuisela Railuni case. Counsel referred to an earlier decision of this Court in Lasarusa Rakula –v- Attorney-General of Fiji HBM 63/2004 where a lapse of 2 years from the time of the incident to the filing of the application was held to be unreasonable.

Reasonable time for the filing of an application must necessarily be a subjective test. It cannot be measured simply by the number of months or years between the time when the matter at issue first arose to when the application under Redress Rule 3 (1) is filed. The circumstances of each case will differ and may contribute to hinder or precipitate the filing of an application. For example, in this case, this Court accepts that the applicant is expected to await the Police Report as a result of his complaints, before he contemplates constitutional redress procedure. Such period spent waiting for the report, should not be included in the computation of time. It is after the applicant has received the report and assuming it had dismissed his complaints as without merit and thereby exonerated the police officers, that the time again began to run from the 4th of June 2002. In any case, the report favoured the Applicant, who, as the Court has already found above, should pursue or have pursued civil action against the police officers. But even if the report had dismissed his complaints the Applicant, would, in my view, have failed to comply with the requirement of reasonable time under Rule 3 (2) when he applied on 17 June 2005.

Abuse of Court Process

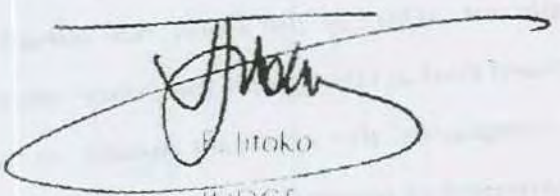
Finally the Respondent submitted that the proper procedure available to the Applicant is by way of Writ action. This is especially so where there is to be a determination of legal issues without contested evidence. Counsel referred to this Court's observation in Makario Anisimai –v- The State HBM 35/2004 which stated that the use of motion or originating summons to seek declaratory orders of the Court in which there are clearly disputes as to facts amount to abuse of process.

The Court agrees with the submission of Counsel quite apart from the fact that upon holding that the Applicant had failed to exhaust alternative remedies, his constitutional redress application does in fact amount to abuse of court process.

In the end I find merit in the Respondent's summons to strike out the Applicant's application on the grounds that the latter has failed to exhaust alternative remedies and that it is an abuse of the process f the Court.

The Applicant's Motion is Struck Out.

I make no order as to costs.



E. Inoko

JUDGE

At Suva.

16 February 2006