IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Miscellaneous Action No. HBM 65 of 2020

IN THE MATTER of an application for Constitutional Redress

AND

IN THE MATTER of section 44(1) of the Constitution of Fiji

BETWEEN

FIJI BUS OPERATORS ASSOCIATION an unincorporated association having its office at 116 Tavakabu Road, Lautoka.

PLAINTIFF

AND

FIJIAN COMPETITION AND CONSUMER COMMISSION a body corporate constituted pursuant to the Fijian Competition and Consumer Commission Act 2010 and having its Head Office at 42 Gorrie Street, Suva.

DEFENDANT

AND

ATTORNEY GENERAL ON BEHALF OF THE STATE

INTERVENOR

Counsel	:	Mr. S. Parshotam with Mr. V. Singh for the Plaintiff Mr. J. Moti Q.C. with Ms. Choy C. for the 1st Defendant. Ms. S. Chand, Mr. D. Solivalu and Ms. Solimailagi for the Intervenor.
Date of hearing	:	09th December 2020
Date of Ruling	:	26th January 2021

RULING

(On Application for Leave to Appeal)

[1] The plaintiff filed this Originating Motion seeking the following reliefs:

1. This Honourable Court do issues declarations as follows:

   (a) that the defendant FIJIAN COMPETITION AND CONSUMER COMMISSION has acted unlawfully and in breach of the requirements of procedural fairness, reasonableness and natural justice contrary to the requirements of section 16(1)(a) and (b) of the Constitution of Fiji, in issuing its determination dated 31st January 2020 entitled "Final Authorisation for Fares

and Charges for Public Service Vehicles in Fiji"(the "Final Authorisation Decision") and in its conduct and procedural steps preceding the issue of Final Authorisation Decision, and is required to cancel the final Authorisation Decision and to reconsider the same in accordance with lawful and procedurally sound principles;

(b) that section 38A(1) of the Fiji Competition and Consumer council Act is unconstitutional and is accordingly not binding on the plaintiff, as its operation and effect are contrary to the requirements of section 16(1)(a) and (b) of the Constitution of Fiji.

2. Damages be awarded to the plaintiff arising from the unlawful and procedurally unfair actions of the defendant in a sum to be assessed.

[2] The Attorney General (Intervener) on 27th May 2020 filed an application pursuant to sections 2(1), 2(4), 173(4) and 173(5) of the Constitution, Administration of Justice Decree to have the matter struck out on the following grounds:

(1) it discloses no reasonable cause of action;

(2) it is frivolous and vexatious; and

(3) it is an abuse of the process of the court.

[3] After hearing the parties the court made order striking out the application of the plaintiff. Being aggrieved by the decision of this court the plaintiff seeks leave to appeal on the following grounds:

The learned Judge erred in law and in fact:

(a) In holding, at paragraph 19 of the Ruling, that the decision of the Court of Appeal in *One Hundred Sands Limited v Attorney General of Fiji* [2017] FJCA 19; ABU27 & Abu31.2015 (23 February 2017) should be followed instead of the later decision of the Court of Appeal in Suva City Council v Saumatua [2019]

FJCA 33 ; ABU73.2017 (8 March 2019), so that the court had no jurisdiction to determine the plaintiff's application for constitutional redress.

(b) In failing to hold, contrary to the submissions of the Plaintiff, that section 173(4)(d) of the Constitution and the relevant surviving provisions of the Administration of Justice Decree 2009 only applied, on their popper reading and construction and having regard to other relevant provisions of the Constitution and to relevant Fiji and overseas authorities on the correct interpretation in law of privative provision, to a decision which was lawfully and properly made and authorised, which was not the case with the defendant's decision dated 31st January 2020, which was both unlawful and had been reached through procedural impropriety contrary to the provisions of section 16(1)(a) and (b) of the Constitution.

(c) In failing to hold, contrary to the submissions of the plaintiff, that the surviving provisions of the Administration of Justice decree 2009 were not applicable in the present case because the validity of FCCC decision dated 31st January 2020 depended upon the coming into force of both the Land Transport (Amendment) Act 2019 and the Fijian Competition and Consumer Commission (Control of Fares and Charges of Public Service Vehicles) Order 2020, both of which took effect after the date of the FCCC decision, were outside the period covered by the surviving provisions of 2009 Decree and were not saved by section 24 of the Interpretation Act 1967.

(d) In failing to hold, contrary to the submissions of the plaintiff, that the Plaintiff's originating motion for constitutional redress fell within the words of exception in in section 173(4)(d) of the Constitution reading "except as may be provided in or authorised by any such promulgation, Decree or Declaration (including any provision of any such laws) made or as may be made between 5th December 2006 until the first sitting of the Parliament under this constitution", given that the ouster provision in section 38A(1) of the Fijian Competition and Consumer Commission Act 2010 (the "FCCC

Act") did not apply on its proper construction and interpretation to bar the relief sought in the Plaintiff's originating motion, so that the Plaintiff's challenge to FCCC decision dated 31st January 2020 was therefore either expressly or impliedly authorised under the FCCC Act and came within the said words of exception.

(e) In holding at paragraphs 23 – 25 of the Ruling that the filing by the Plaintiff of its application for judicial review amounted to an adequate alternative remedy to the relief sought in the plaintiff's application for constitutional redress given that, as at the date of the Ruling, leave has not been granted to the plaintiff to apply for judicial review and such grant leave was likely to be strenuously opposed by the Defendant and the Attorney-General.

(f) In holding at paragraphs 26 of the Ruling that the question of whether the decision of the defendant was made outside its powers was a matter that had to be decided on the application for judicial review, given that, as at the date of the Ruling, leave had not been granted leave to the plaintiff to apply for judicial review and such grant leave was likely to be strenuously opposed by the Defendant and the Attorney-General.

(g) In making, in paragraph 27 of the Ruling, an order striking out the Plaintiff's originating motion for constitutional redress when the more appropriate order, if the court was so minded, would have been to adjourn or stay the originating motion.

[4] In **Niemann v. Electronic Industries Ltd.** [1978] V.R. 431 at page 441 where Supreme Court of Victoria (Full Court) held as follows:

> ".....leave should only be granted to appeal from an interlocutory judgment or order, in cases where substantial injustice is done by the judgment or order itself. If the order was correct then it follows that substantial injustice could not follow. If the order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to affect a substantial injustice by its operation.

> It appears to me that greater emphasis is therefore must be on the issue of substantial injustice directly consequent on the order. Accordingly if the effect of the order is to change substantive rights, or finally to put an end to the action, so as to effect a substantial injustice if the order was wrong, it may be more easily seen that leave to appeal should be given.

In the case of **Khan v Suva City Council** [2011] FJHC 272; HBC406.2008 (13th May 2011) the following observations were made in regard to applications for leave to appeal;

> It is trite law that leave will not generally be granted from an interlocutory order unless the Court sees that substantial injustice will be done to the applicant.
>
> Further in an application for leave to appeal, it is incumbent on the applicant to show that the intended appeal will have some realistic prospect of succeeding.

In **Kelton Investment Ltd & Tapoo Ltd v Civil Aviation Authority of Fiji** and **Motibhai & Company Limited** Civil Appeal No. ABU 0034 of 1995 the Court of Appeal observed as follows;

> The Courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence leave to appeal are not readily given. Having read the affidavits filed and considered the submissions made I am not persuaded that this application should be treated as an exception. In my view the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted.

In the case of **Ex parte Bucknell** (56 CLR 221 at page 224) it was held:

> At the same time it must be remembered that the prima facie presumption is against appeals from interlocutory orders, and, therefore, an application for leave to appeal under section 35(1)(a) should not be granted as of course without consideration of the nature and circumstances of the particular case. It would be

unwise to attempt an exhaustive statement of the considerations which should be regarded as a justification for granting leave to appeal in the case of an interlocutory order, but it is desirable that, without doing this, an indication should be given of the matters which the court regards as relevant upon an application for leave to appeal from an interlocutory judgment.

In **Dunstan v Simmie & Co Pty Ltd** 1978 VR 649 at 670 it was held:

> "….although the discretion to grant leave cannot be fettered, leave is only likely to be given in a case where the determination of the primary issue puts an end to the action or at least to a clearly defined issue or where, to use the language of the Full Court in Darrel Lea (Vic.) Pty Ltd v Union Assurance Society of Australia Ltd., (1969) V.R. 401, substantial injustice would result from allowing the order, which it is sought to impugn, to stand."

[5] Having in mind the principles laid down in the above decisions I will now consider the grounds of appeal relied on by the plaintiff.

[6] In both One Hundred Sands Limited v Attorney General of Fiji [2017] FJCA 19; ABU27 & Abu31.2015 (23 February 2017) and Suva City Council v Saumatua [2019] FJCA 33; ABU73.2017 (8 March 2019), the Court of Appeal interpreted Section 173(4)(d) of the Constitution. One is an application for constitutional redress and the other is an application for judicial review. There cannot be any argument that this court is bound by the decisions of the Court of Appeal. However, the two interpretations of the Court of Appeal in the above two cases are contrary to each other and none of the parties in those two matter took it up to the Supreme Court. In such a situation the lower court has to consider the application before it and make a suitable decision which this court did in its ruling.

[7] Section 16(1)(a) and (b) provides:

> Subject to the provisions of this Constitution and such other limitations as may be prescribed by law—

(a) every person has the right to executive or administrative action that is lawful, rational, proportionate, procedurally fair, and reasonably prompt;

(b) every person who has been adversely affected by any executive or administrative action has the right to be given written reasons for the action; and …

[8] The provisions of section 16(1) of the Constitution must be read with other provisions of the Constitution and also with limitations prescribed by other laws of the country.

[9] The plaintiff in this application relies on many grounds of appeal. The crux of the matter before this court was whether the applicant has a right to challenge the decision of the Fiji Competition and Consumer Commission.

[10] Section 173(4)(d) of the Constitution provides:

> Notwithstanding anything contained in this Constitution, no court or tribunal (including any court or tribunal established or continued in existence by the Constitution) shall have the jurisdiction to accept, hear, determine, or in any other way entertain, or to grant any order, relief or remedy, in any proceeding of any nature whatsoever which seeks or purports to challenge or question—
>
> …
>
> *(d)* any decision made or authorised, or any action taken, or any decision which may be made or authorised, or any action which may be taken, under any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution, except as may be provided in or authorised by any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution.

[11] Section 173(4)(d) provides that any decision made under any promulgation made between 5th December 2006 until the next sitting of the Parliament. It does not only take away the right of a party to challenge a decision made between 5th December 2006 until the next sitting of the Parliament but it takes away the right of any party challenge any decision made under any Promulgation, decree or declaration made between 5th December 2006 until the next sitting of the Parliament.

[12] This the interpretation given by this to section 173(4)(d) of the Constitution, by this court in its ruling on the summons to strike out as well and I do not see any error in the interpretation.

[13] The submission of the learned counsel for the plaintiff is that provisions of the Administration of Justice Decree were not applicable to this case. Although certain provisions of the said Decree have been reproduced in the ruling the court did not rely on such provisions in arriving at the findings.

[14] The learned counsel for the plaintiff also submitted that the plaintiff's application for constitutional redress fell within the exception in section 713(4)(d) of the Constitution. The learned counsel does not say where this provision can be found. A bare statement that the plaintiff's action is excluded from the operation section 713(4)(d) is not sufficient without showing the court the specific provision which has the effect of such an exclusion. It is also important to note that this issue was never raised at the hearing of the application for striking out.

[15] One of the grounds on which the court struck out the application for constitutional redress is that an alternative remedy was available to him.

[16] Section 44(4) of the Constitution provides:

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

[17] The plaintiff simultaneously filed an application for constitutional redress and also for judicial review. The submission of the learned counsel is that the court has not yet granted leave to apply for judicial review. What the court has to consider is whether there is an alternative remedy available to the plaintiff. In this instance the plaintiff sought to challenge an administrative decision of the government and it could have been challenged in an application for judicial review. It is sufficient for the court to refuse the application for constitutional redress. It is immaterial whether or not the court has heard the application for judicial review.

[18] The learned counsel also submits that the court should have stayed the application for constitutional redress. As I understand what the learned counsel means is that the court should have stayed the application for constitutional redress until the application for leave to apply for judicial review. It is the party who come before the court must decide which course is more appropriate. If the intention of the plaintiff was to proceed with the application for judicial review it could have moved the court to hear that application first. It cannot now fault the court for proceeding with the application for constitutional redress.

ORDERS

1. The application for leave to appeal refused.
2. The plaintiff is ordered to pay the defendant and the Intervenor $2000.00 ($1000.00 each) within 14 days.

Lyone Seneviratne

JUDGE

26th January 2021