

In the High Court of Fiji
At Suva
Civil Jurisdiction

Civil Action No. HBJ 14 of 2020

Lydia Eliana Lazel-Racule
Applicant

v

Special Administrators Nasinu Town Council & Nausori Town Council
First respondent

Permanent Secretary for Ministry of Local Government
Second respondent

Attorney General
Third respondent

Counsel: Mr I. Betakula for the applicant
Mr T.Sharma with Ms. D. Sharma for the first respondent
Ms S. Chand with Ms S. Taukei and Mr S. Kant for the second
and third respondents

Date of hearing: 31st March, 2021

Date of Ruling: 1st July, 2022

Ruling

1. The applicant seeks leave to apply for judicial review of the “*wrongful and unlawful decision-making process of the Respondents that resulted in the creation of a new post of CEO for Nasinu Town Council,(TC) and Nausori.. (TC)” on 10 July,2020, by an irregular procedure.*

2. The applicant seeks an order of certiorari to remove and quash the decision, an order of mandamus directing the first respondent to reinstate her with immediate effect as Acting CEO, Nausori TC without loss of benefits and entitlements and directing the second respondent to advertise the new post. Alternatively, a declaration that the decision is tainted with “*biasness, double standard, irrational, erroneous and unreasonable*” and damages.
3. The grounds relied on are as follows, viz, that: she had to relinquish her post to accommodate the new post; the respondents breached the provisions of the Local Government Act by failing to legitimize the process prior to unlawfully creating the post and merging Nasinu and Nausori TCs; the conduct of the respondents is a matter of public interest, as it affects all the ratepayers of two populated Municipalities; she has been denied her rights to hold the position of CEO of Nausori TC; the irregular decision making process and subsequent decision is susceptible to Judicial Review.
4. The applicant in her affidavit in support states that she was employed by the first respondent as the “*Acting*” CEO, Nausori TC effective from 18th November,2019. In December,2019, she applied for the position of CEO, Nausori TC, as advertised by the Ministry of Local Government. She was shortlisted and called for an interview in December,2019. In January,2020, the Ministry asked her to submit her medical report and Police clearance. On 10th July, 2020, the second respondent announced that the first respondent has appointed Anurashika Bari to the newly created position of CEO and merged Nasinu and Nausori TCs. The second respondent adopted an irregular procedure, as the post was never advertised. Ms Bari did not apply for that post nor for the position of CEO of Nausori TC.
5. The first and second respondents failed to comply with section 122(1) & (2) of the Local Government Act of 1972. Their conduct is unlawful and wrong. The third respondent has wrongfully failed to intervene and cure this irregularity. The first respondent is a fully funded statutory government public body. The applicant states that the decision-making process of the respondents is susceptible to judicial review, as the process adopted was unfair, inconsistent with the principles of natural justice and Regulation 22(2) & (3) of the Public Service Regulations, 1999.

6. The first respondent in his affidavit in opposition states that the selected candidate was the best to execute relevant duties. He identified a capable candidate who could effectively hold both positions and further their goal of providing services to the populations of the respective local government in a manner that is most economically beneficial and allows for full and effective shared use of resources. The applicant, as Acting CEO of Nausori TC was part of a meeting that put forward the idea and practice of shared resources between Nausori TC and Nasinu TC.
7. The Director, Local Govt in his affidavit on behalf of the second and third respondents states that the first respondent made the decision to appoint Ms Bari to the position of CEO for Nasinu and Nausori TCs. The Local Government Act, 1972 gives Special Administrators of a Municipality power to appoint town clerks or CEOs. Section 122(1) and (2) relates to the Council's powers to make by-laws not the appointment of CEOs of Municipal Councils. There is no regulation titled Public Service Regulations, 1999.
8. The applicant, in her reply states that it is not simply the creation of the new post, but the wrongful and unlawful procedure relied on to create that post.

The determination

9. I will first deal with the matter of delay, as raised by Ms Chand, counsel for the first respondent.
10. The impugned decision was made on 10th July,2020. This application was filed on 14th December,2020.
11. Or 53, r 4(2) requires an application for an order of certiorari to be made within 3 months of the date of the decision, as held in *Harikkisun Ltd v Dip Singh & Ors*, [1996]FJCA 15; ABU 0019.1995S(4th October,1996) and *Public Service Commission v Singh*, [2010]FJSC 3; CBV 0011.05.2008(27 August,2010).
12. The applicant has not explained the delay in seeking the order of certiorari.

13. The question as to whether the delay would cause “*substantial hardship to, or substantially prejudice the rights*” of the respondents in terms of Or 53, r 4(1) are “ *matters for the Court on the substantive review application*” as held in *Harikkisun Ltd v Dip Singh & Ors,(supra)*.
14. I note that the applicant also seeks orders of mandamus, a declaration and damages.
15. The applicant contends that a new post of CEO for Nasinu TC and Nausori TC was created by the first respondent on 10 July, 2020, by a wrongful and unlawful procedure. She was denied natural justice and a fair procedural appointment process, as the dual post of Nasinu TC and Nausori TC was not advertised by the first and second respondents. The appointee did not apply.
16. The advertisement as attached to the applicant’s affidavit invites applicants for the position of CEO for several TCs, including the Nasinu and Nausori TCs.
17. Section 35 of the Local Government Act provides that:
 - 1) *Every Council shall appoint fit and proper persons to be town clerk, health inspector and building surveyor and may appoint such other officers and servants as the Council considers necessary for the efficient discharge of its functions.*
 - 2) *One person may hold 2 or more of such offices.*(emphasis added)
18. Section 9A(2) states that the “*persons appointed as special administrators under subsection (1) shall be deemed to be the fully constituted Council of a municipality*”.
19. In my view, Section 35(1) read with section 9A(2) empowered the first respondent to appoint Ms Bari to hold the 2 offices of CEO for Nasinu TC and Nausori TC. The post was advertised.

20. The applicant was appointed as “*ACTING CEO*”. Her letter of appointment provides expressly that the “*acting period will be such time that the position of CEO is filled*”. The question of reinstatement does not arise.
21. I find no arguable case against the first respondent for breach of natural justice or procedural impropriety. The inclusion of the second and third respondents in these proceedings are an abuse of process, as the decision was made by the first respondent.
22. The application for leave is declined with costs.
23. **Orders**
- a. The applicants’ application for leave to apply for judicial review is declined.
 - b. The applicant shall pay each of the respondents costs summarily assessed in a sum of \$ 750.00 to each of the respondents within 15 days of this Ruling.



A.L.B. Brito-Mutunayagam
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JUDGE
1st July, 2022