

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBM 137 of 2018

BETWEEN : **THE PROCEEDING COMMISSIONER** on behalf of **JOSEUA LALAUVAKI** of Kuiva Village, Tailevu

FIRST APPLICANT

AND : **THE PROCEEDING COMMISSIONER** on behalf of **HUMAN RIGHTS AND ANTI-DISCRIMINATION COMMISSION** of level 2, Naibati House, 8 Goodenough Street, Suva.

SECOND APPLICANT

AND : **THE ATTORNEY-GENERAL OF FIJI** of Level 7, Sovayou House, Victoria Parade, Suva, Fiji.

FIRST DEFENDANT

AND : **THE COMMISSIONER OF THE FIJI POLICE FORCE** of Vinod Patel Building, Ratu Dovi Road Suva, Fiji.

SECOND DEFENDANT

Counsel : **Applicant:** Mr. Vanamalagi R
Defendant: Ms. Tankei S and Ms. Chand S.

Date of Hearing : 27 February, 2019

Date of Judgment : 11 April, 2019

JUDGMENT

INTRODUCTION

1. This is an application for constitutional redress instituted by 2nd Applicant on behalf of a deceased against Defendants for declarations relating to violations of right to life, torture,

and unlawful arrest. The alleged incident happened on 2.9.2018 and the victim died on 11.10.2018. The constitutional redress is sought in terms of Section 44(1) (d) of the Constitution of the Republic of Fiji. (Constitution) Jurisdiction is conferred in Section 44(3) of the Constitution and this is exercised by single judge of the High Court in terms of Rule 2 of High Court (Constitutional Redress) Rules of 2015. This application is made by 2nd Applicant pursuant to Sections 38(1) of Human Rights and Anti-Discrimination Act, 2009. Applicants allege that Police had assaulted the deceased and he had succumbed to the injuries from the assault. There is a criminal action filed against the Police officers but it had not concluded.

FACTS

2. The Applicants filed an application for constitutional redress, by way of a Notice of Motion and Affidavit of an assistant investigating officer of the Second Plaintiff, in support on 23.11. 2018.
3. The Application is made pursuant to Sections 8, 11(1) 13(1)(a)(i), 45(4)(e) of the Constitution and sections 38(1) 38(2), 40(1), 40(2) and 41(1)(d) of the Human Rights and Anti-Discrimination Act 2009 and the inherent jurisdiction and High Court (Constitutional Redress) Rules of 2015.
4. This Application seeks the following declarations and orders:
 - (i) A declaration that the first Applicant late Joseua Lalauvaki's Constitutional Right to Life under Section 8 of the Constitution was violated and breached by the Second Respondent and or his its employees, servants or agents leading to his demise thereof.
 - (ii) A declaration that the First Applicant late Joseua Lalauvaki's Constitutional Right to Freedom from Cruel and Degrading Treatment under Section 11(1) of the Constitution was violated and breached by the Second Respondent and employees, servants or agents leading to his demise thereof.
 - (iii) A declaration that the First Applicant late Joseua Lalauvaki's Constitutional Right of Arrested and Detained Persons under Section 13(1)(a)(i) of the Constitution was violated and breached by the Second Respondent and or its employees, servants or agents;

(iv) An order for the Respondents to pay damages for:

- (a) Humiliation, loss of dignity and injury to feeling under section 4(1)(d) of the Human Rights and Anti-Discrimination Act 2009;
- (b) Loss of life; and
- (c) Such other damages as the High Court thinks fit.

5. The Respondents did not file any affidavit in response to the affidavit in support filed by the assistant investigating officer of 2nd Applicant but filed summons seeking strike out of the application *in limine* for abuse of the process and non-compliance of High Court (Constitutional Redress) Rules of 2015 and High Court Rules of 1988.
6. Counsel for Respondents raised same reasons stated in the summons for strike out as preliminary objections to this Constitutional Redress, at the hearing.

ANALYSIS

7. The Defendants raised an objection that Applicant had not complied with Order 15 rule 17(1) of the High Court Rules 1988 which states -

"where in any proceedings it appears to the Court that a deceased person was interested in the matter in question in the proceedings and that he has no personal representatives, the Court may, on the application of any party of the proceedings, in the absence of a person representing the estate of the deceased person or may by order appoint a person to represent that estate for the purposes of the proceedings, and any such order, any judgment or order subsequently given or made in the proceedings, shall bind the estate of the deceased person to the same extent as it would have been bound had a personal representative of that person been a party to the proceedings." (Emphasis added)

8. High Court (Constitutional Redress) Rules of 2015 Rule 7 states that in an application for Constitutional Redress needs to comply with High Court Rules of 1988, with any variations of that, if required.
9. The Respondents contend that the Application was not in compliance with Order 15 rule 17(1) of the High Court Rules of 1988, and Proceeding Commissioner is attempting to represent a dead person as first applicant without compliance with said rule.
10. Even after raising this objection, no steps were taken to remedy the irregularity. Since there is a claim for damages it is imperative to comply with said provision of law and without that no order can be granted for damages.

11. Notice of Motion filed on 23.11. 2018 stated that the application was made pursuant to Articles 8, 11(1), 13(a)(i), 45(4)(e) of the Constitution of the Republic of Fiji and sections 38(1)(2), 40(1)(2) and 41(1)(d) of the Human Rights and Anti-Discrimination Act 2009 and the inherent jurisdiction of this Honourable Court.
12. Civil Proceeding in High Court lie at the suit of the second Applicant in terms of Section 38 (1) Human Rights and Anti-Discrimination Act 2009. In terms of the said provision second Applicant can institute an action in High Court seeking Constitutional Redress for any breach of Bill of Rights contained in the Constitution.
13. When such an application is made the Application can seek damages in terms of Section 41(1) (d) Human Rights and Anti-Discrimination Act 2009.
14. The objection raised by counsel for Defendant is noncompliance of Order 15 rule 17(1) of High Court Rules of 1988. First Applicant cannot be made a party without compliance of Order 15 rule 17(1) of High Court Rules of 1988. In terms of Order 15 rule 17(2) of High Court Rules of 1988 it is required to give notice of such appointment in terms of Order 15 rule 17(1) of High Court Rules of 1988, to all person interested in the estate of dead person. So, in order to seek damages on behalf of a dead person compliance of said provision is required, and accordingly objection is upheld and first Applicant is struck off for non-compliance of Order 15 rule 17(1) of High Court Rules of 1988.
15. Nevertheless, Second Applicant can institute an action seeking constitutional redress and also make submissions in terms of Section 38(1) of Anti-Discrimination Act 2009, after an investigation. So irrespective of striking off of the First Applicant, this matter can proceed, in respect of the declaration sought.
16. In the affidavit in support of the assistant investigation officer of 2nd Applicant is stated an investigation was conducted as to cause of death of late Joseua Lalauvaki and accordingly this action was instituted.
17. An application for Constitutional Redress under Bill of Rights contained in the Constitution, in terms of Section 44(1) of Constitution, is made in terms of Rule 3 of High Court (Constitutional Redress) Rules of 2015.
18. Applicants are seeking damages for alleged breaches conducted by the Police. In the light of that it is imperative that late Joseua Lalauvaki's estate is made a party to the action or comply with Order 15 rule 17 of High Court Rules of 1988. In the absence of that 1st Applicant is struck off from the application, but this will not result striking off of the

action as it will not affect Second Applicant who may bring an action seeking constitutional redress on its own.

19. Second Applicant, had sought damages for alleged infringement in terms of Section 41(1) of Anti-Discrimination Act 2009. This can be done if the victim was living, by that person or when the victim is dead, through estate of the deceased or seeking an appointment of personal representation.
20. The Applicant are alleging that late Joseua Lalauvaki's rights under the Constitution have been breached and they are following sections of the Constitution,
 - i) the right to life pursuant to section 8;
 - ii) the right to freedom from cruel and degrading treatment pursuant to section 11(1); and
 - iii) the right of arrested and detained persons pursuant to section 13(1)(a)(i).
21. Alleged infringements and assault was on 2.9.2018. There is only one affidavit in support of this application and that is from an assistant investigation officer and to this, the death certificate is annexed. Death certificate indicate the date of death as 11.10.2018. There is no evidence to support the allegation of assault other than the affidavit of assistant investigating officer.
22. According to death certificate cause of death is due to blunt force trauma. This alone is not sufficient to come to a conclusion as to infringement of Right to Life a person guaranteed under Constitution. This only support that death was due to a blunt force.
23. The affidavit in support of assistant investigation officer at paragraph 3 stated that his investigations in the matter revealed the facts that he had alleged from paragraph 4 onwards.
24. The deponent had not even divulged his source of information as to the facts alleged in the affidavit. In such a situation how could the Respondent reply or deny the facts stated.
25. It is trite law that affidavit should only contain facts which that person perceived. (See Order 41 rule 5(1) of the High Court Rules of 1988). In an interlocutory application a person can depose as to the facts which he believes with the source. The affidavit in support contains facts that assistant investigator depose, but he had even failed to divulge the source. This is a requirement when the affidavit relates to an interlocutory application. The relief sought in this Constitutional Redress is not interlocutory and it is

- final relief and even divulging source of information) is not sufficient to prove facts on balance of probability.
26. Section 43 of Human Rights and Anti-Discrimination Commission Act, 2009 allows a court to disregard technicalities and consider the merits of the matter, but that cannot be extended to accept any evidence in whatever the form it is presented.
 27. Section 43 of Human Rights and Anti-Discrimination Commission Act, 2009 can be utilized to allow certain types of evidence which is not allowed in court, when there is no option available to adduce such facts by way of evidence in compliance with the rules of evidence. This provision cannot be invoked for any type of non-compliance when such evidence can be easily obtained. If there is a difficulty in obtaining any evidence and or compliance of rules of evidence that should be clearly stated, too. In this case there is none.
 28. Constitutional Redress is a final relief sought and not an interlocutory application hence compliance of Order 41 rule 5(1) is required, and if there is some impediment not to comply that should be stated or evident from the facts of the case and there is no such reasons either stated and or evident to deviate from rules of evidence to apply Section 43 of Human Rights and Anti-Discrimination Commission Act, 2009.
 29. So the affidavit in support of the constitutional redress is be struck off *in limine* for non-compliance of rules of evidence as it had failed to prove the facts of assault to deceased by Police, on balance of probability in terms of Section 40(2) of Human Rights and Anti-Discrimination Commission Act, 2009 and accordingly the application is struck off.
 30. Even if I am wrong, there is an alternative remedy for aggrieved party. It is more appropriate, where oral evidence can be adduced. A properly instituted action by personal representative or estate of deceased can claim damages in such action, which is dealt more detailed later.
 31. The Respondents submit that when facts are in contention the correct way of instituting proceedings is by way of a Writ of Summons rather than a Notice of Motion, This is pursuant to Order 5 Rule 2 (a) and or (c) of the High Court Rules of 1998.
 32. In Makario Anisimai v State Civil Action 35D of 2004S Jitoko J stated:

"The use by the Applicant of Motion or Originating Summons to seek declarations from this Court in which there are clearly disputes as to facts is clearly an abuse of the Court process. This process is usually for the

determination of a legal issue without contested evidence. This action should be by Writ of Summons. But in the end, it is obvious that the Applicants effort through filing of a Motion to establish this breach of his rights cannot be done by Affidavit evidence alone ... I have no alternative but to dismiss this application."

33. Silatolu v State [2007] FLR 80 held (Per Pathik J) -

"In recent past the Courts have been inundated with constitutional redress applications particularly under s41(1).

A good number of these applications (listed here) were made when alternative remedies were still available to the applicants and as a result upon applications made by Respondents they were struck out or dismissed and this is one such case: [Lasarusu Rakula v The Attorney General of Fiji & The Director of Public Prosecutions - Miscellaneous Case No. HBM 63D of 2004 - Jitoko J; Aliyaz Ali v State - Civil Action No. HBM 79 of 2004 - Jiten Singh J; Elike Lasarusu v State - Civil Action No. HBM 27D of 2005 - Jitoko J; Josefa Nata v Director of Public Prosecutions & State - Civil Action No. HBM 35 of 2005 - Jiten Singh J.]

Further held,

In the instant case it is my view that procedure by way of writ of summons if applicable would have been more appropriate to the concerns raised by the applicant rather than by Motion and Affidavit for constitutional redress. (emphasis added)

34. In the said case an affidavit was filed by the witness of the fact, but the court had held that more appropriate mode is writ of summons considering the circumstances of the case. When there is only an affidavit from investigating officer without a good reason for not filing an affidavit from the witnesses it is more appropriate to test the truth, by adducing best available evidence. The allegations are serious and that is also a reason for doing so.
35. In Silatolu v State [2007] FLR80 there were no affidavits in opposition filed but it was contended that considering the nature of allegations, it is more appropriate to file a writ action and the court struck off the action. In the said case the court had relied on the section 44(4) of the then constitution (which is identical to Section 44(4) of the Constitution) that provides dismissal of Constitutional Redress where alternative action prevailed.

36. Section 44(4) of the Constitution states:

*"The High Court may exercise its discretion not to grant relief in relation to an application or referral made to it under this section if it considers that an adequate alternative remedy is available to the person concerned."*¹ (emphasis added)

37. Second Applicant is alleging that officers of Police had violated certain rights of deceased person including and not limiting his right to life. There is a pending criminal action against several officers of Police regarding this incident. The criminal action had not commenced and Constitution guarantees right to remain silent including, not to be compelled to give self-incriminating evidence, in Bill of Rights in terms of Section 14 (2) (J) of the Constitution.

38. First Applicant allegedly seeking relief on behalf of the deceased, for damages.

39. If the Respondents replied to the allegations contained in the affidavit in support, it is inevitable that the Police officers who were already charged in the Criminal Action for alleged criminal offences involving deceased, needs to swear affidavits as to the facts and circumstances.

40. In a Australian High Court decision of Commissioner of the Australian Federal Police v Zhao [2015] HCA 5 ;[2015] HCA 5 (12 February 2015) it was held that allowing an accused to swear affidavit as to the facts would violate right to silence. In the said action there was no statutory provision in Australian statute that allowed such proceeding despite criminal action. This position was also held, in another Australian case of Lee v New South Wales Crime Commission [2013] HCA 39 (9 October 2013)

41. The Applicants have not provided any evidence to show the nexus between the alleged assault on 2 September 2018 and the death of the late Lalauvaki on 11 October 2018. There has not been finding that the death of late Lalauvaki was the result of the alleged assault by the officers of the Second Respondent. The matter pertaining to the allegations of assault against the officers of the Second Respondent is currently before the Criminal division of High Court, pending trial. The prejudice to accused in the criminal action is also one ground to exercise the discretion granted in the Section 44(4) of the Constitution, since there is an adequate alternate remedy, for aggrieved party. There is no provision in Human Rights and Anti-Discrimination Act, 2009 that allows proceeding when Criminal Action is pending before court.

42. In Application for constitutional redress by Josefa Nata, [2006] FJHC 139 Jiten Singh J held,

¹ Section 44(4) of the Constitution is identical to the constitution that prevailed in 2007.

*"Section 41(4) of the Constitution provides that a Court may refuse to grant relief if adequate alternative remedy is available to the person concerned". The Redress Rules do not provide for a parallel procedure to be invoked where alternative remedy is available. To use the Constitutional Redress process as a substitute for normal procedure is to devalue the utility of this Constitutional remedy. Mere allegation of constitutional breach was insufficient to invoke this remedy — **Harikisoon v. Attorney General** — 1979 3 WLR 62 "*

43. There is a discretion granted to court to dismiss Constitutional Redress application when there is alternate action. **Harikisoon v. Attorney General** — 1979 3 WLR 62 (Privy Council) Lord Diplock held that if it is apparent that Constitutional Redress, was sought *inter alia*, in order to avoid the 'normal way for appropriate remedy' it can be dismissed. This was case where there was no provision analogous to Section 44(4) of the Constitution where express discretion is granted to the court to dismiss Constitutional Redress when there is an alternate remedy.
44. Section 44(4) of the Constitution does not preclude Constitutional Redress whenever an alternate remedy is available, but it grants a discretion to court to exercise considering the circumstances of the case. Constitutional Redress should not be utilized as to deny due process of law under normal way of litigation. It is not a short cut or means to prevent due ventilation of issues though oral as well as documentary evidence of the alleged arrest and assault through witnesses. There is no reason stated in the affidavit in support, that such a procedure is inappropriate or impracticable in this instance. If an even if there is an alternate remedy, an application for Constitutional Redress can proceed. So the discretion granted in Section 44(4) of the Constitution needs to be exercised considering all the circumstances of the case. (See *A-G of Trinidad and Tobago v McLeod* (1984) 1 WLR 522; *Boodram v A.G* (1996) AC 842; *DPP vs Tokaj* (1996) AC 856).
45. *In Re Application Aiyaz Ali* [2005] FJHC 255; HBM0079,2004. (29 August 2005) The Court set out:

"An isolated incident of assault is an offence under the Penal Code and may also be subject of damages in tort. To elevate these under the evocative banner of abuse of human rights is to really abuse of process. The Redress Rules do not provide a parallel process where other remedies are available. 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 by-pass existing mechanisms in law. Section 41 of the Constitution is not an Alladin's cave which contains all the remedies for all

the ills and the Redress Rules the magical words "open sesame" which are keys to those remedies.

Section 41(4) of the Constitution endorses my above remarks and provides that the court may refuse to grant relief if "adequate alternative remedy" is available to the person concerned. In the present case the applicant has following alternative remedies available to him.

(a) Complain to police about assault

(b) File writ in Magistrate Court for damages for his injuries which are minor.

(c) Additionally there are the provisions of the Prisons Act Cap 86." (Emphasis is ours).

46. Constitutional Redress is not suitable for the resolution of disputed facts regarding a death of a person, ahead of a criminal trial in relation to the charges relating to death. (see Abhay Kumar Singh v The Director of Public Prosecutions & The Attorney General unreported Cr App No AAU0037 of 2003S; 16 July 2004). Court of Appeal held, an application for constitutional redress on questions of disputed facts ahead of a scheduled criminal that will fragment the criminal process and will delay it.
47. The Applicants allege that late Lalauvaki was assaulted at the time of arrest and thereafter he passed away more than a month later on 11.10. 2018 at the CWM Hospital. However, the Applicant has not adduced any evidence of this allegation in their Affidavit in Support of their application. There is no medical report or post mortem nor is there any investigation report from the deponent to prove that such material were even considered before institution of Constitutional Redress alleging denial of Right to Life which is the paramount right found in Bill of Rights chapter of the Constitution.
48. Considering all the circumstances in this case, discretion in Section 44(4) of Constitution is exercised in favour of striking out this application for Constitutional Redress. In my opinion an aggrieved party can proceed with civil litigation for Tort by way of writ of summons for alleged assault and or alleged death of late Lalauvaki. (see Chokalingo v A.G. of Trinidad and Tobago [1981] 1WLR106).

CONCLUSION

First Applicant is struck off due to non-compliance of Order 15 rule 17 of the High Court Rules of 1988. A claim for damages cannot proceed without an appointment of a party to represent the estate of deceased in terms of said High Court Rule. Second Applicant can bring an action for violation of Bill of Rights provision in the Constitution, but that


application needs to be supported by an affidavit with sufficient evidence to prove the facts on balance of probability. The affidavit in support had failed to comply with such essential requirements. It lacked evidence of witnesses and also medical reports, post mortem reports. So there is no proof of alleged infringements. An affidavit from investigating officer cannot substitute evidence from witnesses. There was no reason for not doing so. So the application for Constitutional Redress is struck off *in limine*. Without prejudice to that, there is alternate remedy available for damages under tort with proper examination of witnesses and also documents. This will also allow proper appointment of a party to prosecute such an action and also discovery of evidence by parties. So in the exercise of discretion granted in Section 44(4) of the Constitution this application is struck off.

FINAL ORDERS

- a. Application for Constitutional Redress is struck off.
- b. No costs.

Dated at Suva this 11th day of April, 2019.




Justice Deepthi Amaratunga
High Court, Suva