

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Judicial Review No.HBJ 8 of 2013

IN THE MATTER of an Application for
Leave for Judicial Review pursuant to
Order 53 Rule 3, High Court Rules
1988.

BETWEEN : **JOVESA SAUMAKI**

FIRST APPLICANT

AND : **SEAVIEW SHIPPING SERVICES LIMITED**

SECOND APPLICANT

AND : **THE CHIEF EXECUTIVE OFFICER** of the
MARITIME SAFETY AUTHORITY OF FIJI, MR.
NEALE SLACK

FIRST RESPONDENT

AND : **MARITIME SAFETY AUTHORITY OF FIJI**

SECOND RESPONDENT

BEFORE : **His Lordship Hon. Justice Kamal Kumar**

COUNSEL : Mr. S. P. Sharma for the Applicants
Mr. V. Kapadia for the Respondents

DATE OF JUDGMENT : 29 April 2016

RULING

(Application for Leave to Apply for Judicial Review)

1.0 INTRODUCTION

- 1.1 On 25th September 2013, the Applicants filed Application for Leave pursuant to Order 53 Rule 3(2) of the High Court Rules to Apply for Judicial Review of the Respondent's decision to suspend the Master Class 3 Certificate of Competency of the First Applicant ("**the Application**").
- 1.2 On 4 October 2013, being the returnable date of the Application, Counsel for the Respondents informed Court that Notice of Opposition is ready to be filed and sought leave to file Affidavit in Opposition.
- 1.3 Respondents were directed to file Affidavit in Opposition by 15 October 2013, and the Application was adjourned to 16 October 2013, at 9.30am for review.
- 1.4 On 16 October 2013, Counsel for the Respondents informed the Court that Affidavit in Opposition is ready to be filed. By consent parties were directed to file Affidavits and Submissions by 1 November 2013, and thereafter ruling was to be delivered on notice.
- 1.5 Respondents were granted leave to amend the Notice of Opposition by deleting "section 88" in paragraph 3 and substitute it with "section 81" and by deleting the word "relevant" in paragraph 4 and substituting with the word "irrelevant".
- 1.6 On 30 July 2014, First Applicant wrote to Court informing Court that he has resigned from the Second Applicant and that he intends to withdraw as First Applicant in this matter.
- 1.7 As a result, I directed the Registry to have this matter called before this Court on 12 September 2014, at 9.30am.
- 1.8 Registry then served Notice of Adjournment Hearing on Solicitors on record.
- 1.9 On 12 September 2014, Counsel appearing on instructions informed the Court that Applicants Solicitors were not aware about the letter written by First Applicant. Court directed that copy of letter be provided to Applicants Solicitors and adjourned the Application to 31 October 2014, for review.
- 1.10 This matter was next called on 7 November 2014, when Counsel and Solicitors on record for the Applicants informed the Court that First Applicant wrote the letter because of a misunderstanding and wants to proceed with this matter.

Ms. Nanius from Siwatibau & Sloan appeared for the Respondents when Notice of Change of Solicitors had not been filed.

Ms. Nanius informed Court that she needs time to take instruction from Respondents and that Notice of Change of Solicitors will be filed.

The Application was adjourned for 14 November 2014, at 9.30am for review.

1.11 On 14 November 2014, Counsel for the Respondents informed Court that Applicants have committed further breaches as such the suspension cannot be uplifted even though the six (6) month period has expired. Counsel for Applicants then sought Court's ruling on the Application.

1.12 Following Affidavits were filed on behalf of the parties:

For Applicants

- (i) Affidavit in Support of Jovesa Saumaki filed on 25 September 2013 ("**Saumaki's 1st Affidavit**");
- (ii) Affidavit in Response of Jovesa Saumaki filed on 21 October 2013 ("**Saumaki's 2nd Affidavit**").

For Respondents

Affidavit in Reply of Esiteri Loiti filed on 16 October 2013 ("**Loiti's Affidavit**")

2.0 BACKGROUND FACTS

- 2.1 First Applicant has been a seaman for more than forty (40) years and holds Master Class 3 Certificate of Competency ("**Certificate**") duly issued to him by First Respondent on 8 May 2008, and Certificate is valid until 8 May 2018.
- 2.2 The Second Applicant is engaged in the business of carrying and transporting passengers and general cargo.
- 2.3 The Second Applicant owns and operates vessel known as "M.V. Lady Sandy 1" ("**the vessel**") which is used for transportation of passengers and general cargo in Fiji.
- 2.4 First Applicant was at material time employed by Second Applicant as the Captain/Master of the vessel.

- 2.5 On 3 June 2013, the First Respondent issued Notice of Intent to Suspend the Certificate of First Applicant on the ground that on 21 March 2012, the vessel was overloaded.
- 2.6 On 12 June 2013, First Applicant responded to the aforesaid letter in which he referred to letters of 23 March 2012, and 3 April 2012, written by officers of First Respondent.
- 2.7 On 27 August 2013, First Respondent wrote to the First Applicant suspending the Certificate for six months with effect from 2 July 2013, in accordance with s100(3) of Marine Act 1986.

3.0 LAW

- 3.1 Order 53 Rules 1 to 3(i) of the High Court Rules provide:-

- “1.(1) An application for an order of mandamus, prohibition or certiorari shall be made by way of an application for judicial review in accordance with the provisions of this Order.***
- (2) An application for a declaration or an injunction may be made by way of an application for judicial review, and on such an application the court may grant the declaration or injunction claimed if it considers that having regard to:-***
- a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari.***
 - b) the nature of the persons and bodies against whom relief may be granted by way of such an order, and***
 - c) all the circumstances of the case, it would be just and convenient for the declaration for injunction to be granted on an application for judicial review.***
- 2. On an application for judicial review any relief mentioned in rule 1(1) or (2) may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of or relates to or is connected with the same matter.***
- 3.(1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.”***

3.2 The test for Application for Leave to Apply for Judicial Review was stated by her Ladyship Justice Scutt (as she then was) in **Nair v. Permanent Secretary for Education & Ors** Judicial Review No. 2 of 2008 as follows:-

- ***Does the applicant have sufficient interest in the application;***
- ***Is the decision susceptible to judicial review – that is, is it of a private or public nature;***
- ***Are alternative remedies available to the applicant and, if so, have they been pursued by the applicant;***
- ***Does the material available disclose an arguable case favouring the grant of the relief sought, or what might, on further consideration, be an arguable case.***

3.3 The Respondents do not contest First Applicant's standing which obviously means the Respondent concedes that First Applicant has sufficient interest in this matter.

3.4 The Respondents however, contest the Second Applicant's standing and at paragraph 3.12 of Respondents Submission it is submitted as follows:-

"3.12 The Second Applicant does not have any locus standi to make any application. It is a limited liability company which is not the owner of the MV "Lady Sandy". We refer your Lordship to the register of ownership of the Lady Sandy which is annexure "A" in the Affidavit of Esiteri Loiti which states that one Sandya Prasad of 37 Matua Street, Walu Bay, Suva is the owner of 64 shares in the said vessel. This is admitted by the First Applicant in his Affidavit in Reply in paragraph 6. The fact that Sandya Prasad is a shareholder and/or director in Seaview Shipping Services Limited (the Second Applicant) is not relevant and does not give the Second Applicant any locus to commence judicial review proceedings in the matter. No decision is made by the Respondents that directly affect the Second Applicant."

3.5 I entirely agree with Respondents submission in respect to Second Applicant's standing and hold that Second Applicant does not have sufficient interest in this matter as First Respondent's decision was challenged by the First Applicant only as it only affects the First Applicant.

- 3.6 It is also not disputed that subject matter of this proceedings is of public nature and the First Applicant had no alternative but to make the Application for Leave to Apply for Judicial Review.
- 3.7 The only point of contention between the parties is, whether First Applicant has arguable case in that whether Respondents action were illegal and in breach of natural justice and procedural fairness.

Arguable Case

- 3.8 The test for arguable case was stated by Lord Diplock in **Inland Revenue Commission v National Federation of Self Employed and Small Businesses Ltd** [1982] AC 617 as follows:-

“The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into matter at any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration, turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him, leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which is it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.”

- 3.9 The above test have been adopted and applied by Courts in Fiji.
- 3.10 In **Fiji Airline Pilots Association v The Permanent Secretary for Labour and Industrial Relations** Civil Appeal No. ABU00594 of 1997S (High Court Judicial Review No. HBJ 15 of 1997) the Court of Appeal in respect to Leave Application stated as follows:-

“The basic principle is that the Judge is only required to be satisfied that the material available disclose what might on further consideration, turn out to be an arguable case in favour of granting the relief. If it does, he or she should grant the application per Lord Diplock in Inland Revenue Commission v National Federation of Self Employed [1982] AC 617 at 644. This principle was applied by this Court in National Farmers Union v Sugar Industry Tribunal and Others (CA 8/1990, 7 June 1990). In R v Secretary of State for the Home Department exp Rukshanda Begum [1990] COD107 (referred to in 1 Supreme Court Practice

1997 at pp 865 and 868) Lord Donaldson MR accepted that an intermediate category of cases existed when it was unclear on papers whether or not leave should be granted, in which event a brief hearing might assist, but it should not become anything remotely like the hearing would ensue if the parties were granted leave (page 9).”

3.11 The reliefs sought by the First Applicant and grounds for seeking such relief are stated in the Application for Leave to Apply for Judicial Review as follows:-

Reliefs

- “(i) An Order of Certiorari to remove into this Court and quash the said Decisions; and/or*
- (ii) An Order of Declaration that the said Decisions were erroneous in law, unlawful, invalid and of no effect; and/or*
- (iii) An Order of Declaration that the said Certificate of Competency issued to Captain Jovesa Saumaki remains current, valid and effectual; and/or*
- (iv) An Order of Mandamus requiring the First Respondent to reconsider the said Decisions according to law and direction of this Honourable Court; and/or*
- (v) An Order of Declaration that the First Respondent breached the Rules of Natural Justice in reaching the said decisions and/or acted contrary to fairness and/or the First Applicant’s legitimate expectation to be heard prior to the suspension of his Certificate of Competency;*
- (vi) Damages against the Respondents for loss of earnings, humiliation and distress suffered by the First Applicant and for loss of use and business profits by the Second Applicant;*
- (vii) Costs on Solicitor/Client indemnity basis;*
- (viii) Such further or other relief as this Honourable Court deems just.*

Grounds

- (a) That the said Decisions made by the First Respondent are illegal, unlawful and ultra vires the provisions of the Marine Act No. 35 of 1986 and the Maritime Safety Authority of Fiji Decree 2009;*

- (b) *That in arriving at the said Decisions the First Respondent acted in breach of the substantive and procedural Rules of Natural Justice;*
- (c) *That the said Decisions of the First Respondent in all the circumstances is unreasonable and irrational and wholly unsupported and unsubstantiated by any credible or any evidence of overloading of motor vessel “MV Lady Sandy 1” on the part of the First Applicant;*
- (d) *That the Applicants reserve their rights to amend its grounds of application.”*

3.12 Section 88 of the Marine Act 1986 deals with preliminary investigation in respect to marine casualty and not overloading of passengers which is provided for in Section 81 of Marine Act 1986.

3.13 First Applicant in his 1st Affidavit stated that the Summons served on him was under section 88 of Marine Act 1986 instead of section 81 (paragraph 18 page 9 of Saumaki’s 1st Affidavit).

3.14 At paragraph 13 of Loiti’s Affidavit she states that:-

- (i) Summons under Section 88 was withdrawn and fresh Summons was issued under Section 81 on or about 5 April 2012 (Annexure “G” of Loiti’s Affidavit);
- (ii) Respondent can act independently under section 100 of the Marine Act 1986 and need not issue Criminal action under Section 81 of the Act.

3.15 First Applicant in his 2nd Affidavit denied being served with fresh Summons under Section 81 of the Marine Act 1986.

3.16 I accept First Applicant’s Affidavit evidence that he was not served with Summons under Section 81. This has some support from Loiti’s Affidavit in that she only says that the fresh Summons under Section 81 was issued on or about 5 April 2012, but does not say on what date it was served on the First Applicant.

3.17 However, even though Summons served on the First Applicant was in the Form used for Section 88 the particulars of in respect which First Applicant

was to answer questions were that which is covered by section 81 of Marine Act.

3.18 The mere fact that the heading of Summons state “Section 88” instead of section 81 does not in any way prejudice or mislead the First Applicant and therefore does not invalidate the Summons.

3.19 I will now deal with section 100 of the Marine Act 1986.

3.20 Before I proceed I must state that the provision of section 100 of the Marine Act has been amended by Marine (Amendment) Act 1999 and Marine (Amendment) Decree 2009.

3.21 Section 100 of Marine Act provides as follows:-

“100.-(1) Where it appears to the Chief Executive Officer of MSAF that the holder of a certificate issued under section 99 is unfit to be the holder of that certificate whether by reason of medical unfitness, incompetency, misconduct, dereliction of duty or for any other reason the Chief Executive Officer of MSAF may give the holder written notice that he is considering suspending or cancelling the certificate.

(2) The notice referred to in subsection (1) must:-

(a) state the reasons why it appears to the Chief Executive Officer of MSAF that the holder is unfit to be the holder of the certificate; and

(b) state that within a period specified in the notice, being not less than 14 days, the holder may make written or oral representations to the Chief Executive Officer of MSAF.

(3) After considering any representations made in accordance with paragraph (2)(b) the Chief Executive Officer of MSAF shall decide whether or not to suspend or cancel the holder’s certificate and shall give the holder written notice of his decision.

(4) The Chief Executive Officer of MSAF may require the holder of certificate to provide reasons as to why the reasons outlined in subsection 100(1) do not apply to him or her.

- (5)
- (6) *Where in accordance with subsection (5) the Chief Executive Officer of MSAF decides to suspend or cancel a certificate the notice given under paragraph (5)(b) must-*
- (a) *in the case of a decision to suspend the certificate-state the date from which and the period for which the suspension is to take effect;*
- (b) *in the case of a decision to cancel the certificate-state the date from which the cancellation is to take effect; and*
- (c) *require the holder to deliver the certificate to the Director or a shipping officer not later than the date specified in the notice in accordance with paragraph (a) or (b).*
- (6) *A person who is required to deliver a certificate in accordance with paragraph (6)(c) shall not fail to deliver that certificate.*

Penalty: A fine not exceeding \$200.”

- 3.22 First Applicant submits that the First Respondent failed to comply with the requirement of Section 100 of Marine Act 1986.
- 3.23 The First Respondent on 3 June 2013, gave First Applicant notice under s100 (1) of the Marine Act 1986.
- 3.24 The First Applicant responded to the said notice by letter dated 12 June 2013, (Annexure “Q” of Saumaki’s 1st Affidavit) informing the First Respondent that:-
- (i) He received letter dated 23 March 2012, regarding overloading of passengers from the Manager Regional Enforcement and Compliance;
- (ii) The Investigation Officer conducted the investigation and they had mediation within the required time;
- (iii) He received letter dated 5 April 2012, stating that the matter has been withdrawn.

- 3.25 On 27 August 2013, Chief Executive Officer of MSAF wrote to First Applicant in following terms:-

“Reference is made to your letter dated 12th June 2013.

Please be informed that your written appeal was taken into consideration; however due to the seriousness of the matter, your Certificate No. M3 033 is hereby suspended for six months effective 02nd July 2013 in accordance with Section 100(3) of the Marine Act 1986.

You are therefore advised to deliver your Certificate No. M3 033 to the undersigned by close of business 03rd September 2013.”

- 3.26 First Applicant submits that by failing to hear him and giving him an opportunity to present his case the Respondent denied him natural justice and procedural fairness.

National Justice - Procedural Fairness

- 3.27 The right to afford natural justice and procedural fairness has been very well stated in the case of **Annets v McCain** (1990) 170 CLR 596 at 598 by Mason C.J Deane and McHugh JJ and adopted with approval in **Divendra Pillay v Permanent Secretary for Education, Women & Culture & Anor** Judicial Review No 5 of 1997 as follows:

“It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person’s rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment: Commissioner of Police v Tanos (1958) 98 CLR 383 at 395-396; Twist v Randwick Municipal Council (1976) 136 CLR 106 at 109-110; Heatley v. Tasmanian Racing & Gaming Commission (1977) 137 CLR 487 at 496, 500; J v Lieschke (1987) 162 CLR 447 at 456; Haoucher v Ministry for Immigration & Ethnic Affairs (1990) 169 CLR 648 at 680. In Tanos (1958) 98 CLR at 396, Dixon CJ and Webb J said that an intention on the part of the legislature to exclude the rules of natural justice was not to be assumed nor spelled out from “indirect references, uncertain inference or equivocal considerations”. Nor is such an intention to be inferred

from the presence in the statute of rights which are commensurate with some of the rules of natural justice: Baba v Parole Board (NSW) (1986) 5 NSWLR 338 at 344-35, 347-349. In Kioa v West (1985) 159 CLR 550 at 584, Mason J said that the law in relation to administrative decisions, has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affects rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary intention.”

3.28 It is obvious that the letter written by the First Applicant in response to notice given by First Respondent pursuant to section 100(1) of Marine Act 1986, was not reasons as to why First Applicant’s Certificate should not be suspended or cancelled but was to seek clarification in respect to letter of 3 April 2012, from First Respondent to First Applicant’s lawyer.

3.29 It is undisputed that:-

- (i) First Respondent did not provide the First Applicant the clarification sought in First Applicant’s letter dated 12 June 2013;
- (ii) First Applicant was not heard or was given any opportunity to make submissions before his Certificate was suspended.

3.30 I am satisfied that the First Applicant has raised arguable case, as to whether the Respondents have complied with the provisions of the Marine Act and whether Respondents were required to afford First Applicant natural justice and procedural fairness. If so, then what Respondents should have done, and whether they breached rules of natural justice and procedural fairness.

3.31 This Court will need to determine the above after hearing the parties fully at the substantive hearing and not at this stage.

3.32 I therefore hold that First Applicant has established that he has arguable case in this matter.

Costs

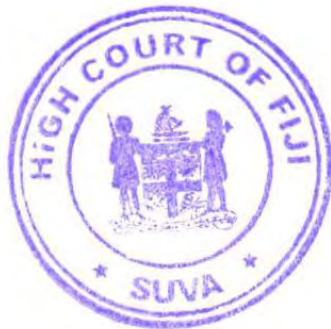
3.33 I take into consideration that all parties filed Affidavits and made Submissions. The Court will need to determine whether Respondents have

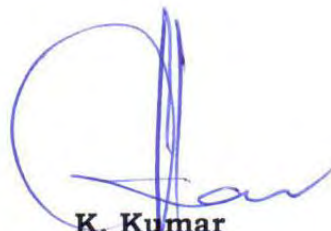
denied the First Application natural justice and procedural fairness at the substantive hearing. I think it is only just that issue of cost between the First Applicant and Respondents be left until after the substantive hearing.

Orders

3.34 I make following Orders:-

- (i) First Applicant is granted leave to apply for judicial review of First Respondent's decision by letter dated 27 August 2013, to suspend First Applicant's Master Class 3 Certificate of Competency;
- (ii) Application for Leave to Apply for Judicial Review filed on 25 September 2013, by the Second Applicant is dismissed with no order as to costs;
- (iii) Cost of the Application between the First Applicant and the Respondents be costs in the cause.




K. Kumar
JUDGE

At Suva

29 April 2016

Patel Sharma & Associates for the Applicants

Siwatibau & Sloan for the Respondents