IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No.HBM 31 of 2018

IN THE MATER of an application for redress under Section 44 of the Constitution

IN THE MATTER of the purported (sic) repeal of the Motor Vehicles (Third Party Insurance) Act 1948 [Cap.177] by the Accident Compensation Act 2017 (Act No.40 of 2017)

BETWEEN	:	SUN INSURANCE COMPANY LIMITED
		PLAINTIFF
AND	:	ATTORNEY GENERAL
		DEFENDANT
Coram	:	The Hon. Mr Justice David Alfred
Counsel	:	Mr J Moti Q.C and Mr A. Narayan Sr, for the Plaintiff
	:	Mr S Sharma, Solicitor General, Ms B. Narayan, Ms O. Solimailagi and Mr D. Sokalu for the Defendant
Dates of Hearing	:	13 and 16 April 2018
Date of Judgment	:	25 April 2018

JUDGMENT

Once again I am tasked with the interpretation of constitutional provisions. Once again I shall cut the Gordian knot, not with the sword of Alexander but with the pen of a judge. The matter at hand, if it proceeds to a full determination will involve a consideration of the doctrine of the separation of powers, which Fiji, as a functioning democracy, applies. In essence this provides for 3 separate branches of government viz the legislative, the executive and the judicial branches. The Constitution, the supreme law of the State sets down the province of each branch.

In this judgment a reference to a section without more is a reference to that section in the Constitution.

1. This is the Plaintiff's Motion seeking the following redress:

   (1) A Declaration that the Plaintiff is a "person" entitled under section 44(1) of the Constitution, to apply to this Court for "redress" for "contravention" of the provisions of:

   (a) Section 27(1), and

   (b) Section 26(1) and (2)

   (2) A Declaration that the repeal of the Motor Vehicles (Third Party Insurance) Act 1948 (CTP Act) and the Motor Vehicles (Third Party Insurance) Regulations 1949 (CTP Regulations) by section 31 of the Accident Compensation Act 2017 (AC Act) and resulting in:

   (i) The extinction (with operative date from 1 January 2018) of the business which the Plaintiff undertook under the CTP Act and the CTP Regulations and conducted since 2000 (CTP Insurance Business).

   (ii) The creation and operation of substantively that same business as a statutory monopoly in terms of the AC Act.

   (iii) The uncompensated deprivation by the State of the Plaintiff's property in the CTP Insurance Business.

   (iv) The arbitrary acquisition or expropriation of the Plaintiff's proprietary business in its CTP Insurance Business

   contravened section 27(1).

(3) A Declaration that the repeal of the CTP Act and the CTP Regulations effected by s.31 of the AC Act contravened s.26(1) and (2) by abrogating the Plaintiff's rights to equality and equal protection, treatment and benefit of the law when the AC Act:

(i) Was enacted by Parliament without:

(a) prior, proper, meaningful and effective consultation with the Applicant (sic) contrary to the Attorney-General's previous statement of assurance; and

(b) any opportunity for public participation in the legislative and other processes of Parliament and its committees contrary to s.72(1)(b);

(ii) resulted in :

(a) The (arbitrary and/or uncompensated) extinction of the Plaintiff's CTP Insurance Business.

[At the hearing on 16 April 2018, Mr Narayan withdrew the Declaration 3 para (2)(b) of the Motion].

(4) Payment by the Defendant of vindicatory and/or compensatory damages to the Plaintiff.

2. The Motion which was filed on 28 February 2018, is supported by the affidavit of Lolesh K Sharma (Sharma).

3. The Defendant filed a Summons to Strike Out seeking an Order that the Plaintiff's application for constitutional redress be struck out under Order 18 rule 18(1)(a), (b) and (d) of the High Court Rules (HCR) and under the inherent jurisdiction of the Court on the following grounds:

(i) It discloses no reasonable cause of action.

(ii) It is time barred pursuant to r 3(2) of the High Court (Constitutional Redress) Rules 2015 (CRR).

(iii) It is frivolous or vexatious; or

(iv) It is otherwise an abuse of the process of the Court.

And on the following grounds:

(i) Pursuant to r 3(2) of the CCR, the Plaintiff's application was instituted outside the prescribed statutory time period; and

(ii) Pursuant to s.44(4), the Plaintiff has an adequate alternative remedy available to seek the relief sought in paras (3) and (4) of the Motion.

4. The Defendant relies on the sworn affidavit of Faizul Ariff Ali (Ali).

5. The hearing commenced with the leading Counsel for the Plaintiff informing that he had an application to exclude Ali's affidavit, which the Solicitor informed took him by surprise. Mr Moti said he relied on s.15(12) and s.163(1). Mr Narayan said Mr Ali is not a party to these proceedings and his affidavit should be excluded on common law principles.

6. Ms Narayan of Counsel for the Defendant said they had not received any letter from the Plaintiff's solicitors on this point and submitted that Mr Ali was authorized to affirm his affidavit on behalf of the State.

7. After hearing arguments from Counsel on both sides I had to make a ruling on whether Ali's affidavit could be admitted as evidence in these proceedings. After considering the matter, I delivered the following Ruling.

RULING

(1) S.15(12) of the Constitution says evidence obtained in a manner that infringes any right in this Chapter or any other law must be excluded unless the interests of justice require it to be admitted. The right that has allegedly been infringed is contained in s.19(1) of

the Reserve Bank of Fiji Act. A perusal of this sub-section impels me to conclude that it does not have the current situation within its ambit. This is further fortified by sub-section (2) that provides for a fine not exceeding $200 if a person is guilty of an offence. Clearly the intention of Parliament was aimed at a criminal perspective and not a civil one.

(2) Further the learned Chief Justice, Gates J as he then was, wrote in his paper entitled "Affidavits" in para 3.4 that "the solicitor verifies the authorization himself by inquiry". Here I am satisfied the Attorney General's Chambers have satisfied this requirement by the statement, I may say assertion, that "The Defendant intends to read and rely on the sworn affidavit of Faizul Ariff Ali, filed in support of this Summons".

(3) Finally in reaching my decision I have been fortified by the requirement imposed by the promulgators of the Constitution that such evidence cannot be excluded if the interests of justice require it to be admitted.

(4) Accordingly, the Plaintiff's oral application to exclude the affidavit of Faizul Ariff Ali is not granted and consequently his affidavit is admitted in these proceedings.

8. With that out of the way, the Solicitor commenced his oral submissions on the striking out summons. He was relying on r 3(2) of the CRR. He said the AC Act had been enacted on 14 July 2017, assented to on the same day and gazetted on 18 July 2018. The Plaintiff was aware of and consulted before the Bill. The Plaintiff wanted to transfer all its responsibilities to the State. The commencement date was gazetted on 15 August 2017. The 15th August 2017 was the commencement date for some sections of the Act, and 1 January 2018 for the remainder of the Act. The Regulations were gazetted on 29 November 2017.

9. The Solicitor submitted that the 14th July 2017 or 15 August 2017 was the starting point for the 60 days. The Plaintiff had knowledge of the law and of its interest by providing input and entering into a Memorandum of Understanding (MOU) in February 2018. Discussions were entered into in November 2017. The Plaintiff's application was filed in

February 2018 when the Act was fully operational and was out of time. It also did not disclose any reasonable cause of action.

10. Mr Moti now submitted. He said the Plaintiff has not breached rule 3(2) CRR. The AC Act by s.31(1) which repealed the 1948 Act came into force on 1 January 2018 and therefore the Plaintiff had filed its motion within 60 days thereafter. The 60 days came to an end on 2 March 2018. Everything under the 1948 Act came to an end on 1 January 2018. The onus is on the Plaintiff to show the period commences on the date of repeal but he had no decided case authority on this point. He said the commencement date is 1 January 2018. The public interest was not affected as the Plaintiff is not seeking annulment of the Act but only damages.

11. Mr Moti then submitted on the exceptional circumstances and that it was just to hear the application outside of the period. The Plaintiff was negotiating since 29 November 2017 and the agreement was signed on 12 February 2018 on the transfer of business.

12. The Solicitor in his reply said the Plaintiff was fully aware that on 1 January 2018 the (1948) Act would be repealed and would have been fully aware, of this date, on 14 July, 18 July or 15 August 2017. The Plaintiff was fully aware and divested their existing property and transferred their insurance business. The Solicitor said there were no exceptional circumstances.

13. His co-Counsel, Ms Narayan concluded by saying the words likely to be contravened relates to when the Plaintiff realized its rights were likely be contravened and she referred to paras 38 and 40 of Sharma's affidavit.

14. At the conclusion of the arguments I said I would take time for consideration. Having done so I now deliver my decision. At the outset I shall state quite explicitly that at this juncture I am only called upon to decide whether or not I should allow the Defendant's

Summons to strike out. Only if I do not allow that, will the Plaintiff's Motion proceed to a full hearing. My duty is to interpret relevant provisions of the Constitution and rule 3(2) of the CRR. The issues canvassed and the questions ventilated here appear not to have been explored in the Courts of Fiji.

15. The lodestar for me in this matter is the decision of the Privy Council in: Attorney General of Fiji AND Director of Public Prosecutions [1983] 2 A.C. 682. Lord, Fraser of Tullybelton delivering the advice of the Board to Her Majesty The Queen of Fiji accepted the well-known passage in Minister of Home Affairs v. Fisher [1980] A.C. 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".
He went on to say "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"

16. As "sui generis" means "of its own kind; the only one of its kind" this will be an exercise which requires the Court to discern the plain meaning of the words in the sections and rules concerned. I shall be referring, accordingly to the Oxford Advanced Dictionary of Current English.

17. I shall start with s.44(1)
There are 2 discrete situations envisaged here because I consider "or" after "been" to be disjunctive and not conjunctive. The first is a person's constitutional right has been contravened. It has already happened.
The second is the person's right is "likely", to be contravened. This will be in the future. "Likely means "that is expected "or" to be expected". "Contravened" means "to go

against (a law)". So applying the applicable words in the section to the present situation, the Plaintiff should have applied to the High Court for redress as soon as it became aware that the AC Act was expected and that to the Plaintiff, the Act would go against s.27 of the Constitution. That in my view would have been as early as the date of enactment i.e. 14 July 2017 and to err on the side of caution the date it was gazetted i.e. 18 July 2017. It would stretch credulity to breaking point if it can be seriously contented for the Plaintiff that it was not aware, at least by the later date of something that was by then in the public domain.

18. The Plaintiff by the later date should have been or actually was cognizant that the Act would allegedly contravene its rights in the future. But it did nothing for the 60 days thereafter, thus allowing r.3(2) of the CRR to take effect. The source of the CRR, is s.44(10) which provides that the Chief Justice may make rules for the purposes of this section including the time within which applications are to be made to the High Court.

19. I turn now to r 3(2). At first blush it appears to close the door to applying for constitutional redress, for it uses the words "must not be admitted or entertained after 60 days from the date when the matter at issue first arose". There is no difficulty about what "admitted" means. What does "entertain" mean? It means "be ready to consider". And "the date when the matter at issue first arose"?. This I have already opined is 14 or 18 July 2018.

20. So, putting s.44(1) and r.3(2) together, the legal or constitutional arrangement is there for all to see and I shall paraphrase it as follows: If a person becomes aware that his rights are expected to be contravened in the future, he must within 60 days of first becoming aware of this, apply to the High Court for constitutional redress. The period of 60 days starts to run from the date when he first became aware of an expected future contravention of his rights. In my view, this must necessarily be so, for the maxim of public policy is.

"Ignorance of the law which everybody is supposed to know does not afford excuse" (Osborn's Concise Law Dictionary).

21. But if the door is closed at the end of 60 days it can be opened if I find there are exceptional circumstances and that it is just to hear this application. This entails my deciding the Summons while observing both the letter of the law and the spirit of the law. It is this that Shakespeare's Portia achieved with elan in dealing with the case of the Merchant of Venice.

22. Thus it is incumbent upon the Plaintiff to show there are exceptional circumstances and that it is just that I hear this application. I find that the Plaintiff has failed to provide any cogent evidence of any such exceptional circumstances. On the contrary the evidence provided points in the opposite direction. For instance Sharma's affidavit's paras 34,35 and 36 make it crystal clear that the Plaintiff was fully aware that the AC Act had been passed and assented to on 14 July 2017 and gazetted on 14 July 2017 (sic). Then Annexure LKS 42 show that Sharma was on 17 July 2017 informing the media that the Plaintiff's revenue through third party insurance would decline by about $4.5 million a year because of "the setting up of the Accident Compensation Commission after the passing of the bill in Parliament last week".

23. If I may say so with respect the Plaintiff was indeed out of time but failed to take steps to avoid the inevitable outcome of such, and instead chose to indulge in a disquisition which rather appeared to resemble an academic dissertation on what the legal position might or ought to be rather than what it was.

24. It was in the interest of the Plaintiff to bridge the wide gap between the end of the 60 day period and the end of February 2018 but this the Plaintiff singularly failed to do. Consequently in the face of an unbridged gap the Motion could not move any further.

25. Having decided as I have done, the working of r.3(2) precludes me considering this matter any further, because on the totality of the evidence of both sides and the submissions of Counsel I am unable to hold that it is just for me to hear this application.

26. Before I pronounce my judgment I have the following comments to make regarding costs. Generally I am reluctant to order an unsuccessful supplicant for constitutional redress to pay costs, believing costs should not be an impediment to a supplicant seeking unhindered access to justice. Here, however, the circumstances are such that I am constrained to follow the norm that costs follow the event.

27. In the result I make the following orders:

(1) The Defendant's submission to strike out the motion is allowed.

(2) The Plaintiff's Motion is dismissed.

(3) The Plaintiff is to pay the costs of this matter, summarily assessed at $2,000 to the Defendant.

Delivered at Suva this 25th day of April 2018.

HIGH COURT OF FIJI
SUVA

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David Alfred

JUDGE

High Court of Fiji