

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No: HBC 202 of 2022

IN THE MATTER of an Application for Committal
under Order 52 of the High Court Rules.

BETWEEN: **THE ATTORNEY – GENERAL OF FIJI** of Level 4-8, Suvavou House, Victoria
Parade, Suva.

APPLICANT

A N D: **RICHARD KRISHNAN NAIDU**, Legal Practitioner, Duncan Road, Domain in
Suva C/- Munro Leys, Level -3 Pacific House, Butt Street, Suva.

RESPONDENT

Appearance : Ms. Gul Fatima for the Applicant
 Mr. John Apted with Mr. Subhas Parshotam, Mr. Hemendra Nagin,
 Mr. Gavin O’Driscoll, Mr. Rasokisoki Vosarogo for the Respondent

Decision : Friday, 02nd September, 2022 at 10.30 a.m

DECISION

(A) INTRODUCTION

[1]. The matter before me stems from the respondent’s summons filed on
15.07.2022, seeking the grant of the following orders:

1. *That pursuant to Order 32, rule 6 of the High Court Rules 1988, the order
of the Honourable Justice Jude Nanayakkara herein dated 27 June 2022
and sealed on 29 June 2022 (**Order**) and the Notice of Motion dated 28
June 2022 herein and the service thereof together with the Statement*

dated 22 June 2022 and affidavit in Support of the Applicant filed on 22 June 2022 on the Respondent be set aside.

2. *That all further proceedings in the action be stayed*
3. *Costs*
4. *Such other relief as may be appropriate.*

UPON THE GROUNDS THAT:

1. *The Applicant failed to make full and frank disclosure to the Court of all material facts and failed to disclose, among other things, the following material facts*
 - a). *the date upon which the Applicant first became aware of the Facebook post complained of (**Post**) and in respect of which he has applied for the Respondent's committal*
 - b). *the steps, if any, the Applicant or any other person took to have the Post removed before applying for committal proceedings*
 - c). *that the Respondent was a well-known public critic of the Applicant*
 - d). *that the Respondent was a prominent member of the National Federation Party (**NFP**), a rival political party to the Fiji First Party of which the Applicant is a member and General Secretary and the current party of Government (in which the Applicant is Attorney-General amongst other things)*
 - e). *that there has been public speculation and comment that the Respondent might be a candidate for the NFP in the forthcoming General Election and could or should be appointed to be Attorney-General in place of the Applicant*
 - f). *that the Applicant has publicly demonstrated animus towards the Respondent and the law firm of which he is part, including regularly criticizing and referring negatively to them in Parliament*

- g). *that on account of the matters set out in sub-paragraphs (c)-(f) above the Applicant had a direct personal interest in the outcome of the decision leading to the making of the Order*
- h). *that, having regard to the matters in sub-paragraphs (c)-(f) above, there may be a real or apprehended possibility of bias and/or conflict of interest between the Applicant's role as Attorney-General and his political and/or personal interests.*

2. Further or alternatively by reason of the matters set Out in sub-paragraph 1(c)- (f) above:

- (a) *the Applicant was disqualified from making the application and/or*
- (b) *the application amounts to an abuse of the Court's process and/or*
- (c) *the Applicant's application for leave was in breach of the Respondent's right to executive and administrative action that was lawful, rational, proportionate or procedurally fair under s.16 of the Constitution of the Republic of Fiji and/or*
- (d) *the Applicant's application for leave was in breach of the Respondent's rights of political participation under s.23 of the Constitution of the Republic of Fiji and/or*
- (e) *the Applicant was required to, but did not, demonstrate a strong prima facie case for the grant of leave*

and the said order dated 27 June 2022 should accordingly not have been made.

3. *Further or alternatively no reasons (or alternatively insufficient reasons) were given in the decision pursuant to which the order was made.*

[2]. The setting aside summons is supported by the following affidavits:

- (a) Affidavit of Loraine Alpana Bhan filed on 15.07.2022
- (b) Affidavit of Lenora Salusalu Qereqeretabua filed on 15.7.2022.
- (c) Affidavit of Ronal Jasvindra Singh filed on 29.7.2022.

- [3]. The application is opposed by the applicant.
- [4]. The applicant did not file an answering affidavit. The applicant challenged the affidavit evidence of Loraine Bhan and Lenora Qereqeretabua on the following grounds:
- (a) The affidavits need the respondent's authority.
 - (b) The respondent is required to swear affidavit.
 - (c) Third parties cannot swear affidavits.

(B) PRELIMINARY ISSUE

- [5]. The applicant challenges the affidavit of Loraine Bhan and Lenora Qereqeretabua. The applicant says that the affidavits cannot be admitted as evidence in these proceedings because:
- (a) The affidavits need the respondent's authority.
 - (b) The respondent is required to swear affidavit.
 - (c) Third parties cannot swear affidavits.
- [6]. Neither Ms. Bhan nor Ms. Qereqeretabua are swearing affidavit "on behalf" of anyone.
- [7]. Ms. Qereqeretabua [one of NFP's Member of Parliament] is deposing to the conduct of the applicant in Parliament. She refers to remarks made by the applicant about the respondent and his law firm. She deposed that the applicant regularly criticises the respondent and his law firm, in Parliament.
- [8]. Ms. Bhan is employed as Library Manager of Munro Leys, the solicitors for the respondent. She says ; (at paragraph (1), (2) and (3) of the affidavit)
- 1) *I am employed as Library Manager of Munro Leys, the solicitors for the Respondent (Mr Naidu). I hold a Diploma in Library/Information Studies and a Bachelor of Laws degree from the University of the South Pacific.*
 - 2) *I have been instructed by Mr Ronal Singh, a partner of Munro Leys, to compile materials which reflect the relationship between the Applicant in these proceedings, Mr Aiyaz Sayed- Khaiyum, the Attorney-General of Fiji (also, among other things, the Minister for Economy, responsible for*

economic management) (**Mr Sayed-Khaiyum**), and Mr Naidu and the law firm of Munro Leys. Mr Naidu instructs that Mr Sayed-Khaiyum's relationship with him is mutually antagonistic and that this is also reflected in public attacks by Mr Sayed-Khaiyum against Munro Leys, of which Mr Naidu is a partner.

3) *In the course of my research I have reviewed Hansard for the years 2020, 2021 and 2022 (to date), mainstream and social media over the same periods. I have had limited time to do this, being instructed that this information must be complied by 15 July 2022 to comply with Court directions.*

[9]. She has annexed to her affidavit Hansard, and news media, social media comments by the applicant on the respondent referring to the alleged antagonism between the applicant and the respondent.

[10]. As to the issue concerns authority, under the heading "authority of the respondent", Mr. Apted writes in his reply written submissions filed on 17.08.2022.

65) *The Applicant challenges the affidavit evidence of Loraine Bhan and Lenora Qereqeretabua on the basis of law that does not apply to those affidavits.*

66) *The law on affidavits, and the necessity (or otherwise) for an authority from a party has been clarified by the Courts in more recent decisions. It is respectfully submitted that the fullest discussion of the law relating to the swearing of affidavits was undertaken by Master Azhar in **Pillay v Barton Limited**. His discussion and conclusions have been approved of in subsequent decisions of the High Court including in **Smak-Works Pte Ltd v Total (Fiji) Pte Ltd** (Stuart J).*

67) *In Pillay, Master Azhar responded to two questions to be decided in relation to the preliminary objection of the plaintiff in that case:*

a. *first, who can depose an affidavit in a civil suit?*

b. *second, does the deponent need a written authority from a company to swear an affidavit on its behalf?*

68) *The Learned Master correctly pointed out first at observed correctly that affidavit evidence is in principle no different to oral evidence:*

08. *Accordingly, the affidavits, which are equated with the oral evidence, are the way of giving evidence and the person who has privy to any information may depose an affidavit to that effect. This was affirmed by the court in **Vodafone Fiji Ltd v Pacificconnex Investment Ltd** [2010] FJHC 419; HBE097.2008 (30 August 2010) and held that:*

Affidavits are a source of providing evidence and anyone privy to knowledge and information has a right to depose to an affidavit.

69) *It follows that since counsel for a party can call a witness to give evidence of matters within the witness's knowledge without providing an authority from the party so too can they file an affidavit without annexing evidence of the client's express authority.*

70) *Following rigorous survey of the rules and authorities, the Learned Master concluded as follows:*

14. *The above analysis on the rules of the court and the decided cases supports the conclusion that the general rule is that, save in the excepted cases, an affidavit must contain the evidence of the deponent, as to such facts only as he is able to speak to, of his own knowledge to prove. The exceptions are the applications under Order 14 rules 2(2) and 4(2), Order 86 rule 2(1) and the affidavits falling under paragraph 2 of Order 41 rule 5... under these rules, the respective parties must swear an affidavit. If not, the deponent should have been authorised to do so. However, there is no requirement for a written authority to be attached with the affidavit under those circumstances, but the deponent should state the fact that, he was authorised to make the affidavit... The main factor, in deciding the admissibility of an affidavit, is whether the deponent is able of his own knowledge to prove the facts contained in a particular affidavit or whether the deponent can positively swear to those facts ...*

[Emphasis added]

71) *That, then, disposes of the “written authority” point.*

[11]. What is critical to note is that neither Ms Bhan nor Ms Qereqeretabua are swearing affidavits on behalf of **anyone** [Paragraph (79) of the reply written submission of the respondent filed on 17.8.2022]. **This being so, the affidavits are sworn by someone other than a party to the proceedings.** There are two forms of legal proceedings in our court system ; (1) Actions (also known as suits or trials) and (2) Applications (also known as Summons or Motion proceedings). Each form of proceedings follows its own Rules and has a different application in Civil Law. In Pillay v Barton Limited¹ the question before the Master was who can depose an affidavit in an inquiry under Order 25, Rule 9. The legal proceedings before me is not a civil suit or an inquiry. The legal proceedings before me concerned Summons taken out by the respondent pursuant to Order 32, Rule 6 of the High Court Rules, 1988 and under the inherent jurisdiction of the court for an order setting aside the leave granted ex parte on 27.06.2022 under Order 52, rule 2 to apply for an order of committal against **the respondent**. Therefore, the matter before me stands entirely on a different footing and I disagree with Mr. Apted’s attempt to link the decision in Pillay v Barton Limited (supra) to the proceedings before me.

[12]. In the proceedings before me, an application to set aside the ex parte order is launched by the respondent against the applicant Attorney – General. It is trite that the respondent needs to swear an affidavit setting out the facts in support of his desired relief. This affidavit is called the ‘**founding affidavit**’ as it forms the foundation of the respondent’s application. The founding affidavit creates the frame work for the application. The respondent in the proceedings before me did not file a founding affidavit of his application for setting aside. In the absence of founding affidavit, how could this court scrutinize the facts relied on by the respondent in support of his desired relief?. Where is the frame work created for the application? This is disastrous! That is not the end of the difficulty. Neither Ms. Bhan nor Ms. Qereqeretabua say in the body of the affidavit in which capacity and under what authority the affidavits are filed in court with the application. Are they witness affidavits to the application? Then, where is the declaration as to the followings in the body of the affidavit ; (1) Ms. Bhan and Ms. Qereqeretabua have read and understood the matters of the application, And (2) Ms. Bhan and Ms. Qereqeretabua have personal knowledge of the facts related to the application of the respondent filed in court. The reason is that the matter before me is concerned with an application for setting

¹ (2018) FJHC 599

aside an order and not a civil suit or trial involving Tort claims, Breach of Contract claims, Equitable claims or Landlord – tenant claims.

[13]. For all those reasons, therefore, I place no weight on the contents of the affidavits of Ms. Bhan and Ms. Qereqeretabua filed on 15.07.2022.

(C) Ground One

[14]. In ground one, the respondent contends that the applicant had failed to make a full and frank disclosure to the court the following facts and therefore the ex parte order granting leave must be set aside.

- a). *the date upon which the Applicant first became aware of the Facebook post complained of (**Post**) and in respect of which he has applied for the Respondent's committal*
- b). *the steps, if any, the Applicant or any other person took to have the Post removed before applying for committal proceedings*
- c). *that the Respondent was a well-known public critic of the Applicant*
- d). *that the Respondent was a prominent member of the National Federation Party (**NFP**), a rival political party to the Fiji First Party of which the Applicant is a member and General Secretary and the current party of Government (in which the Applicant is Attorney-General amongst other things)*
- e). *that there has been public speculation and comment that the Respondent might be a candidate for the NFP in the forthcoming General Election and could or should be appointed to be Attorney-General in place of the Applicant*
- f). *that the Applicant has publicly demonstrated animus towards the Respondent and the law firm of which he is part, including regularly criticizing and referring negatively to them in Parliament*
- g). *that on account of the matters set out in sub-paragraphs (c)-(f) above the Applicant had a direct personal interest in the outcome of the decision leading to the making of the Order*

h). that, having regard to the matters in sub-paragraphs (c)-(f) above, there may be a real or apprehended possibility of bias and/or conflict of interest between the Applicant's role as Attorney-General and his political and/or personal interests.

[15]. In reply, the applicant submits that the matters raised by the respondent are not relevant for an ex parte application for leave to apply for an order of committal against the respondent.

The facts highlighted by the respondent did not need to be disclosed at the time of applying for an ex parte leave to apply for an order of committal – The leave stage is commenced ex parte before a judge as an application in chambers (now chambers business in a open court room)

[16]. **In the setting aside summons the respondent seeks to set aside the ex parte grant of leave to issue the committal proceedings on the ground that the applicant's statement and the affidavit in support did not disclose his animus towards, and political rivalry with, the respondent which might have indicated to the court that the applicant's only purpose in seeking committal was personal and political.**

The thrust of Mr. Apted's oral submissions is that the contempt proceedings, including an application for ex parte leave under Order 52, Rule 2 are motivated by a personal vendetta. Whether this allegation is admitted or denied, it is obvious from Order 52, Rule 2(2), the ex parte application for leave must be accompanied by a statement setting out; (1) the name and the description of the applicant (2) the name, description and address of the person sought to be committed (3) the grounds on which his committal is sought. The above contents of the statement must be verified by an affidavit. **That is all what is required to be disclosed by the Attorney - General at the leave stage and he is under no duty to place his fitness before the court to be entrusted with the conduct of public interest proceedings beyond realistic doubt.**

[17]. If I may, the Attorney – General has formed the view that the respondent's Facebook post of 02.02.2022 which included an excerpt of the judgment delivered on 21.01.2022 is calculated to ridicule presiding judicial officer and the Fijian Judiciary as a whole and therefore he is entitled to invoke the court process under Order 52, Rule 2 to apply ex parte for leave to apply for an order of committal against the respondent. Therefore, I see that the Attorney – General has brought the proceedings for a legitimate purpose for which he is entitled under law. It has not been shown that the committal proceedings based upon respondent's Facebook post has no real prospect of success. Mr. Apted did not seek to persuade the court that the Attorney – General's allegation of

contempt lacked a reasonable basis in fact or law. Therefore, it is probable that the Attorney – General is pursuing the committal application for legitimate reason. In the circumstances, the contempt proceedings engage the public interest and it should not be viewed with suspicion. In my judgment, viewed in that light, it is not the part of the court’s function at the leave stage to analyze the evidence to resolve whether the ex parte leave application represent a personally vindictive campaign of harassment against the respondent by the Attorney – General.

- [18]. It is axiomatic that, upon an application for leave, the judge is to satisfy himself that; what exactly the alleged contemnor is alleged to have done, disclose a basis for granting leave to apply for an order of committal and **not** whether a case is established or whether the proceedings were brought in bad faith or for some ulterior motive. **At the leave stage, the court should not trespass on the issues at the substantive matter.**

THE SCOPE OF ORDER 52, RULE 2

What should this court ensure at the leave stage – The rationale of the leave stage

- [19]. The Fiji Court of Appeal in **Ratu Kaliova Dawai v Native Lands and Fisheries Commission and Others**², Fiji Court of Appeal announced the considerations of Order 52, Rule 2 of the High Court Rules in the following terms; [Reference is made to paragraph (21) to (25) of the Fiji Court of Appeal Judgment]

21) *“In this case, the contempt proceedings under Order 52 are clearly designed to operate in two stages. The first stage is an application for leave to apply for an order for committal. The second stage is the application for an order of committal. The first stage is commenced ex parte by notice before a judge as an application in chambers (now chambers business in a court room). It is essentially administrative in nature. The judge examines the documents to determine compliance with Order 52 Rule 2.*

22) **At the first stage the judge must ensure that the application has been made ex parte by a notice given to the Registry within the time prescribed by Order 52 Rule 2 (3) and lodged with the required statement and affidavit at the same time. The judge must ensure that the statement sets out the information that is specified in and required by Order 52 Rule 2 (2). The contents of the statement must be verified by an affidavit which is to be filed before the application is made and at**

² [2014] FJCA 194; Misc.02.2012 (7 November 2014)

the same time as the other documents. The Judge must also satisfy himself that the application is one that falls within the jurisdiction that is given to the Court under Order 52 Rule 1. This, however, is all that is required at the leave stage.

- 23) *Once leave has been granted, the application for an order of committal is made by motion and in accordance with the requirements of Order 52 Rule 3. The application by motion ordinarily proceeds inter partes in court.*
- 24) **In this case the learned High Court Judge has proceeded to determine the application for an order at the leave stage and in my judgment has clearly exceeded his jurisdiction in doing so. When he ordered that the application for leave to apply for an order of committal be refused, the learned Judge had considered and in effect determined the issues that were relevant to the substantive application. He has not considered the matters that were relevant at the leave stage under Order 52 Rule 2.**
- 25) *However, having noted the jurisdictional error of the learned Judge, it should be stated that it is not the function of this Court to determine whether the learned Judge had erred in his judgment. Given the nature of the application that was before him and what must have been extremely limited affidavit material in support of that application, it is not clear from what sources the learned Judge obtained the factual material that formed the basis of his judgment. **The point is that the learned Judge has embarked upon an inquiry which he was neither entitled nor required to do.***

[Emphasis added]

- [20]. The Judgment of the Fiji Court of Appeal indeed, if I may say with respect, is easy to understand and it is plain. I regard myself as bound by the Judgment and the ratio therein stated.
- [21]. Under Order 52, Rule 2(2), the ex parte application for leave must be accompanied by statement setting out:
- 1) *The name and description of the applicant.*
 - 2) *The name, description and address of the person sought to be committed.*
 - 3) *The grounds on which his committal is sought.*
- [22]. The above contents of the statement must be verified by an affidavit. That is all what is required to be disclosed at the leave stage.

(D) **Ground Two**

[23]. For the sake of clarity and completion, ground two is reproduced below:

Further or alternatively by reason of the matters set Out in sub-paragraph 1(c)-(f) above:

- (a) the Applicant was disqualified from making the application and/or**
- (b) the application amounts to an abuse of the Court's process and/or**
- (c) the Applicant's application for leave was in breach of the Respondent's right to executive and administrative action that was lawful, rational, proportionate or procedurally fair under s.16 of the Constitution of the Republic of Fiji and/or**
- (d) the Applicant's application for leave was in breach of the Respondent's rights of political participation under s.23 of the Constitution of the Republic of Fiji and/or**
- (e) the Applicant was required to, but did not, demonstrate a strong prima facie case for the grant of leave**

[Emphasis added]

Limb 1 - Disqualification

[24]. Mr. Apted argues that the affidavit evidence in support of the setting aside summons sets out in detail evidence of the applicant's animus against the respondent by way of repeated public attacks on him and his law firm.

[25]. On the other hand, the applicant submits that the Attorney General is not disqualified from making the application for leave because 'he has brought the proceedings in his role as the Attorney General'.

[26]. In reply, the respondent contends that since the application for leave is tainted with bias or ulterior purpose, the Attorney General is disqualified. The respondent says that it is the essence of abuse of process.

[27]. In order to answer those questions, it is necessary to bear in mind that except for contempt in the face of the court, a judge has no jurisdiction to deal with

contempt of his own motion. In the context of the contempt proceedings pending before this court, the Attorney General is the appropriate public officer to represent the public interest in the administration justice. In doing so he acts in constitutional theory on behalf of the state but not in the exercise of his executive functions³.

- [28]. Mr. Apted did not seek to persuade the court that the Attorney General's allegation of contempt lacked a reasonable basis in fact or law. As I understood his written submission, he submitted that the Attorney General's proceedings represent an abuse of court process because the application for leave is tainted with bias or ulterior purpose. With respect, I find this submission not persuasive.

An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice. As noted, Mr. Apted did not seek to persuade the court that the Attorney – General's allegation of contempt lacked a reasonable basis in fact or law. The thrust of his written submissions and the allegation is that contempt proceedings including an application for leave is motivated **only** by personal vendetta (as a stick to beat Attorney – General's opponent). Mr. Apted says that the Attorney – General is pursuing a vendetta.

In my judgment, If the Attorney- General obtains a favorable verdict from the court at the end of the substantive hearing, there will be nothing preventing him from asserting that that the court's verdict provides vindication in respect of the authority and dignity of the court and promotion of the public welfare by protection of the majesty of the judiciary and the law. Then how could the respondent allege that the Attorney- General's contempt proceedings have not served a legitimate purpose? How could the respondent allege that the Attorney – General's contempt proceedings are motivated **only** by a personal vendetta? Has the proceedings not served a legitimate purpose of protecting the judiciary from attack? I am bound to ask how the respondent could argue that the contempt proceedings of the Attorney- General are designed **only** to cause harassment to the respondent. How could the respondent argue that the Attorney – General's contempt proceedings are not serving the legitimate purpose of protecting the judiciary?

³ Attorney General v Times News Paper Limited [1973] 3 ALL. E. R. 54 at page 74

- [29]. It should always be borne in mind that in order to disqualify a person from invoking the jurisdiction of the court, there should be proof:

that the proceedings have been instituted not only for an improper purpose

But also

(1) **without reasonable grounds**

This being so, to exclude a litigant with a genuine cause of action is unjustifiable unless an Act of Parliament so provides.

- [30]. Let me take a **hypothetical situation**. What if the Attorney General or any other Law Officer with an **arguable cause of action** for an application for leave to apply for an order of committal, which he would wish to pursue in any event, can be shown also bias and ulterior purpose in view, as a desired by produced of the litigation? Can the Attorney General or the Law Officer be debarred from proceeding with the contempt proceedings? The simple answer is "Attorney General or the Law Officer should not be debarred unless an Act of Parliament so provides." The plea of bias and ulterior motive in bringing the contempt proceedings has no bearing on the outcome of the proceedings and therefore, the improper motive and bias alleged is irrelevant.

- [31]. I do not accept the argument of Mr. Apte which in my view is fundamentally misconceived. The present case involves a contest between an individual and a representative of the state. In my Judgment, it would be wrong to circumscribe the public interest requirement with notions of bias and ulterior motive that are more apt for litigation between citizens so long as the contemnor's interest is adequately safeguarded by giving him an opportunity of being heard in defence. Therefore as to the aspect of disqualification, I reject the argument of Mr. Apte as bereft of substance or merit.

Limb 2 - Abuse of process of the court -

- [32]. In paragraph (64) of the respondent's written submission filed on 15.7.2022 the respondent submitted:

64. The (uncontested) evidence is that Mr Naidu is a public critic and political rival (or potential rival) of the Applicant. The Applicant has offered no

evidence that, at any time in the four months between February 2022 and June 2022, he took any steps to have the allegedly contemptuous post removed or the incorrect judgment corrected. There is (uncontested) evidence that he has made harsher criticism of sitting court officers. The evidence therefore points (as was found in the Draunidalo case) to the conclusion that these proceedings were brought for an ulterior purpose and are, accordingly, abusive.

- [33]. Mr. Apted argued that the material before the court leads to the conclusion that the applicant's real and only purpose in the bringing of the proceedings for contempt is to attack an opponent – thereby abusing the process of the court. Mr. Apted is seeking to set aside the proceedings for that reason.
- [34]. I keep steadily in mind that Mr. Apted did not seek to persuade the court that the Attorney General's allegation of contempt lacked a reasonable basis in fact or law.
- [35]. The proceedings concerned an application by the Attorney General for an order committing the respondent to prison for contempt of court for scandalizing the court.
- [36]. The proceedings arose from a Facebook post on 02.02.2022 at 12.53pm. The facts relied on by the Attorney General in the leave application are set out in the affidavit evidence. If I may reproduce the evidence as to the alleged contempt.
- 1) *My office was alerted to a Facebook post published by the Respondent on 2nd February 2022 at 2:53pm on his Facebook page. Screenshots of the Facebook post and comments to the post are annexed hereto and marked "A".*
 - 2) *The Facebook post read **"Maybe our judges need to be shielded from all this vaccination campaigning. [I'm pretty sure all the, Applicant wanted was an injunction [Thinking Face Emoji]."***
 - 3) *The Facebook post also included a photograph of the Judgement delivered in **Naidu v Gulf Investment (Fiji) Pty Ltd (2022) FJHC 23 on 21st January 2022.***

- 4) *The Respondent selectively cropped 4 portion of the Judgement which read:*
 3. *After hearing counsel for the first to fourth Defenda[...]*
 4. *This application for injunction was heard on 22.1[...]*
 5. *By the time injection application was heard a wi [...] against first Defendant.”*
- 5) *The ellipses indicate portions which have been cropped out from the excerpt of the Judgment posted by the Respondent.*
- 6) *The written Judgment of the presiding Judicial Officer, included two spelling errors. The word injunction was misspelled as “**injection**” in two places. The Respondent deliberately cropped and published on his Facebook page, the portion of the Judgment where the word injunction was misspelled. In the remainder of the Judgment, the word injunction was spelled correctly.*
- 7) *The Respondent's Facebook post was publicly accessible and attracted 107 reactions, 11 comments and was shared 2 times. Out of the 107 reactions, 84 were laughing emojis or pictograms:*
- 8) *One Facebook user by the name of Grace Wise, commented as follows:*
- 9) ***“OMG. Hope it’s not an expat judge [emojis]”***
- 10) *I understand that the presiding Judicial Officer is a Sri Lankan national. This comment by one Grace Wise was not deleted by the Respondent, but remained on his Facebook post for other viewers to read.*

[37]. Quite plainly, the nature of the alleged contempt in this case is that of scandalizing the court. I am mindful that no denial, explanation, justification or rationalization has been proffered, at any time, by the respondent.

[38]. Mr. Apted says there is evidence that the respondent Mr. Naidu is a public critic and political rival of the Attorney- General. The respondent contends that therefore, the proceedings were brought for an ulterior purpose and are accordingly, abuse of process of court.

- [39]. I cannot accept Mr Apted's propositions on abuse of process. It is a fundamental principle of long standing that the mere existence of an unworthy or reprehensible motive for bringing the action was not enough and it must appear that the purpose sought to be effected by the litigant in bring the proceedings was not within its scope and was improper⁴. Mr. Apted in his written submissions did not advance the argument that the object sought to be effected by the applicant by means of the process is outside the lawful scope of the process. **To take an example, "A" prosecutes "B" who is a political opponent for contempt of court, intending to secure the opponent's conviction so that he or she will be disqualified from office by reason of that conviction pursuant to legislation regulating holding of such office. The ultimate purpose of bringing about disqualification is not within the scope of the contempt proceedings instituted by "A". Therefore, the existence of the ultimate purpose cannot constitute an abuse of process when that purpose is to bring about a result for which the law provides in the event that the proceedings terminate in the moving party's favour.** The purposes which legal proceedings are designed to serve are the protection or vindication of particular legal rights and the imposition or enforcement of particular legal penalties, liabilities and obligations. **The achievement of any of the above purposes by any of the means is within the scope of the remedy for which a proceeding is designed.**
- [40]. The onus of satisfying the court that there is an abuse of process lies upon the party alleging it. The onus is "**a heavy one**" to use the words of Scarman L.J in **Goldsmith v Sperrings Ltd** ⁵.
- [41]. Next Mr. Apted cannot allege that the contempt proceedings still pending is unjust or amounts to an abuse of process of law.
- [42]. It is a rule of law that no one shall be allowed to allege of a still depending suit that it is unjust. This can only be decided by a judicial determination, or other final event of the suit in the regular course of it⁶.
- [43]. It is beyond sensible dispute that the Attorney General intended to obtain the remedy which the contempt proceeding was designed to give. The pursuit of a legitimate remedy is not converted to an abuse of process by an unworthy and ulterior motive alleged.

⁴ King v Henderson (Privy Council) [1898] AC 720

⁵ [1977] 1 WLR at 498

⁶ Gilding v Eyre 142 ER at Page 589

- [44]. In a case where a plaintiff intends to obtain relief within the scope of the remedy available in the proceedings, there is no abuse of process whatever the plaintiff's motives may be⁷.
- [45]. As Isaacs J said in Varawa v Howard Smith & Co Ltd⁸ “the term abuse of process connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the court is asked to adjudicate they are regarded as an abuse of process for this purpose”. Mr. Apted did not advance an argument on this aspect in his written submission to this court.
- [46]. I am at the loss to understand how could the respondent seek protection against the continuance of the contempt proceedings on the ground that the Attorney General has commenced and maintained the proceedings for an ulterior purpose, **in the absence of sufficient evidentiary material, which must show that the Attorney General intended to obtain a remedy or result falling outside the scope of the contempt proceedings are intended to serve or designed to give or unrelated to the remedy available in the proceeding commenced in the High Court.**
- [47]. An abuse of process occurs when the only substantial intention of the Attorney General is to obtain an advantage or other benefit, to impose a burden or to create a situation that is not reasonably related to a verdict that might be made in the proceedings for contempt. Mr. Apted did not advance arguments on this aspect. It is essential to stress that Mr. Apted's scathing attack upon the committal proceedings undertaken by the Attorney – General has at no time been based on a submission that the proceedings are without foundation. The basis of Mr. Apted's attack is that the Attorney General instituted and maintained the committal proceedings to have a revenge upon the respondent [the alleged ulterior purpose or motive]. That way of putting the matter, tends with respect, to look at the issue from the wrong end. As I followed the written submissions of Mr. Apted it is not submitted that there is anything in the evidence which would suggest that **the Attorney General intended to obtain a remedy which the proceedings was not designed to give - a purpose foreign to the scope of the process.** I find the submission of Mr. Apted on abuse of process hard to follow. I consider them to be ill-founded and I do not see any principled

⁷ See, Isaacs J. in Dowling [1915] 20 CLR at 521 - 522

⁸ 13 CLR 35 at 91

basis. The principle is that the pursuit of a legitimate remedy is not converted to an abuse of process by an unworthy and ulterior motive⁹. The existence of the ulterior purpose cannot constitute an abuse of process unless and until it is shown by evidence that the moving party commenced and maintained the proceedings with the intention of obtaining a result falling outside the scope of the remedy for which a proceedings is designed. Therefore as to the aspect of abuse of process, I reject the argument of Mr. Apted as bereft of substance or merit.

Limb 3 - Right to lawful executive and administrative action under s.16 of the constitution

[48]. Under this heading Mr. Apted contends:

- *The Attorney General's action in deciding to commence committal proceedings are actions of the executive and subject to Section 16 of the Constitution.*
- *The Attorney General's executive action to commence the contempt proceedings is tainted by ulterior purpose.*
- *The committal proceedings commenced by Attorney General without first seeking an explanation from the respondent is procedurally unfair and in breach of Section 16 of the Constitution.*

[49]. As I understood the written submissions of Mr. Apted filed on behalf of the respondent, the gist of his argument is this:

"The applicant's ex parte leave application involved breaches of Mr. Naidu's rights to lawful administrative and executive action."

[50]. I reject the respondent's submission that the Attorney General's action in deciding to commence committal proceedings are actions of the executive and therefore subject to Section 16 of the Constitution".

[51]. I find this submission had to follow. The role of the Attorney General in initiating and maintaining proceeding for committal are not the actions of the executive.

⁹ King v Henderson, **Privy Council**, [1898] AC 720

The direct authority is **A.G v Times Newspapers Ltd**¹⁰. It is directly in point against the proposition of Mr. Apted.

- [52]. In the illuminating Judgment of Lord Diplock in **A.G V Times Newspapers Ltd** (supra) contained the very significant passage following¹¹:

*My Lords, it will I believe have been apparent from what I have already said that, unlike the Court of Appeal, so far from criticizing I commend the practice which has been adopted since 1954 as a result of the observations of Lord Goddard CJ in **R v Hargreaves, ex parte Dill**¹², whereby the Attorney-General accepts the responsibility of receiving complaints of alleged contempt of court from parties to litigation and of making an application in his official capacity for committal of the offender if he thinks his course to be justified in the public interest. **He is the appropriate public officer to represent the public interest in the administration of justice. In doing so he acts in constitutional theory on behalf of the Crown, as do Her Majesty's judges themselves; but he acts on behalf of the Crown as 'the fountain of justice' and not in the exercise of its executive functions.** It is in a similar capacity that he is available to assist the court as amicus curiae and is a nominal party to relator actions. Where it becomes manifest, as it had by 1954, that there is a need that the public interest should be represented in a class of proceedings before courts of justice which have hitherto been conducted by those representing private interests only, we are fortunate in having a constitution flexible enough to permit of this extension of the historic role of the Attorney-General."*

[Emphasis added]

- [53]. Therefore, Mr. Apted's argument seeking protection under Section 16 of the Constitution is based on a misconception.

- [54]. As was said in **Ex parte Grossman**¹³:

"Contempt proceedings are sui generis, because they are not hedged about with all the safeguards provided in the bill of rights for protecting one accused of ordinary crime from the danger of unjust conviction."

¹⁰ [1973] 3 ALL. E.R 54

¹¹ Ibid, page 74

¹² [1954] Crim LR 54

¹³ 267 U.S 87, at page 117, 45 S. Ct 332, 336 [69L. Ed. 527. 38 A.L.R 131]

[55]. Without prejudice to what I have said above, the protection afforded by Section 16 of the Constitution is not absolute.

Limb 4 - Rights of political participation under Section 23 of the Constitution

[56]. Under this heading Mr. Apted submitted that the respondent is a political rival of the applicant and the application for committal was **aimed at** impeding or restricting the respondent's rights of political participation pursuant to section 23 of the Constitution.

[57]. The protection afforded by Section 23 of the Constitution is not and has never been absolute. Next question on this point of the case is whether there is reliable evidence to substantiate the allegation? This case should not rest only on surmises and conjectures. Neither is there any material, forthcoming, on the basis whereof the court could arrive at the conclusion. As I understand, the submission of Mr. Apted is that the Attorney General had not commenced or maintained the proceedings for any substantial legitimate purpose. The onus is impossible to discharge. The test is "**but for his alleged ulterior purpose, (the applicant) would not have commenced proceedings at all**". The respondent has not discharged the onus.

[58]. This limb of the second head of ground accordingly dismissed.

Limb 5 - Prima Facie Case

[59]. Under this heading Mr. Apted contends that the applicant was required to, but did not, demonstrate a strong prima facie case or any prima facie case for the grant of ex parte leave.

[60]. The Fiji Court of Appeal Judgment [**Ratu**] is clear and sufficient. The court should not pre-judge the application for leave on its merits.

[61]. As noted, under Order 52, Rule 2(2), the ex parte application for leave must be accompanied by statement setting out:

1) The name and description of the applicant.

2) The name, description and address of the person sought to be committed.

3) *The grounds on which his committal is sought.*

- [62]. The above contents of the statement must be verified by an affidavit.
- [63]. That is all that is required under Order 52, Rule 2 of the High Court Rules, 1988 at the leave stage. Let me go back in time for a moment, on 27.06.2022, this court did not rubber stamp the ex parte application of the Attorney- General for leave to apply for an order of committal against the respondent. The applicable standard is not a 'rubber stamp process' by the court. On 27.06.2022, the court examined the documents and was satisfied that; (1) what exactly the respondent is alleged to have done, disclose a basis for granting leave to apply for an order of committal (2) the statement sets out the information (as to the nature and details of the particular contempt alleges, as well as, the manner and occasion when it is alleged to have been committed) that is specified in and required by Order 52, Rule 2. (3) The contents of the statement is verified by an affidavit (4) the application falls within the jurisdiction that is given to the court under Order 52, Rule 1. The application for ex parte leave was assessed through this lens. Of course, merely making an application for leave under Order 52, Rule 2 without any foundation would not invoke the relief afforded under Orde 52, Rule 2.
- [64]. **Thereafter, the court granted leave ex parte to the Attorney - General to apply for an order of committal against the respondent.**
- [65]. At the costs of some repetition, if I may say that, Mr. Apted did not seek to persuade the court that the Attorney – General's allegation of contempt (viz, scandalizing the court) lacked a reasonable basis in fact or law. Mr. Apted made a scathing attack on the Attorney – General's application for leave on the basis that the proceedings have been commenced and maintained for a purpose alien to the purpose which such proceedings are intended to serve. As I understood his submissions, he said that the court process for leave has been employed by the Attorney – General for ulterior purpose or in such a way as to cause improper vexation and oppression.
- [66]. At the leave stage which is commenced ex parte by notice before a judge in chambers (now chambers business in open court) the court should not journey into the merits, motive, good faith, promptness and the true purpose of the applicant in bringing the proceedings for leave. The court should not envisage an inquiry into the merits, motive, promptness, good faith and the true purpose of the application. **In doing so the court will be exceeding its Jurisdiction conferred by Order 52 Rule 2 of the High Court Rules 1988 and would be committing a jurisdictional error.**

- [67]. Applying the ratio of the Court of Appeal Judgment in Ratu (ibid) to the present case and carrying it to the logical conclusion, I have no hesitation in concluding that Order 52, Rule 2 does not call for an evidential investigation as to the merits and legitimate purpose of the application for leave which is outside the scope of the role of the court at the leave stage. **It is unnecessary and would be undesirable to import the test of strong prima facie case or mere prima facie case at the leave stage, and to subject an application of this kind to a preliminary vetting on merits.** The Court of appeal Judgment is clear and sufficient – no pre-judging on the merits at the leave stage. **I do not see any principled basis for importing such a requirement in the context in which the Fiji Court of Appeal arrived at the ratio and the Judgment in Ratu’s case.**
- [68]. With respect, I find the submissions of Mr. Apted as to (1) merits threshold: before court grants leave and (2) to subject an application for leave to a preliminary vetting on its merits (3) to subject an application for leave for an inquiry in to the true purpose of bringing the proceedings (4) to subject an application for leave to an inquiry as to whether or not it is in the public interest that the application has been made; hard to follow. With respect, I consider his submissions to be both ill- founded, and incapable of explaining the wording of Order 52, Rule 2 of the High Court Rules, 1988. The authors of the rules never intended that for an application in chambers. It is not an accident of drafting. To give effect to Mr. Apted’s submission would involve a substantial re writing of the High Court Rule Order 52, Rule 2. It is important to remember, significantly as I believe, where the meaning of the statutory words or subordinate rules are plain and unambiguous, it is not for the judges to invent fancied ambiguities as an excuse to failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. The truth is it would be injurious to public interest if judges, under the guise of interpretation, provide their own preferred interpretation to words of a statute or subordinate legislation. To decide a prima facie case, to make such an assessment, it was necessary to consider the strength of the evidence relied on by the moving party. **This is clearly outside the scope of the role of the court at the leave stage. Order 52, Rule 2 does not provide for a provisional vetting on merits and an investigation as to the good faith of the applicant bringing in the proceedings.**
- [69]. The court should not commit a jurisdictional error. From the research I conducted, I did not find a single case in the apex courts of Fiji that holds that the Attorney- General or any Law Officer must show a strong prima facie case or mere prima facie case, bona fide and good faith, in order to pursue a leave application for committal. There is no merits threshold before the court grants leave. The court cannot require the Attorney – General [when he is invoking the jurisdiction of the court to grant leave] to show a ‘strong prima facie’ case or ‘mere prima facie case’ or show legitimate purpose for commencing and maintaining the proceedings for leave. The present case involves a contest

between an individual and a Law officer. In my judgment, **at the leave stage, in a proceeding for contempt of court which is sui generis¹⁴ and also an ex parte application in chambers** it would be wrong to circumscribe the public interest requirement with notions prima facie case, good faith, vexation, oppression and proportionality that are (lying across a spectrum) more apt for litigation between citizens in open court trials.

Limb 6 - No reasons or insufficient reasons

- [70]. Finally Mr. Apted contends that this court's written decision on 27.06.2022 granting ex parte leave under Order 52, Rule 2 of the High Court Rules, 1988 is defective for its failure to explain its reasoning and seeks to set aside the ex parte order.
- [71]. I cannot accept this attack on the form and contents of my written decision on ex parte leave for contempt which is a chamber application.
- [72]. On 27.06.2022, this court did not rubber stamp the ex parte application of the Attorney- General for leave to apply for an order of committal against the respondent. On 27.06.2022, the court examined the documents and was satisfied that ; (1) what exactly the respondent is alleged to have done disclosed a basis for granting leave to apply for an order of committal (2) the statement sets out the information (as to the nature and details of the particular contempt alleges, as well as, the manner and occasion when it is alleged to have been committed) that is specified in and required by Order 52, Rule2. (3) The contents of the statement is verified by an affidavit (4) the application falls within the jurisdiction that is given to the court under Order 52, Rule 1.
- [73]. **Thereafter, the court granted leave ex parte to apply for an order of committal against the respondent.**
- [74]. Needless to say I disagree with Mr. Apted's elevation of first stage proceedings of contempt (viz, Order 52 Rule 2) which is an application in chambers – (now in a court room)
- [75]. This limb of the second head of ground is accordingly dismissed.

¹⁴ Neither civil actions nor prosecutions for offences - See, Myers v United States 264 U.S 95 at page 103

ORDER

The respondent's application for setting aside is refused.



A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke extending to the right.

.....
Jude Nanayakkara
[JUDGE]

High Court - Suva
Friday, 02nd September 2022