

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No.: HBC 21 of 2016

BETWEEN : **RATU JOSEVA VATUNITU** aka **RATU JOSEVA SAMUDUNATUA VATUNITU** of Nadi, Businessman, suing in *propia persona* and in a representative capacity for and behalf of other beneficiaries who qualify pursuant to the provisions of the iTaukei Land Trust Act (as amended) and as customary native owners of iTaukei land.

PLAINTIFF

AND : **ITAUKEI LAND TRUST BOARD** established under the iTaukei Land Trust Act (as amended) whose registered office is at Victoria Parade, Suva.

1ST DEFENDANT

AND : **BARTON LIMITED** a limited liability company duly registered under the Companies Act of Fiji and having its registered office at Pricewaterhouse Coopers, 52 Narara Parade, Lautoka.

2ND DEFENDANT

AND : **DUBBO LIMITED**, a limited liability company duly registered under the Companies Act of Fiji and having its registered office at Pricewaterhouse Coopers, 52 Narara Parade, Lautoka.

3RD DEFENDANT

AND: **FARLEIGH LIMITED**, a limited liability company duly registered under the Companies Act of Fiji and having its registered office at Pricewaterhouse Coopers, 52 Narara Parade, Lautoka.

4TH DEFENDANT

Counsel : **Mr. A. Singh with Mr. S.Valenitabua for the Plaintiff**

Ms. Raitamata E for 1st Defendant

Mr. Richard Naidu for the 2nd to 4th Defendants

Date of Hearing : **25th August 2016**

Date of Judgment : **1st September 2016**

JUDGMENT

INTRODUCTION

1. The present application for Constitutional Redress (CR) was filed by way of motion by the Plaintiff seeking discovery of certain facts in terms of Section 44 of the Constitution of the Republic of Fiji (the Constitution). The Plaintiff filed the action against the Defendants by way of Originating Summons and at the hearing of the said Originating Summons an adjournment was sought on the basis of the motion seeking CR was made. The present application is filed in terms of the Section 25 of the Constitution that deals with 'Access to information' contained in the Chapter 2 of the Constitution that enshrine the Bill of Rights. The International Covenant on Civil and Political Rights (ICCPR) Article 19 (2) obliged the states that ratified it make provisions in the domestic law that allows 'everyone' the 'freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers, either orally, in writing'. Fiji has included Right to Access to Information in the Constitution and enabling legislation is being considered and according to the written submission it is currently a Bill before the parliament.

FACTS

2. The Plaintiff filed Originating Summons seeking certain orders including declarations. The issue is regarding the change of certain clauses contained in a 99 year Native Lease granted to the Defendants after entering in to that lease between the 1st Defendant and 2nd and 3rd Defendants.
3. The Plaintiff is a member of a land owning unit whose land was subject to said 99 year lease. He had filed the action seeking relief as a representative of the beneficiaries who are land owners.
4. When the hearing of the Originating Summons was fixed on 11th May, 2016 the present application seeking constitutional redress was filed on 5th May, 2016 and the hearing was vacated and directions were given for the determination of the application for

constitutional redress and the hearing was fixed on 5th August, 2016 and on that date the Plaintiff's counsel sought an adjournment on a personal ground and it was granted and hearing was re-fixed on 25th August, 2016. Again the counsel for the Plaintiff sought adjournment on the identical personal ground, that was stated on 5th August and this application was refused and hearing was conducted, and Mr. Anand Singh who appeared for the Plaintiff, did not make any oral submissions but preferred written submission. The hearing started with the submissions of the counsel for the 2nd to 4th Defendants and directions were given for written submissions. Counsel for the 1st Defendant also sought an adjournment, but this was also not granted. The counsel for 1st Defendant did not make any submission.

5. The above brief history of the proceeding before me is required as the Plaintiff's counsel in the written submission stated that there should be a re-hearing as 'Affidavit not properly admitted ...'. At the hearing Counsel for the Plaintiff said he was not making any oral submissions and at the hearing he only requested an opportunity for written submissions and it was granted. So the said contention is untenable and inaccurate.
6. The constitutional redress was sought by the Plaintiff in pursuant to Section 44 of the Constitution seeking redress for an order for discovery in terms of Section 25 of the Constitution.
7. The present application for CR is filed in this action filed by the Plaintiff by way of Originating Summons. In the affidavit in support of the CR application at paragraphs 27 and 28 indicated that he would be seeking conversion of the Originating Summons application to a Writ of Summons and also seeking leave to file a statement of claim.
8. The Defendants did not file affidavits in opposition but legal objections were taken at the hearing.

ANALYSIS

9. The counsel for the 2nd, 3rd and 4th Defendants took a preliminary objection to the mode of this CR, and stated that it cannot be filed by way of motion and it needs to be only through Originating Motion in a separate action.
10. I do not agree with the said objection. High Court (Constitutional Redress) Rules 2015 deals with the mode of institution of such applications and Rule 3 (1) states as follows;
*3(1) An application to the High Court for redress under section 44(1) of the Constitution may be made by **a motion supported by affidavit-***
 - (a) *Claiming a declaration;*
 - (b) *Praying for an injunction;*
 - (c) *Claiming or praying for such other order as may be appropriate.*
(emphasis added)
11. In terms of the above rule, an application for CR can be instituted by a motion and need not be restricted only to Originating Motion. Though the most common method of invoking jurisdiction in a CR may be through an Originating Motion when the Applicant does not have a pending action relating to the application for CR. But, this will not be the case for every application for CR. There may be instances that the issue relating to CR is a pending matter and it had arisen within an action. In such an action as in this instance, it is not uncommon to file a Motion seeking CR, in the same matter. There may be instances that it would be more appropriate to file such redress within the same action for convenience as well as for efficiency of such application. It would also avoid forum shopping.
12. Considering the circumstances in this case I cannot see any irregularity and or impropriety in the mode of filing a Motion seeking CR in this action, hence the objection relating to the mode of institution of this CR is overruled.
13. The main objection for the Constitutional Redress is the availability of alternate remedy under the Order 24 of the High Court Rules of 1988.

14. The Chapter 2 of the Constitution that deals with Bill of Rights are contained in Sections 6 to 45 of the Constitution. Section 6 of the Constitution relate to the general application of the Chapter 2 and states as follows;

Application

- "6. (1) This Chapter binds the legislative, executive and judicial branches of government at all levels and every person performing the functions of any public office.**
- (2) *The State and every person holding public office must respect, protect, promote and fulfill the rights and freedoms recognized in this Chapter.*
- (3) **A provision of this Chapter binds a natural or legal person, taking into account –**
- (a) *the nature of the right or freedom recognized in that provision; and*
- (b) *the nature of any restraint or duty imposed by that provision.*
- (4) *A legal person has the rights and freedoms recognized in this Chapter, to the extent required by the nature of the right or freedom, and nature of the particular legal person.*
- (5) *The rights and freedoms set out in this Chapter apply according to their tenor and may be limited by –*
- (a) *limitations expressly prescribed, authorized or permitted (whether by or under a written law) in relation to a particular right or freedom in this Chapter;*
- (b) *limitations prescribed or set out in, or authorized or permitted by, other provisions of this Constitution;*
or
- (c) *limitations which are not expressly set out or authorized (whether by or under a written law) in relation to a particular right or freedom in this Chapter, but which are necessary and are prescribed by a law or provided under a law or authorized or permitted by a law or by actions taken under the authority of a law.*
- (6) *Subject to the provisions of this Constitution, this Chapter applies to all laws in force at the commencement of this Constitution.*

(7) *Subject to the provisions of this Constitution, laws made, and administrative and judicial actions taken, after the commencement of this Constitution, are subject to the provisions of this Chapter.*

(8) *To the extent that it is capable of doing so, this Chapter extends to things done or actions taken outside Fiji.”*
(emphasis added)

15. The Section 6(3) of the Constitution binds the natural and legal persons taking in to consideration of two factors and they are the nature of the right or freedom and the restraint on them. Considering the right to access to information contained in the Section 25(1)(b) of the Constitution the Defendants (2)-(4) are not excluded merely because they are not included in Section 6(1) of the Constitution as contended by the counsel for the 2nd to 4th Defendants.

16. The interpretation of this Chapter of the constitution contained in the Section 7 of the Constitution. Any application of CR that deals with the Chapter 2 needs to take in to consideration provisions contained in the Section 7 of the Constitution. Section 7 of the constitution states as follows

“Interpretation of this Chapter

7.—(1) *In addition to complying with section 3, when interpreting and applying this Chapter, a court, tribunal or other authority—*

(a) *must promote the values that underlie a democratic society based on human dignity, equality and freedom; and*

(b) *may, if relevant, consider international law, applicable to the protection of the rights and freedoms in this Chapter.*

(2) *This Chapter does not deny, or prevent the recognition of, any other right or freedom recognised or conferred by common law or written law, except to the extent that it is inconsistent with this Chapter.*

(3) *A law that limits a right or freedom set out in this Chapter is not invalid solely because the law exceeds the limits imposed by this Chapter if the law is reasonably capable of a more restricted*

interpretation that does not exceed those limits, and in that case, the law must be construed in accordance with the more restricted interpretation.

- (4) *When deciding any matter according to common law, a court must apply and, where necessary, develop common law in a manner that respects the rights and freedoms recognised in this Chapter.*
- (5) *In considering the application of this Chapter to any particular law, a court must interpret this Chapter contextually, having regard to the content and consequences of the law, including its impact upon individuals or groups of individuals.*” (emphasis added)

- 17. So in the interpretation of any provision contained in the Chapter 2 of the Constitution should be done in ‘contextually’, and due regards need to be given to the consequences, impact on individuals.
- 18. The present application for CR is made for orders of the court seeking certain information from the Defendants in terms of Section 25 of the Constitution.
- 19. The CR is sought regarding certain declarations and orders in the following terms
 - “(i) A declaration that the failure and or refusal of the Defendants to provide the Plaintiff access to the information.
 - (a) Each of them holds and or
 - (b) Is required by the Plaintiff for the exercise of protection of any legal right, contravened Section 25(1) of the Constitution”.
- 20. The Section 25 of the Constitution states;
 - ‘Access to information*
 - 25. (1) *Every person has the right of access to –*
 - (a) *information held by any public office; and*
 - (b) *information held by another person and required for the exercise of protection of any legal right.*
 - (2) *Every person has the right to the correction or deletion of false or misleading information that affects that person.*

(3) To the extent that it is necessary, a law may limit, or may authorize the limitation of, the rights set out in subsection (1), and may regulate the procedure under which information held by a public office may be made available.'

21. In the interpretation of Section 25 of the Constitution, the Article 19(2) of the ICCPR is relevant. The Article 19(2) of the ICCPR states that 'everyone' shall have the right to freedom of expression, and this right includes 'freedom to seek and receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print,'.
22. The exercise of the Article 19(2) is subjected to the restrictions contained in Article 19(3) of the ICCPR. In the Constitution the restrictive provisions are contained in Section 25(3) but for the implementation of such restrictions domestic legislation is needed. At the moment there are High Court Rules that deals with the scope of discovery.
23. It is trite law that resort to International Law under Chapter 2 of the Constitution can be made when there is a 'gap' in the domestic law. The burden of proof of such a 'gap' is with the party seeking application of CR. In the written submission or affidavit in support does not contain such provision. In contrary the Schedule of Documents had specifically mentioned about Order 24 of High Court Rules relating to items 1, 2, 3, 4 and 5.
24. In any civil action 'discovery' will comprise discovery of facts by interrogatories under Order 26, and discovery of documents under Order 24, of the High Court Rules of 1988. The law and the procedure regarding such discovery are comprehensive and there is substantial amount of case law on this area. The proper discovery is an essential part of proper exercise of justice, as discovery would eliminate an element of surprise at the hearing and also parties would know the strength of their claims based on such discovered evidence. The limitations set out in such discovery are also developed over time, through decided cases

25. Why the Plaintiff did not exercise this avenue of discovery in terms of High Court Rules of 1988, when it was available is not explained. It should also be noted that neither in the hearing nor in the written submissions this was addressed. The Plaintiff has to satisfy the existing provisions are not adequate for the discovery before seeking redress under the Constitution for his right to information. In any pending civil litigation there are adequate provisions under discovery for inspection as well as for specific discovery. If this is not adequate it should be explained, and or first it should be explored by way of an application to court for discovery.
26. When there is a 'gap' in the law contained in the Chapter 2 –Bill of Rights and the domestic law, CR can address such lacuna by application of relevant provision from International Law, but for this there should be a need. If not the CR process could be abused.
27. In order to prevent the abuse of CR under Chapter 2 of the Constitution Section 44 grants discretion to the court to reject a CR when there is alternate remedy
28. Section 44 of the Constitution states –

Enforcement

'44(1) If a person considers that nay of the provisions of this Chapter has been or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, in another person considers that there has been, or is likely to be, a contravention in relation to the detained person), then that person (or the other person) may apply to the High Court for redress.

(2) The right to make application to the High Court under subsection (1) is without prejudice to any other action with respect to the matter that the person concerned may have.

(3)The High Court has original jurisdiction –

- (a) to hear and determine applications under subsection (1);*
and
- (b) to determine questions that are referred to it under subsection (5) and may make such orders and give such directions as it considers appropriate.*

(4) The High Court may exercise its discretion not to grant relief in relation to an application or referral made under this section if considers that an adequate alternative remedy is available to the person concerned

(5)..... '(emphasis added)

29. Section 44 of the Constitution gives discretion to dismiss application for constitutional redress when alternate remedy is available.
30. In *Singh v Director of Public Prosecutions* [2004] FJCA 37; AAU0037.2003S (16 July 2004) Fiji Court of Appeal while addressing the issue of availability of the alternate remedy stated¹
- “We note that the Privy Council is consistently laid down that where an adequate alternative remedy is available then constitutional redress will be refused. It has regarded an application for constitutional relief in these circumstances as an abuse of process and as being subversive of the Rule of Law which the Constitution is designed to uphold and protect.”*
31. Fiji Court of Appeal has thus adopted the position of the Privy Council regarding the constitutional redress applications and held that where there is adequate alternative remedy the request is denied.
32. In the *Singh* (supra) Fiji Court of Appeal under ‘Our Consideration..’ said
- ‘..... contention that the Appellant is entitled to seek constitutional redress irrespective of the criminal prosecution which has been brought against him is contrary to the principles laid down by the Privy Council. The Appellant has an adequate alternative remedy. The Application for constitutional redress is a collateral proceeding.*
33. There is no reason given for not exercising said alternate remedy and also any reason as to the inadequateness of the prevailing discovery process to obtain the information sought. It would be premature at this stage to exercise constitutional remedy considering

¹ 41(4) of the 1997 Constitution is analogous to the Section 44 of Constitution (2013)

the nature of the discovery sought. The discovery sought can be narrowed down using appropriate discovery process. For example interrogatories can be helpful to discover certain facts, before seeking discovery of those facts. The existence of those facts, may be relevant for specific discovery

34. In the Singh (supra) Fiji Court of Appeal further stated

'..the Appellant's contention that the Constitution is the supreme law and overrides the existing law is fallacious. It fails to take into account the context in which the constitution, particularly Chapter 4², should be interpreted. When possible the interpretation adopted must be one which leads to the co-existence of existing law (including the common law) with the provisions of the Constitution. That has been the approach consistently adopted by the Privy Council.' (footnote added)

35. In the written submissions filed by the Plaintiff substantive part is devoted to the supremacy of the constitution than replying to the objections raised by the counsel for 2nd - 4th Defendants. I do not think that I need to deal with the said submissions of the Plaintiff considering the above quoted passage from the decision of the Fiji Court of Appeal.

36. In the written submission the Plaintiff while replying to the objections stated that, Singh (supra) has no application as it was a criminal case. This cannot be accepted, as the ratio of the said case is equally applicable to any application for CR. The ratio of the said Fiji Court of Appeal case decision is that when there is adequate alternative remedy it should be exercised before seeking CR.

37. The Court of Appeal went on, Singh (supra) as follows;

'In Harrikisson v Attorney General of Trinidad and Tabago [1979]3 WLR 62, the Appellant was transferred in his employment without the required 3 months notice. Instead of availing himself of the review procedure available in the Regulations, the Appeal applied to the High

² In 1997 Constitution the Chapter 4 dealt with the Bill of Rights. (presently Bill of Rights contained in Chapter 2 of the Constitution.

Court for constitutional redress. He sought a declaration that his rights had been violated. He was unsuccessful in the High Court, the Court of Appeal and the Privy Council. In delivering the opinion of their Lordships, Lord Diplock said at p.64;

*The right to apply to the High Court under [the relevant section 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 vale 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 the [the relevant section], **the mere allegation that a human right or fundamental freedom of the applicant has been or [is] likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection 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.** [emphasis added]*


38. So the position in Fiji, as set out in the Fiji Court of Appeal, is that when there is an alternate remedy it should be exercised and if not the CR can be dismissed in the exercise of the discretion contained in the Section 44(4) of the Constitution.
39. The Affidavit in support at paragraphs 27 and 28 sworn that the present civil action filed by way of Originating Summons would be converted in to a Writ of Summons and also leave would be sought to file a separate Statement of Claim. In such an instance discovery under Order 24 of the High Court Rules of 1988 can be exercised after the close of pleadings. Since the Plaintiff desired this action to convert in to a Writ of Summons and a filing of a Statement of Claim it should be done and this application for CR is premature. The application is struck off. Cost in the cause.

FINAL ORDERS

- a. The application for constitutional redress is refused.
- b. The cost of this application will be cost in the cause.

Dated at Suva this 1st day of September, 2016




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Justice Deepthi Amaratunga
High Court, Suva