IN THE HIGH COURT OF FIJI
AT LAUTOKA
WESTERN DIVISION

CIVIL JURISDICTION

Constitutional Redress Application
No. HBJ 09 of 2018

BETWEEN : **JOELI TAWATATAU**

APPLICANT

A N D : **THE ATTORNEY GENERAL OF FIJI**

1st RESPONDENT

A N D : **DIRECTOR OF PUBLIC PROSECUTIONS**

2nd RESPONDENT

A N D : **COMMISSIONER OF CORRECTIONS**

3rd RESPONDENT

A N D : **FORMER SUPERVISOR OF CORRECTIONS WESTER DIVISION (SAKIUSA VEIWILI)**

4th RESPONDENT

A N D : **OFFICER IN COMMAND LAUTOKA CORRECTIONS CENTRE (ALEVIO TURAGA)**

5th RESPONDENT

A N D : **FORMER CHIEF OFFICER LAUTOKA CORRECTIONS CENTRE (LAISENIA DRAUNA)**

6th RESPONDENT

A N D : **OFFICER IN COMMAND MAXIMUM CORRECTIONS CENTRE (JONETANI VASUCA)**

7th RESPONDENT

A N D : **FORMER CHIEF OFFICER MAXIMUM CORRECTIONS CENTRE (KINIJOJI DRAUNA)**

8th RESPONDENT

A N D : **RECEPTION OFFICER MAXIMUM CORRECTIONS CENTRE (COB ILIESA)**

9th RESPONDENT

A N D : **MEDICAL ORDERLY MAXIMUM CORRECTIONS CENTRE (COB TUINABUA)**

10th RESPONDENT

A N D : **COC OFFICERS MAXIMUM CORRECTIONS CENTRE [COC CAKACAKA AND COC PENIASI)**

11th RESPONDENT

Appearances : **Applicant in person**
: **Mr Josefa Mainavolau for the respondents**
: **Mr Romanu Vananalagi as amicus curiae**

Hearing : **Friday, 10th May, 2019**
Ruling : **Friday, 30th August, 2019**

RULING

(01) The applicant, a prisoner serving a sentence at the Maximum Correction Centre alleges that on 03rd and 04th December, 2017 he was assaulted by the former Chief Officer of Natabua Correction Centre with the former Supervisor of Western Division Correction Centre and 18 other warden officers. It was also alleged that he was denied his right to visitation, proper sanitation and medical attention.

(02) The applicant sought the following orders;

1. *That all involved in the violations of such rights be charged with abuse of power, crime against humanity, grievous harm and contempt of Court.*

2. *That I be compensated and/or cost be paid by respondent for subjecting me to violation.*

3. *That the SOP (IO) of the Maximum Prison be reviewed and upon scrutiny be amended to uphold the Bill of Rights recognized in Chapter Two (2) of 2013 Constitution.*

4. *That I seek the Court order that I've be visited by my defacto wife namely Elesi Vakaroubau and whoever family members and friends wish to visit me.*

5. *That all constitutional rights (as a prisoner) be afforded to me promptly by the authorities.*

6. *And any other Orders that this honourable Court may deem fit to impose. I do believe that I do have the right to add, alter and amend further additional issues.*

(03) The applicant applies for constitutional redress by way of Notice of Motion and Affidavit.

(04) The applicant's Notice of Motion and Supporting Affidavit was served on the Attorney-General and all the other respondents.

(05) The application for constitutional redress was strongly opposed by the Attorney-General and all the other respondents. The Attorney-General filed an affidavit in response through Mr Apakuki Qura, the Supervisor of Corrections Western Division, on behalf of all the respondents. The applicant filed an Affidavit in Reply.

(06) On the day of the hearing, the Attorney-General raised two preliminary objections; first that the application was deficient in form and substance. It was argued that the reliefs sought by the applicant are set out in the affidavit in support rather than being included in the notice of motion. As well it was argued that applicant has not filed a Motion in bringing this action. Counsel submitted that Order 8, rule 3 requires that the motion must include a concise statement of the nature of the claim made or the relief or remedy required. Counsel submitted that these conditions have not been adequately met by the applicant. Counsel says that the applicant has also failed to cite the relevant provisions in the High Court Rules in commencing these proceedings. Secondly, it was contended that the application for constitutional redress is time barred.

(07) In response, Mr Vananalagi submitted that Order 2, rule 2 of the High Court Rules imposes an obligation on a party raising the irregularity to make an application within a reasonable time before the party applying has taken any fresh step after becoming aware of the irregularity. Mr Vananalagi also submitted that Counsel for the respondents on the day of the hearing raised the preliminary objections above from the bar table without complying with the requirements of Order 2, rule 2 by filing a Motion or Summons and stating the objections therein. Counsel submitted that the respondents did not file any Motion or Summons stating their objections and instead took a fresh step by filing an Affidavit in Opposition. Counsel argued that by taking a fresh step the respondents are deemed to have waived the preliminary issue raised.

(08) I cannot accept that it would be proper to entertain the submissions of Counsel for the respondents regarding the form and substance of application for constitutional redress which sprung on the applicant and the Court at the last minute. The respondents took the

preliminary point of law at the beginning of their submissions at the hearing of the application for constitutional redress.

(09) I note that the respondents have failed to file any application to set aside the applicant's notice of motion and the affidavit for **"irregularity",** under Order 2, rule (2) of the High Court Rules and have taken further steps in the proceedings without raising the issue of irregularity by filing an affidavit in opposition.

(10) I am at a substantial loss to understand why the respondents chose to offer response to the applicant's notice of motion and affidavit, if there is any **defect or irregularity** in the notice of motion and in the affidavit.

If the respondents have considered that the applicant's notice of motion and the affidavit in support is **irregular and defective,** they could have moved under Order 02, rule (2) of the High Court Rules. The respondents did not do so. The respondents had the opportunity to object but never did so. This is the first time the Court heard of such an objection to the applicant's notice of motion seeking constitutional redress.

(11) For the sake of completeness, **Order 2, rule (2) of the High Court Rules,** is reproduced below in full.

> ***Application to set aside for irregularity (O.2, r.2)***
>
> ***(2)(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any documents, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.***
>
> *(2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion.*
>
> [Emphasis added]

(12) Reading those words in their natural and ordinary sense, it seems to me reasonably plain that, Order 2, rule (2) provides that an application to set aside any proceedings for irregularity shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity. The requirements are cumulative. Since the application in the case before me is not made within a reasonable time, the application will not be allowed. **If the respondents had considered that the notice of motion and the affidavit in support seeking constitutional redress was in an irregularity, they could have moved under Order 2, rule (2) before they took another step.** If any proceedings are to be set aside on the ground of an irregularity, Order 2, rule (2) is applicable. An application under this rule may be made by Summons or Motion and the grounds of objection must be stated in the Summons or Notice of Motion. **The respondents on their own volition chose not to**

follow the High Court Rules. I am curious to know as to why the respondents chose not to follow the High Court Rules. It seems to me perfectly plain that the respondents slept on the matter and did not wake up at all from their slumber. It is now too late to raise such an argument even if it had any validity.

(13) In **"Ashwin Prasad v Carpenters** (Fiji) Limited[1]", **"Penlington, J A** said as follows;

> *"The affidavit was in substantial compliance with O.41 r.4 and 5. The appellant did not raise any objection to the affidavit in his affidavit of 24th December, 2003.* ***If he had considered that the affidavit was in an irregularity he could have moved under Order 2 r.2 before he took another step. Instead he did not do so.*** *On 31st December, 2003 he filed the statement of defence and the two affidavits referred to previously.* ***It is now too late to raise such an argument even if it had any validity which we think it did not have."***
>
> (Emphasis added)

(14) On the strength of the authority in the above case, I hold that the plaintiff's preliminary point must fail because of the delay involved.

(15) Secondly, it was contended that the application is time barred. Mr Vananalagi also conceded that the application is time barred.

(16) The alleged breaches of human rights have taken place on 03rd or 04th December, 2017.

(17) The High Court [Constitutional Redress Rules, 2015] Rule 3(2) provides;

> *"An application under paragraph (1) must not be admitted or entertained after 60 days from the date when the matter at issue first arose unless a Judge finds there are exceptional circumstances and that it is just to hear the application outside of that period."*

(18) As I can tell from the record, the application for constitutional redress was filed on 08/11/2018. The sixty (60) days expired on 02/02/2018 and therefore the application is made out of time. **The applicant has not shown any exceptional circumstances (by way of an affidavit) for this Court to act upon his belated application.**

(19) Therefore, I uphold the second preliminary objection raised by the Attorney-General.

(20) For the sake of completeness, let me go on to consider whether adequate alternative remedy is available to the applicant. The Court has discretionary power to refuse relief under Section 44 (4) of the constitution if an adequate alternative remedy was available.

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[1] Fiji Court of Appeal decision No. ABU 0004 of 2004S

(21) In the present case, as far as the alleged assault is concerned, the applicant has following alternative remedies available to him.

(a) Complain to police about assault and initiate criminal proceedings;
(b) File writ in the High Court for damages for his injuries.

(22) As far as the allegation that he was denied his right to visitations, proper sanitation and medical attention is concerned, the applicant could have complained to the visiting justice or written to the Chief Magistrate instead of seeking constitutional redress. Section 44 of the Prisons Act requires weekly visits to prison by Resident Magistrates. Under Regulation 157 of the Prison Regulations the Magistrate, amongst other things are required to hear and inquire into complaints by prisoners and ensure that any abuse which come to their knowledge are brought to notice of the Controller. Regulations 158 contain powers of visiting justices. These empower a visiting justice to visit every cell, inspect and test the quality of food, inquire into complaint or request by a prisoner and even inquire into the state of prison buildings and report to Controller if there is need for repairs. The applicant has an adequate alternative remedy. Therefore, the constitutional relief was premature and inappropriate and that the application was an abuse of process of the Court.

(23) In ***In the matter of an application for constitutional redress by Josefa Nata***[2], Singh J declared:

> *...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 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 –* **Harrikissoon v. Attorney General – (1979) 3 WLR 62.**

(24) The judgment of the Court of Appeal in ***Abhay Kumar Singh v Director of Public Prosecution and Anor***[3], cited Lord Diplock in Harrikissoon v A.G [4] as follows:

> *The right to apply to the High Court under section 6 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 value 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..., the mere allegation that a human right or fundamental freedom of the applicant has been or likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the Court under the subsection if it is apparent that the*

[2] Civil Action No. HBM 35 of 2005
[3] (2004)FLR 297 at pg 306;
[4] [1980] AC 265 at pg 268

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.

(25) The Privy Council in ***Thakur Prasad Jaroo v Attorney-General*** [5] as also cited in ***Abhay Kumar Singh,*** (supra) said:

> *"Their Lordship wish to emphasize that the originating motion procedure under Section 14(1) is appropriate for use in cases where the facts are not in dispute and questions of law only are in issue. It is wholly unsuitable in cases which depend for their decision on the resolution of disputes as to fact. Disputes of that kind must be resolved by using the procedures which are available in the ordinary Courts under the common law."*

(26) It is for these reasons the application for constitutional redress is dismissed and relief refused.

ORDERS

(01) The application for constitutional redress is dismissed.

(02) There be no order as to costs.

HIGH COURT OF FIJI LAUTOKA

30/08/2019

Jude Nanayakkara
[Judge]

At Lautoka
Friday, 30th August, 2019

[5] (2002) 5 LRC 258