

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

JUDICIAL REVIEW NO. HBJ 06 OF 2020

IN THE MATTER of **DIRECTOR OF**
THE DEPARTMENT OF TOWN AND
COUNTRY PLANNING

FOR A JUDICIAL REVIEW UNDER
ORDER 53 of the HIGH COURT RULES

AND

IN THE MATTER of an application by
DAVID CONRAD PETERSON and
RUTH ANNE PETERSON as Trustees of
the **David Conrad Peterson and Ruth
Anne Peterson Trust** for Judicial Review
and with other relief including an Order
for Certiorari of the Director of Town and
Country Planning **MADE ON THE 28TH**
SEPTEMBER 2020 by **DIRECTOR OF**
TOWN & CONTRY PLANNING
rezoning of the land comprised in
Certificate of Title Number 40987 Lot 2 DP
10404 Muavunise Baravi, Nadroga from
Residential to Special Use (Tourism Villa)
thereby allowing a construction of a three
level hotel being constructed on the same.

STATE v

DIRECTOR OF THE DEPARTMENT OF TOWN
AND COUNTRY PLANNING Ministry of Local
Government, having its registered office in 1st
Floor, Fiji Football Association House, 4 Gladstone
Road, Government Buildings, Suva, Republic of
Fiji

FIRST RESPONDENT

CHRISTINE BADIA NKANKA aka CHRISTINE SILVIE BADIA of Maui Bay Estates, Baravi, Korolevu.

SECOND RESPONDENT

EX-PARTE

DAVID CONRAD PETERSON and RUTH ANNE PETERSON as a Trustees of the David Conrad Peterson and Ruth Anne Peterson Trust, both of Maui Bay Estates, Baravi, Korolevu.

APPLICANTS

Appearances : Mr R. Singh for the applicants
Mr J. Mainavolau for the first respondent
Mr C.B. Young for the second respondent

Date of Hearing : 11 November 2020

Date of Decision : 09 December 2020

DECISION

[on leave to apply for judicial review]

Introduction

[01] Before me is an application for leave to apply for judicial review. The applicants intends to judicially review the decision of the Director of the Town and Country Planning (*"first respondent" or "respondent"*).

[02] By their application, the applicants seek the following orders:

- (a) *That leave be granted to the applicants to apply for Judicial Review of the decision of the first respondent made on 28 September 2020 and made on behalf of the respondents.*

(b) *A stay of the implementation of the decision of the first respondent made on the 28 September 2020 approving rezoning of the land comprised in Certificate of Title Number 40987, Lot 2 on DP 10404 from Residential to Special Use (Tourism Villa) thereby allowing the second Respondent to construct a three level hotel building on the same.*

- [03] The application is supported by an affidavit of Ruth Anne Peterson, which appears to be verifying the facts relied upon.
- [04] The application is made under Order 53, Rule 3 (2) of the High Court Rules 1988, as amended ('HCR').
- [05] The first respondent has filed a notice of opposition; the second respondents have filed their affidavits in reply.
- [06] At the hearing, the parties tendered their respective written submissions, and they also made oral submissions.

Background

- [07] On 28 September 2020, the first respondent approved the rezoning of the land comprised in Certificate of Title Number 40987, on Lot 2, DP 10404 from residential to special use (Tourism Villa).
- [08] The applicant and the second respondent are neighbours and reside with alongside each other at the Maui Bay Estate Development. The applicant is the registered owner of the land comprised in Certificate of Title Number 36037, Lot 17 at Maui Bay Development at Baravi, Sigatoka.
- [09] The second respondent is the owner of the land comprised in Certificate of Title Number 40987 on Lot 2 on DP 10404. This land measures 1417 sq meters in size and a building line restriction further lessens the size of the subject land. The map on the title clearly shows the building line restrictions.
- [10] The second respondent's land and the applicants' land along with other lands along the seafront were zoned for residential use. However, on 29 December 2009, the first respondent had generally rezoned the lands along the seafront at Maui Bay from Residential to special use (Tourism-Villa sites) with Sites Specific

Development Guideline (SSDG). The SSDG guidelines deal with the scope of developments within the development.

[11] The applicant says that any owner who wants to develop their property their application will need to comply with the provisions of the SSDG.

[12] On 29 December 2009, the first respondent approved the rezoning of Lot 1-6 on DP 9240 and Lots 1 – 16, 18 and 19 on 9022 from residential to special use (Tourism Villa sites) on the condition that:

12.1 *All development works, constructions, activities and operations were to comply with the Maui Bay Estate Special Development Guidelines (SSDG).*

12.2 *An Environment Management Plan (EMP) and an Operational Environment Management (OEMP) was to be submitted to the Director of Environment for approval. The building application relating to the Lots was to be submitted with the approved EMP & OEMP to the first respondent.*

12.3 *No building development work and activity shall commence on the site unless consented to by the first respondent and approved by the Nadroga Rural Local Authority now the second defendant.*

12.4 The approval is valid for two years.

[13] The applicant alleges that the approval for rezoning of the second respondent's land was granted on 28 September 2020, however the second respondent had commenced construction in August 2020. The second respondent acted illegally prior to this date, as there was no approval for construction of a building.

[14] Admittedly, the second respondent is constructing a three-level hotel on their land and when the approval is only for villas.

[15] In these backgrounds the applicant seeks leave to apply for judicial review of the first respondent's decision made on 28 September 2020.

The relief sought

[16] The applicants seek the following relief:

1. **AN ORDER OF CERTIORARI** to remove and quash the decision of the 1st Respondent made dated 28th September 2020 approving the rezoning of Certificate of Title Number 40987, Lot 2 on DP 10404 containing an area of 1420 square meters from Residential to Special Use (Tourism Villa) thereby allowing the 2nd Respondent to construct a three level hotel building on the same.
2. **AN ORDER OF MANDAMUS** directing the 1st Respondent to restrain all construction of a three level hotel building on the land comprised in Certificate of Title Number 40987, Lot 2 on DP 10404.
3. **FURTHER OR IN THE ALTERNATIVE, A DECLARATION** (in any event) that the decisions of the 1st Respondent the approval of the rezoning the land comprised in Certificate of Title Number 40987, Lot 2 on DP 10404 made on 28th September 2020 from Residential to Special Use (Tourism Villa) thereby allowing the 2nd Respondent to construct a three level hotel building on the same is inconsistent with;
 - 3.1 Specific Development Guidelines for Maui Bay Estate 2009 issued by the 1st Respondent and more particularly clause 3(b)(i), (ii),(iii), (iv), (c), and 4.2.
 - 3.2 Schedule C and Clause 4 of the General Provision made under Section 7(4) of the Town Planning Act.
4. Damages.
5. Costs on a full Solicitor/ Client indemnity basis.
6. **ANY FURTHER DECLARATIONS** or other reliefs as this Honourable Court may see fit.

The grounds upon which relief is sought

[17] The grounds which the relief is sought upon are as follows:

1. The first respondent acted unreasonably and unfairly towards the applicants when it granted approval of the rezoning of the land comprised in certificate of Title Number 40987, Lot 2 on DP 10404 containing an area of 1420 square meters from Residential to Special Use (Tourism Villa)

thereby allowing the second Respondent to construct a three level hotel building on the same.

2. That at all material times the applicant held a legitimate expectation that the first Respondent will comply with;

2.2.1 Specific Development Guidelines for Maui Bay Estate 2009 issued by the first respondent and more particularly clause 3 (b) (i), (ii), (iii), (iv), (c) and 4.2 issued by the first respondent.

2.2.2 Schedule C and Clause 4 of the General Provision made under Section 7 (4) of the Town Planning Act and;

2.2.3 Conditional Approval for rezoning made on 29 December 2009 approved the conditional rezoning of Lot 1-6 on DP 9240 and Lots 1 – 16, 18 and 19 on 9022 from residential to Special use (Tourism Villa sites).

3. The first respondent acted in breach of the legitimate expectation held by the applicant.

4. The first respondent acted *ultra-vires* its powers when it approved of the rezoning of the land comprised in Certificate of Title Number 40987, Lot 2 on DP 10404 containing an area of 1420 square meters from Residential to Special Use (Tourism Villa) thereby allowing the second respondent to construct a three level hotel building on the same being a decision inconsistent and in breach of;

4.1 Specific Development Guidelines for Maui Bay Estate 2009 issued by the first respondent and more particularly clause 3 (b), (i), (ii), (iii), (iv), (c) and 4.2 issued by the first respondent.

4.2 Schedule C and Clause 4 of the General Provision made under Section 7 (4) of the Town Planning Act and;

4.3 Conditional Approval for rezoning made on 29 December 2009 approved the conditional rezoning of Lot 1-6 on DP 9240 and Lots

1 – 16, 18 and 19 on 9022 from residential to Special Use (Tourism Villa sites)

5. That the decision of the first respondent in approving the rezoning of the land comprised in Certificate of Title Number 40987, Lot 2 on DP 10404 containing an area of 1420 square meters from Residential to Special Use (Tourism Villa) thereby allowing the second respondent to construct a three level hotel building on the same, was irrational under the circumstances.
6. That the first respondent failed to take into consideration relevant factors and took into account irrelevant factors pertinent to the issues.

The law

[18] The relevant law applicable to the grant of leave to apply for judicial review is the HCR, O 53, R 3, which provides:

“Application for leave to apply for judicial review (O 53, R 3)

3 (1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this Rule.

(2) An application for leave must be made upon filing in the Registry-
(a) a notice in Form 32 in Appendix 1 hereunder containing statement of-

(i) the particulars of the judgment order, decision or other proceeding in respect of which judicial review is being sought;

(ii) the relief sought and the grounds upon which it is sought;

(iii) the name and description of the applicant;

(iv) the name and address of the applicant’s solicitors (if any); and

(v) the applicant’s address for service;

(b) an affidavit which verifies the facts relied on.

(3) (a) Copies of the application for leave and the affidavit in support must be served on all persons directly affected by the application.

(b) The Court may determine the application without a hearing and where a hearing is considered necessary the Court shall hear and determine the application inter partes.

(c) Notice of hearing of the application shall be notified in writing to the parties by the Registrar.

- (d) *Where the Court determines the application without a hearing, the Registrar shall serve a copy of the order of the Court on the applicant.*
- (4) *Without prejudice to its powers under Order 20, Rule 8, the Court hearing an application for leave may allow the relief sought and the grounds thereof to be amended, whether by specifying different or additional grounds or relief or otherwise, on such terms, if any, as it thinks fit.*
- (5) *The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.*
- (6) *Where leave is sought to apply for an order of certiorari to remove for the purpose of its being quashed any judgment, order, conviction or other proceedings which is subject to appeal and a time is limited for the bringing of the appeal, the Court may adjourn the application for leave until the appeal is determined or the time for appealing has expired.*
- (7) *If the Court grants leave, it may impose such terms as to costs and as to giving security as it thinks fit.*
- (8) *Where leave to apply for judicial review is granted, then-*
- (a) *if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;*
- (b) *if any other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ.*
- (9) *Upon granting leave the Court may, if satisfied that such a course is justified, direct that the grant shall operate either forthwith or conditionally as an entry of motion under Rule 5 (4) and may then proceed to judgment on the application for judicial review or may give such further directions as may be warranted in the circumstances.'*

Test for granting leave

[19] To grant leave to apply for judicial review, the court must be satisfied that:

- (a) There is an arguable case for review;
- (b) The claimant has a 'sufficient interest'; and
- (c) There has not been 'undue delay'.

Discussion and decision

- [20] The applicants make an application for leave to apply for judicial review of the first respondent's decision of 28 September 2020. The decision converts the residential lots to special use (Tourism Villa sites).
- [21] An application for judicial review cannot be made unless the leave of the court has been obtained in accordance with HCR, O 53, R 3.
- [22] As required in R 3 (2), the applicants have attached a statement of the particulars of the decision in respect of which judicial review is sought. The application has been made in compliance with O 53, R 3. The applicants have filed an affidavit, which verifies the facts relied upon. This complies with the requirement of the HCR, O 53, R 3 (2) (b). There was no dispute in regard to the formality of the application.
- [23] The application for leave to apply for judicial review may be determined without a hearing and where a hearing is considered necessary, the court will hear and determine the application *inter partes* (see O 53, R 3 (3) (b)). In this case, I heard the application *inter partes*.
- [24] I now turn to apply the test for granting leave to apply for judicial review.

Sufficient interest

- [25] The court will not grant leave unless it considers that the applicant has a sufficient interest (standing) in the matter to which the application relates (see O 53, R 3 (5)).
- [26] The question of sufficient interest is to be decided:
1. In the light of the circumstances of the case before the court (it cannot be decided in advance of litigation).
 2. It has to be judged in the light of relevant statutory provisions-who is to be allowed to challenge decisions made under the statute?
 3. It has to be judged in the light of substance of the complainant's complaint. (In *R v Somerset CC, ex p Dixon* [1998] Env LR 111, Sedley J said that *provided*

the claimant had an arguable substantive case, leave should not be refused on the basis of lack of standing unless the claimant was a 'busybody' or a 'troublemaker'.).

4. Whether the claimant's interest is sufficient depends to some extent on the seriousness of the alleged breach of administrative law. Whatever the claimant's interest, the more serious the breach, the more likely that interest is to be sufficient.

[27] The purpose of the standing rules under O 53 appears to be a mechanism for weeding out hopeless or frivolous cases at an early stage and protecting public functionaries from harassment.

[28] The test for deciding whether a claimant has sufficient interest was considered by the House of Lords in *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Business Ltd* [1982] AC 617, where it was held:

'That not only was standing a ground in itself upon which permission could be granted, it should also be considered at the substantive hearing after the relevant law and facts were examined in full.'

[29] The decision sought to be judicially reviewed affects the applicants' right to clean environment. The decision directly affects their personal right. For the current purpose, I, without examining the relevant law and facts in full, am satisfied that the applicants have sufficient interest in the matter to which the application relates.

The arguable case for review

[30] The second test for granting leave is that a claimant must demonstrate to the court upon '*a quick perusal of the papers*' that there is an arguable case for granting relief (*R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Business Ltd* (above)).

[31] In determining an arguable case for granting the relief sought, the court will not go into the matter in depth. The court will only see, upon perusal of the papers, whether there is an arguable *prima facie* case for granting the relief.

[32] The applicant challenges the decision of the first respondent on the grounds that:

- a. The first respondent acted unreasonably and unfairly towards the applicants when he granted approval of the rezoning of the land from Residential to Special Use (Tourism Villa) thereby allowing the second respondent to construct a three level hotel building on the same;
- b. The applicant had a legitimate expectation that the first respondent will comply with the Specific Development Guidelines for Maui Bay Estate 2009 issued by the respondent, which the first respondent had breached;
- c. The first respondent acted *ultra-vires* his powers when he approved of the rezoning of the land from Residential to Special Use (Tourism Villa) thereby allowing the second respondent to construct a three level hotel building;
- d. The decision of the first respondent in approving the rezoning of the land was irrational in the circumstances; and
- e. The first respondent failed to take into consideration relevant factors and took into account irrelevant factors pertinent to the issues.

[33] In *Fiji Airline Pilots Associations v. Permanent Secretary for Labour and Industrial Relations* [1998] FJCA 14, the Court of Appeal said:

“That the basic principle is that the judge is only required to be satisfied that on the material available and disclosed is what might, on further consideration, turn out to be an arguable cause in favour of granting relief.”

[34] In the current application, the applicants challenge the decision of the first respondent of 28 September 2020, whereby he re rezoned the land from residential to Special Use (Tourism Villa) site on the grounds as stated above.

[35] Having had a quick perusal of the papers, this means without going into the matter in depth having considered the submissions made by the parties, I find that there is an arguable *prima facie* case for granting the relief.

Undue delay

- [36] The applicants intend to challenge the decision of the respondent made on 28 September 2020. They have made the application for leave to apply for judicial review on 19 October 2020, which is 21 days after the date of the decision.
- [37] The court has the discretion to refuse to grant leave for the making of the application for judicial review; or any relief sought on the application if the court considers that there has been undue delay in making an application for judicial review (see HCR, O 53, R 4).
- [38] The applicants seek an order of *certiorari*. In the case of an application for certiorari to remove any judgment, order, conviction or other proceeding for the purpose of quashing it, the relevant period is 3 months after the date of the proceeding.
- [39] The application for leave has been made 21 days after the date of the decision. Therefore, it is made within the time limit.
- [40] I do not see any undue delay in the making of the application.

Stay

- [41] HCR, O 53, R 3 (8), provides:

“(8) Where leave to apply for judicial review is granted, then-

(a) if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;

(b) if any other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ.”

- [42] Under this sub rule (8), the court has the power, if the relief sought is an order of *prohibition* or *certiorari*, to direct that the grant of leave shall operate as a stay of proceedings to which the application relates until the determination of the application or until the court otherwise orders.

[43] In this case, the applicant as plaintiff has made an application for interim relief in respect of the same matter in Civil Action HBC 224 of 2020. That matter is pending before Nanayakkara, J who has reserved his ruling until 29 January 2021.

[44] Since the applicant has sought interim relief in the writ action in respect of the same matter, I would decline to direct that the grant of leave shall operate as a stay of proceedings.

Conclusion

[45] For the reasons set out above, I conclude that the applicant has demonstrated an arguable case for judicial review. I would accordingly grant leave to make an application for judicial review of the respondent's decision made on 28 September 2020.

The result

1. Leave to apply for judicial review granted.
2. The grant of leave shall not operate as a stay.

M. H. Mohamed Ajmeer
09/12/20

M. H. Mohamed Ajmeer

JUDGE



At Lautoka
09 December 2020

Solicitors:

For the applicant: Patel & Sharma, Barristers & Solicitors

For the first respondent: Office of the Attorney General, Lautoka

For the second respondent: Young & Associates, Solicitors