IN THE HIGH COURT
AT SUVA
CIVIL JURISDICTION

JUDICIAL REVIEW HBJ NO. 11 of 2014

IN THE MATTER of an application for leave to apply for Judicial Review by **SAVERIO BALEIKANACEA** (the Applicant)

AND

IN THE MATTER of the decision by the **PUBLIC SERVICE COMMISSION** (the Respondent) who purportedly made the Applicant redundant from the Public Service on the 24th day of April, 2014.

BETWEEN	:	**THE STATE**
AND	:	**THE SECRETARY PUBLIC SERVICE COMMISSION**
		Respondent
EX-PARTE	:	**SAVERIO BALEIKANACEA**
		Applicant
BEFORE	:	The Hon. Mr Justice David Alfred
COUNSEL	:	Mr. I V Tuberi (Mr K Maisamoa with him) for the Applicant Ms. S Taukei and Ms. K Naidu for the Respondent

Date of Hearing: 1st May 2015

Date of Interlocutory Judgment: 22nd May 2015

INTERLOCUTORY JUDGMENT

[1] The Application for leave to apply for Judicial Review and the Summons for leave to file the Application out of time, both came up for hearing before me on the 1st May 2015.

[2] At the commencement of the hearing, Mr. Tuberi made a preliminary submission that because of Section 15(2) of the Constitution, the requirement for leave of the Court to be obtained before any application for Judicial Review shall be made under Order 53, Rule 3(1) of the Rules of the High Court (the Rules) is unconstitutional.

[3] Ms. Taukei for the Respondent submitted that since the Applicant was not satisfied with a decision of an administrative body, he had made his Application in a court of law under Order 53 of the Rules and that therefore the process and procedure should follow the Rules. She also referred to Section 15(2) and (3) of the Constitution of the Republic of Fiji (the Constitution).

Henceforth Sections wherever stated refer to Sections of the Constitution.

[4] After a short recess, the submission on behalf of the Respondent was taken over by Ms Naidu. She submitted that the reasonable time, enjoined by Section 15(3), for the determination of a civil dispute is determined by Order 53 rule 4(2) of the Rules which provides a time frame of three months.

[5] She also submitted that the requirement for leave is constitutional and referred to Section 100 (3) and stated the ***"any written law"*** therein includes the High Court Act, Section 25 of which gives powers to the Chief Justice to make the Rules.

[6] Finally Ms. Naidu referred to the decision of the **Employment Tribunal in Rupeni Silimuana and Telecom Fiji Limited**. However, as I have not been enlightened as to in what way a decision of a tribunal is either binding upon or of persuasive authority for a High Court, I will not say any more about it.

[7] Mr. Tuberi, in his reply, submitted that the determination in Section 15(3) refers to the decision and not the filing of (the Application).

[8] At the conclusion of the hearing, I reserved judgment to be delivered at 2:30pm on the 22nd May 2015 in open court. I also made clear to Counsels that after my judgment on the preliminary constitutional issue, they were to be prepared to submit thereafter on the Summons for extension of time and the Application for leave to apply for Judicial Review, in that order.

[9] I now proceed to deliver my decision. I am called upon, to consider the import of a provision of the Constitution. This, I am empowered to do under Section 100(4). In order to enable me to judicially and judiciously construe Section 15(2), I shall rely on the decision of the Judicial Committee of the Privy Council in Appeal No. 37 of 1981, which is an appeal from the Fiji Court of Appeal entitled ***"The Attorney General.. Appellant v Director of Public Prosecutions ... Respondent***. Lord Fraser of Tullybelton delivering the advice of the Board to Her Majesty (the Queen of Fiji), *inter alia*, referred to the judgment delivered by Lord Diplock in **Ong Ah Chuan v Public Prosecutor** [1981] AC 648, 669 which repeats the well-known passage in the **Minister of Home Affairs v Fisher** [1980] AC 319 to the effect that:

> ***"the way to interpret a Constitution on the Westminster model is to treat it not as if it were an Act of Parliament but as sui generis calling for principles of interpretation of its own, suitable to its character.... without necessary acceptance of all the presumptions that are relevant to legislation of private law".***

Lord Fraser went on to state that:

> ***"Their Lordships fully accept that a constitution should be dealt with in that way and should receive a generous interpretation. But that does not require the courts, when***

construing a constitution, to reject the plain ordinary meaning of words."

[10] Section 15(2), it will be useful to note, provides that:

"Every party to a civil dispute has the right to have the matter determined by a court of law ....."

[11] Since the Applicant has brought his civil dispute to a court of law, it is not necessary for me to consider the remaining words in Section 15(2).

[12] Now I will turn to Section 15(3) and read the words therein which are relevant for our present purposes. They are *".... every party to a civil dispute has the right to have the case determined within a reasonable time."* There is only one word that needs to be considered here, "determined". "**Determine**" is defined by Osborn's Concise Law Dictionary (*7th Edition*) as "***To decide an issue or appeal***". Therefore it is quite a different matter for Counsel for the Respondent to refer to Section 15(3) to bolster her argument regarding the issue of leave. To my mind the leave requirement is to be considered entirely within the four corners of Section 15(2).

[13] This requirement for leave is imposed by Order 53 rule 3(1) of the Rules of the High Court, which are made by the Chief Justice under Section 25 of the High Court Act which comes within the ***"any written law"*** in Section 100(3)of the Constitution. By laying down the trail as I have done, I am making it crystal clear that Order 53 Rule 3(1) is validly made under a Constitutional provision. Therefore I have only to determine whether it is an obstacle to prevent the Applicant from having the dispute decided by a court of law or a sieve to ensure the speedier determination of disputes. If it is the former then it ought not to stand. But if it is the latter then it ought to remain.

[14] What then is the *raison d'etre* for the leave requirement? This is provided by the decision in the House of Lords (now the Supreme Court of the United

Kingdom) in the case of **R v Inland Revenue Commissioners ex-parte National Federation of Self-Employed and Small Businesses Ltd**.[1981] 2 AER page 105. Lord Diplock in his speech said:

> ***"The need for leave to start proceedings for remedies in public law is not new. It applied previously to applications for prerogative orders, though not to civil actions for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived."***

[15] The Supreme Court Practice 1995 (The White Book) further explains that the rationale for the leave requirement is:

> ***(a) to eliminate frivolous, vexatious or hopeless applications for judicial review without the need for a substantive inter partes judicial review hearing and***
>
> ***(b) to ensure that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further investigation at a full inter partes hearing.***

[16] If a requirement for leave could conceivably be considered as preventing or precluding the Applicant from having his dispute determined by a court of law and ought not to be there, then the *reductio ad* absurdum to disprove this proposition is to show that its logical conclusion can only be the absurd result of opening the floodgates for futile litigation to inundate the courts.

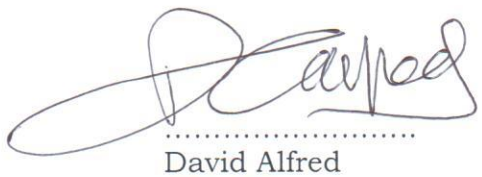
[17] In my opinion, it is as plain as a pikestaff that the leave requirement is not an obstacle but a sieve to ensure the smoother, unimpeded flow of the judicial

stream, by keeping out specious litigants with dubious claims. It is not an obstacle to the Applicant as an interested person, filing within time, his application for leave to move for judicial review.

[18] Therefore I find and I so hold that the leave requirement is not unconstitutional as it does not contravene Section 15(2) of the Constitution and I hereby dismiss the Applicant's preliminary submission/objection. The issue of costs I will address at the final disposal of the Applications.

[19] I will now hear Counsel for the Applicant followed by Counsel for the Respondent make their submissions on the Summons for leave to file the Application out of time and then the Application for leave to apply for Judicial Review.

Delivered at Suva this 22nd day of May 2015.



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David Alfred
JUDGE
High Court of Fiji