

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. 88 of 22

THE FIJI LABOUR PARTY
1st Plaintiff

UNITY FIJI
2nd Plaintiff

THE SPEAKER OF PARLIAMENT
1st Defendant

THE GOVERNMENT OF FIJI
2nd Defendant

THE ATTORNEY-GENERAL OF FIJI
3rd Defendant

Before: Hon. Chief Justice Kamal Kumar

Solicitors: Mr. S. Valenitabua for the Plaintiffs
Ms G. Fatima for the Defendants

Date of Hearing: 27 September 2022

Date of Judgment: 18 October 2022

JUDGMENT

Introduction

1. On 18 March 2022, the Plaintiffs filed Originating Summons - Expedited Form seeking following declarations and orders.
 - 1) *A Declaration that the provisions of subsection (4C) and 4(D) of section 116 of the Electoral Act 2014, as inserted into the said Act by section 38 of the Financial Management (Amendment) Act 2021, are unreasonable, arbitrary and unfair.*
 - 2) *A Declaration that the provisions of subsections (4C) and (4D) of section 116 of the Electoral Act 2014, as inserted into the said Act by section 38 of the Financial Management (Amendment) Act 2021, are breaches of section 23(1) and section 23(2) of the 2013 Constitution being the rights to campaign freely prior to and during elections.*
 - 3) *A Declaration that the provisions of subsections (4C) and (4D) of section 116 of the Electoral Act 2014, as inserted into the said Act by section 38 of the Financial Management (Amendment) Act 2021, are unconstitutional.*
 - 4) *A Declaration that the provisions of subsection (4C) and (4D) of section 116 of the Electoral Act 2014, as inserted into the said Act by section 38 of the Financial Management (Amendment) Act 2021, are invalid and unenforceable.*
 - 5) *A Declaration that political parties and candidates for elections are not budget section agencies or off-budget State entities and ought not be compelled to satisfy such a cumbersome provision of legislation warranted only for the budget sector agencies and off-budget State entities which are funded by and through Government.*
 - 6) *An Order that the provisions of subsections (4C) and (4D) are unconstitutional and null and void.*
 - 7) *An Order as to Costs.*
 - 8) *And any other Orders this Honorable Court may deem just.*

(“the Originating Summons”)

2. The Originating Summons was called on 3 May 2022, when parties were directed to file Affidavits and Submissions. The Originating Summons was adjourned to 26 June 2022, for hearing.
3. On 26 July 2022, the hearing date was vacated on the Plaintiffs application and this matter was adjourned to 13 September 2022 for hearing.

4. Hearing could not proceed on 13 September 2022 and this matter was called on 15 September 2022. On this day this matter was adjourned to 27 September 2022, for hearing.

5. Following Affidavits was filed on behalf of the parties:-

For the Plaintiffs

(i) Affidavit of Mahendra Pal Chaudhary sworn and filed on 18 March 2022
(“Chaudhary’s 1st Affidavit”).

(ii) Affidavit of Mahendra Pal Chaudhary sworn and filed on 14 June 2022.
(“Chaudhary’s 2nd Affidavit”).

For the Defendants

(i) Affidavit Preetika Priyadarshni Prasad sworn on 23 May 2022, and filed on 24 May 2022.**(“Prasad’s Affidavit”)**

6. The parties filed Submissions and made oral submission at the hearing.

Preliminary Issues

7. Three preliminary issues in this proceedings relates to Affidavits filed for and on behalf of respective parties and in particular, the authority given to them to institute legal proceedings or sign Affidavits. The other preliminary issue is whether the parties named as Defendants have been joined wrongfully.

Authority dated 4 January 2022 (Annexure MPC1 of Chaudhary’s 1st Affidavit)

8. This Court accept Defendants Counsels’ submission that this authority is general and not specific to this proceedings and as such cannot be accepted as an authority by the so called Executive Board to institute and maintain this proceedings.

9. Also no evidence has been produced in Court to prove that, the 2nd Plaintiffs Constitution gives the Management Board, the power to issue a general authority to the deponent as leader of the 1st Plaintiff.

10. This authority is given by Management Board of the 1st Plaintiff to the leader of the 1st Plaintiff. At paragraph 4(3) of the Authority it is stated

“3. Making, swearing and execution of legal which may be necessary for the pursuit and furtherance of any of the Fiji Labour Party Legal actions whether inside or outside Courts.”

11. The Court holds that this authority is too general and insufficient to institute and maintain this proceedings.

Authority dated 19 January 2022 (Annexure “MPC2 of Chaudhary’s 1st Affidavit”).

12. The comments made in respect to MPC1 applies to this authority as well except that Management Board is changed to Executive Board.
13. No evidence has been produced in Court to prove that the Executive Board of the 2nd Plaintiff has the power to give any person including its leader such an authority.
14. In the last sentence at paragraph 3 of the Authority it is stated that;

*“In this Meeting, the **Board members hereby authorize** Unity Fiji to institute Legal action in respect of any matter or issue which may need such legal action to be taken.”*

[emphasis added]

15. Also at paragraph 4 of the Authority it is stated that

*“**The Board also authorizes** the Leader of Unity Fiji, Mr. Savenaca Narube, to take all actions, necessary and expedient in the institution of such legal actions”*

[emphasis added]

16. The question that needs to be asked is when the Authority says **“Board members hereby authorizes”** and **“The Board also authorizes”** then why the so called **“Board Members”** did not sign the authority.
17. This authority (MPC2) is given by Executive Board of the 2nd Plaintiff to the leader of the 2nd Plaintiff. At paragraph 4(3) of the Authority it is stated;-

“3. Making, swearing and execution of legal document which may be necessary for the pursuit and furtherance of any of UNUTY FIJI’s Legal actions whether inside or outside of Courts.”

18. There is nothing in the authority that permits, the leader of the 2nd Plaintiff to delegate this authority to a third Party which in this case is leader of the 1st Plaintiff.

19. Even if the leader of the Plaintiff had power to delegate, there is no proof that the leader of the 2nd Plaintiff had authorized the deponent to swear any Affidavit for and on behalf of the 2nd Plaintiff.
20. For the reasons stated at paragraphs 12 to 19 of this Judgment, this Court holds that authority dated 19 January 2022, is defective and insufficient for the department to institute and maintain this proceeding for and on behalf of the 2nd Plaintiff.
21. When this Court at hearing of this proceedings or a related matter enquired with the Plaintiffs Counsel if the Plaintiffs Constitutions could provide such a power to the leader of the party, the Counsel honorably answered that such provision can be abused and used arbitrarily.
22. On the same token a general authority like Annexures SN1 and SN2 can be abused or used arbitrarily by the person with such an authority.
23. For the reason stated at paragraph 8 to 22 of this Judgment, this Court hold that authorities dated 4 January 2022 and 19 January 2022, is defective and insufficient to institute and maintain this proceeding. In addition there is no authority from leader of the 2nd Plaintiff to the deponent to swear the Affidavit for and on behalf of the 2nd Plaintiff.
24. Having held that the authorities relied on by the deponent is insufficient to institute this proceedings leaves this Court can dismiss this proceeding.
25. Even though, the Affidavits are defective on the grounds stated above, this Court will grant leave to use the Affidavits as the insufficient authority is an irregularly as to form. If this Court, decides the remaining preliminary Issue in favor of the Plaintiffs this Court will use the Affidavits filed on behalf of the Plaintiffs to determine the substantive issue.

Prasad's Affidavit

26. Preetika Priyadharshni Prasad at paragraph 1 of her Affidavit states that she is authorized to depose the Affidavit for on behalf of 2nd and 3rd Defendants.
27. The Plaintiffs by their Counsel submit that Prasad as Acting Solicitor did not have the authority to swear Affidavits as the authority to do has not been delegated to her by the Solicitor General.
28. At paragraph 3.1 (5) of the Plaintiffs submissions filed on 4 July 2022, they state as follows:-

“It is submitted that the functions and powers of the Solicitor General conferred pursuant to section 116 of the Constitution cannot be delegated. There is no provision in the Constitution which delegates the Solicitor General’s constitutional functions and powers, if he is unable to perform, to the Acting Solicitor General. The Defendants are invited to disclose such a provision to the Court for the Court’s and the Plaintiffs’ purpose.

29. Section 116(6) of the Constitution provides:

“The President may, on the recommendation of the Judicial Services Commission following consultation by it with the Attorney-General, appoint a person to act as the Solicitor-General during any period or during all periods, when the office of the Solicitor-General is vacant or when the Solicitor-General is absent from duty or from Fiji or is, for any reason, unable to perform the functions of office.”

(emphasis added)

30. It goes without saying that an acting appointment is made when the person appointed to perform certain functions and duties for some reason is absent from office.
31. When a person assumes the role of acting position, then the person so appointed performs the functions and duties of the person who is absent from office.
32. The question that needs to be answered is how can the Solicitor General delegate his powers to Acting Solicitor General when the Solicitor General is not in the office and not performing the functions and duties of the Solicitor General.
33. In this instance, Preetika Priyadharshani Prasad having been appointed Acting Solicitor General assumes the responsibility to perform the functions and duties of the Solicitor General including signing of legal documents like court pleadings and Affidavits for and on behalf of governmental bodies, Ministries and the Attorney – General of Fiji.
34. This Court therefore holds that Preetika Priyadharshani Prasad, being the Acting Solicitor General had the legal authority to depose her Affidavit on 23 May 2022.

Whether the parties named as Defendants have been joined wrongfully?

35. Defendants submit that it is the Parliament which deliberates on Bills and passes the legislation and once an Act is passed by the Parliament it is assented to by the President of Fiji.

36. The relevant provisions of the Constitution are sections 46(1)(2), 47(1), 48(1) and 54(1) which sections provide as follows:

Section 46(1)(2)

*“(1) **The authority and power to make laws for the State is vested in Parliament consisting of the members of Parliament and the President**, and is exercised through the enactment of Bills passed by Parliament and assented to by the President.*

*(2) **No person or body other than Parliament has authority to make any law in Fiji, except under authority conferred by this Constitution or by a written law.**”*

(emphasis added)

Section 47(1)

*“(1) **Any member of Parliament may introduce a Bill in Parliament, but only the Minister responsible for finance, or another Minister authorised by Cabinet, may introduce a Money Bill, as described in subsection (4).**”*

(emphasis added)

Section 48(1)

*“(1) When a Bill has been passed by Parliament, **the Speaker must present it to the President for assent.**”*

(emphasis added)

Section 54(1)

“(1) For the first general election of members of Parliament held under this Constitution, Parliament shall consist of 50 members, elected in accordance with this Constitution”

Pursuant to section 54(2), the number has been increased to 51.

37. It must be noted that **only the Parliament has the constitutional authority to make laws except** under authority of the Constitution or any written law (s46(2) – The constitution).
38. This Court takes judicial notice of the fact that the current Parliament (more so when the relevant provisions were passed) consists of Fiji First Party (FFP), Social Democratic Liberal Party (SODELPA) and National Federation Party (NFP). The number of seats held by each of these parties are as follows:-
FFP: 27 seats
SODELPA: 21 seats
NFP: 3 seats
39. When Bills are presented in Parliament, the members present either physically or virtually have the opportunity to deliberate on the Bill and vote on the Bill. The Bill is passed unanimously or by majority vote of parliamentary members in

attendance and once it is passed it is submitted by the Speaker to the President for his assent.

40. This Court will in brief consider the roles and responsibilities of the Defendants.

The Speaker of Parliament (The Speaker)

41. The Parliament by simple majority vote elects the Speaker who then presides over every sitting of the Parliament (**s77(1)(3) of the Constitution**).
42. Section 77(6) of the Constitution provides as follows:-

The Speaker, Deputy Speaker, or any other person presiding at any time, in the performance of the functions of the Speaker—

- a. is independent and subject only to this Constitution and any other law;*
 - b. serves to secure the honour and dignity of Parliament;*
 - c. is responsible for ensuring—*
 - (ii) the rights and privileges of all members; and*
 - (iii) public access to the proceedings of Parliament and its committees;*
 - d. has authority to maintain order and decorum in Parliament, in accordance with its standing orders and parliamentary tradition; and*
 - e. must act impartially, and without fear, favour or prejudice.*
43. The Speaker presides over the parliamentary process in respect to Bills presented to the Parliament. He also presides over voting on the Bills and once passed submits the Act for the President's assent.
44. Apart from this the Speaker has no other role to play in making the law. The Speaker does not even vote for or against the Bills presented to the Parliament. (**s69(2) of the Constitution**).

The Government of Fiji

45. Government in simple terms is the party that commands majority in the Parliament and has power/ duty to make policies for the social and economic development of the country in addition to functions and powers conferred under the Constitution or any written law.
46. In Fiji, FFP being the party that commands the majority in Parliament is the Government of Fiji. Since FFP commands the majority, it appoints members to the

Cabinet which consists of the Prime Minister, Ministers and the Attorney-General of Fiji.

47. Even though, the Government of Fiji presents Bills to Parliament which is mostly done by the Attorney-General of Fiji, it does not in any make the laws as no authority is vested in them to do so.
48. As stated earlier legislative authority to make law is vested in the Parliament which currently consists of members from FFP, SODELPA and NFP.

The Attorney-General of Fiji (“The Attorney-General”)

49. The Attorney-General of Fiji is the Chief Legal advisor to the Government of Fiji. (s96(1) – the Constitution)
50. Even though the Office of the Attorney-General prepares or vet Bills for and for and on behalf of the Government, the Attorney-General presents those Bills to Parliament and moves motion in favor of the Bill, the Attorney-General does not make law as power to make laws is vested in the Parliament.
51. It is interesting to note that s44(7) of the Constitution gives the Attorney-General discretion to intervene in a proceeding that relate to matters concerning a provision in Chapter 2 of the Constitution (Bill of Rights). If, Attorney General was to be added as a party when legislations are challenged on the ground that it breaches provisions of chapter 2 of the Constitution or any reason then the Constitution would have said so.
52. The law subject to this proceeding was made by the Parliament being the legislation authority with the President’s assent.
53. This Court therefore holds that the Speaker, Government of Fiji and The Attorney-General has been wrongfully joined as parties to the proceeding.
54. Usually, this Court after determining the preliminary issues would deal with substantive issues. However in this instance, it is inappropriate to do so for the simple reason that any declaration or orders made would not be enforceable against the Defendants named in this proceeding.

Costs

55. This Court takes note that parties filed submissions on preliminary issues and substantive issues.
56. Parties made oral submissions at the hearing.

57. The Plaintiffs proceeded with hearing of this proceeding despite being put on notice by the Defendants Counsel that Defendants have been wrongfully joined as Defendants, as they do not make laws.

Orders

- (i) Originating Summon - Expedited Form filed on 18 March 2022, is dismissed and struck out.
- (ii) 1st and 2nd Plaintiffs jointly and severally do pay \$3000.00 each to the 1st, 2nd and 3rd Defendants as costs within seven (7) days from date of this Judgment.

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Kamal Kumar
CHIEF JUSTICE

Solicitors:

Ratumaiyale Esquires, Suva
R. Patel Lawyers, Suva