IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Action No. HBJ 05 of 2022

IN THE MATTER of an Application for Judicial Review by SEREMAIA TUI also known as SEREMAIA TUITECI in respect of the decision of the rejection of this provisional candidacy nomination

BETWEEN

SEREMAIA TUI also known as SEREMAIA TUITECI

APPLICANT

AND

THE SUPERVISOR OF ELECTIONS

FIRST RESPONDENT

AND

THE CHAIRMAN ELECTORAL COMMISSION

SECOND RESPONDENT

Counsel	:	The Applicant in person
		Ms. M. Faktauton for the Respondents
Date of Hearing	:	30th May 2023
Date of Ruling	:	11th July 2023

RULING

(On Respondent's Summons for Strike Out)

[1] The Applicant, Mr. Tuiteci initiated the substantive action to apply leave for Judicial Review, on a decision made by the Respondents rejecting his nomination of Provisional Candidacy to stand for the Parliamentary Election in 2022.

[2] On the first call date Mr. Tuiteci's counsel informed Court that he wishes to withdraw as counsel. Mr. Tuiteci faced some difficulty to retain a counsel for his matter. In the meantime the Respondents filed Summons to strike out Mr. Tuiteci's Application. Nevertheless Mr. Tuiteci complied with the directions of the Court on filing his reply and later attended the hearing on the Summons to Strike Out in person.

[3] The Respondent's application has been made pursuant to section 31 (1) and (6) of the **Electoral Act 2014** (hereinafter referred as Act) and Order 18 Rule 18 (1) (a), (b) and (d) of the **High Court Rules 1988**.

[4] Order 18 Rule 18 empowers the Court to strike out any pleading at any stage of the proceedings on the ground that it discloses no reasonable cause of action as the case may be or that it is scandalous, frivolous, vexatious or for abuse of the process of the Court. Rule 18 (3) states that the Rule applies to the pleadings of an originating summons and a petition.

[5] The Respondent's contention is that the Court has no jurisdiction to hear an application challenging a decision of the Electoral Commission made under section 31 (1) and (6) of the Act. Further the Respondent submits that the whole Application has now become a moot point as the granting of an injunction would not be practical.

[6] Section 31 (1) states,

> Any person –
>
> (a) Who applied for nomination as an independent candidate or as a party candidate on a party list; and
> (b) Whose nomination has not been accepted by the Supervisor,
>
> may lodge an application to the Electoral Commission for a review of the decision of the Supervisor.

[7] Mr. Tuiteci firmly believes that he has fulfilled necessary prerequisites in section 23 of the Act for the candidate eligibility. The Supervisor of Elections has made a decision to disqualify his nomination. Mr. Tuiteci made an appeal to the Electoral Commission to review the decision of the Supervisor of Elections. In a written decision the Electoral Commission dismissed his appeal on 15th November 2022.

[8] At the hearing Ms. Faktaufon relied on section 31 (6) where it states a decision made by the Electoral Commission under section 31 shall be treated as final and shall not be subject to any further appeal or review by any court, tribunal or any other adjudicating body.

[9] Neither party submitted any legal precedents (case law) in support of their respective positions.

[10] Ms. Faktaufon's view was that the meaning of section 31(6) is unambiguous, therefore no necessity for the Court to refer any case law on the point. On the other hand Mr. Tuiteci states that he is entitled to institute this action to seek redress under section 16 (1) (c) of

the **Constitution of the Republic of Fiji**. It appears that that the Applicant had some misconception on the legal basis to his application. His application to this Court was made pursuant to Order 53 Rule 3 of the High Court Rules for leave to apply judicial review of the decision made by the Respondents. Thus I am not inclined to consider this action as an application for Constitutional Redress within the meaning of section 44 (1) of the Constitution.

[11] The matter before me narrows down to the issue whether I have jurisdiction to hear this application in light of the ouster clause in the Electoral Act.

[12] In **Ramasi v. Native Lands Commission** [2015] ABU 0056 of 2012 President Court of Appeal Hon. Justice Calanchini (as his lordship then was) considered whether judicial review is available to challenge decisions of the iTaukei Lands Commission (the Commission) and the Appeal Tribunal (the Tribunal) established under sections 6 and 7 respectively of the iTaukei Lands Act Cap 133. More particularly in light of section 7(5) of the Act, where it states that decisions of the Tribunal are to be final and conclusive and cannot be challenged in a court of law.

[13] His lordship stated *"the learned High Court Judge acknowledged that the effect of section 7(5) is that a decision of the Tribunal is final and cannot be challenged in court. However, as the learned Judge observed, an examination of the decision-making process is not prohibited by section 7(5) of the Act. The learned Judge concluded that it remains open to the court to examine the decision-making process by way of an application for judicial review. Of the accepted grounds upon which an application for judicial review may be made, the issues of jurisdiction and natural justice are more relevant to the decision-making process than to the merits of the decision and therefore can be reviewed by a court.*

What this means is that it is open to an aggrieved person to apply for judicial review of a decision of the Tribunal alleging either lack of jurisdiction or a denial of natural justice. A denial of natural justice may mean either the existence of bias on the part of the Tribunal or procedural impropriety. These issues are not directly concerned with the merits of the decision.

Therefore, in my judgment, whenever a challenge to a decision of the Tribunal is based on a lack of jurisdiction or a denial of natural justice, the High Court has the necessary jurisdiction to consider an application for judicial review under Order 53 of the High Court Rules notwithstanding section 7(5) of the Act".

[14] In **Natauniyalo v. Native Land Commission** [1998] 44 FLR 280 full bench of the Court of Appeal considered an ouster clause in the 1990 Constitution.

[15] Section 100(4) of the 1990 Constitution read as follows:
(4) For the purpose of this Constitution the opinion or decision of the Native Lands Commission on:

(a) matters relating to and concerning Fijian customs, traditions and usages or the existence, extent, or application of customary laws; and

(b) disputes as to the headship of any division or sub-division of the Fijian people having the customary right to occupy and use any native lands,

shall be final and conclusive and shall not be challenged in a court of law.

[16] In the High Court decision Byrne J. held that *"a decision or opinion of the First Respondent would only qualify for protection under s. 100(4) if the decision were a valid decision - reached in accordance with the principles of natural justice".*

[17] Accordingly the Court of Appeal held with the decision of Byrne J. that he should conduct the judicial review hearing in order to determine whether in fact the principles of natural justice has been breached.

[18] However in a more recent case of **One Hundred Sands Ltd v. Attorney General of Fiji** [2017] ABU27 of 2015 & ABU31 of 2015 another full bench of the Court of Appeal took a different view when their lordships considered an ouster clause in section 173 (4) (d) of the 2013 Constitution. The section states;

(4) 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 authorized, or any action taken, or any decision which may be made or authorized, 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 authorized 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."

[19] In arguing ***One Hundred Sands*** the learned Solicitor General relied on the decisions of the High Court in **Steven Pradeep Singh and Fiji Labour Party v. Electoral Commission and Others** (Civil Action No.HBC 245 of 2014) and **Makereta Waqavonvono v. Chairperson of Electoral Commission and Others** (Civil Action HBM 92 of 2014) where the High Court held that section 173 excluded from the jurisdiction of the Courts any decision under any laws made between 5 December 2006 until 6 October 2014.

[20] As these two cases dealt with decisions made before 6 October 2014 (first sitting of the parliament under the 2013 Constitution) they did not come strictly within the position in the ***One Hundred Sands*** where the decision in question was made after the 6 October 2014. However, they affirm the position that the exemption to section 173 (4) (d) would be where such mechanisms of challenge are provided in such Promulgation or Decree itself.

[21] The Court of Appeal unanimously held that "the decision of the learned High Court Judge in holding that the High Court had jurisdiction to hear and determine the application of the Appellant is erroneous and has to be set aside. Section 173 provides for the exclusion of jurisdiction in the widest possible terms when it states that "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 way entertain or to grant any order, relief or remedy in any proceeding of any nature whatsoever". This section therefore clearly excludes the jurisdiction of the High Court in accepting, hearing and determining the application of the Appellant seeking leave for judicial review".

[22] By another full bench of the Court of Appeal in **Suva City Council v. Saumatua** [2019] ABU73 of 2017 held that section 173 (4) (d) is applicable to a 'decision' but not to 'directive' or 'adherence' or any such other word.

[23] None of these decisions of the Court of Appeal reached the Supreme Court to have finality to the application of section 173 (4) (d) of the Constitution.

[24] Recently in **Swamy v. Permanent Secretary for Immigration** [2020] HBJ06. Of 2020 Hon. Justice Amaratunga followed the decision in ***One Hundred Sands*** to hold the view that *"court's jurisdiction to review is ousted to any decision taken under Promulgation made during 15.12.2006 to 14.10.2014 in terms of Court of Appeal (Full Court) One Hundred Sands (supra). Promulgation 3 of 3008 expressly ousted jurisdiction of court regarding decision taken in terms of Section 13(2)(g) of Immigration Act 2003. This Promulgation was made between the relevant time, stated above.... Accordingly, there is no restriction to time of the making of decision in order to be ousted from jurisdiction of courts"*.

[25] The Electoral Act 2014 was also a Decree when it was first implemented. It was Decree No. 11 of 2014 commenced on 28th March 2014. According to the recent legal precedents mentioned above, section 173 (4) ouster clause provisions should be applicable to the decisions taken under the provisions of Electoral Decree as Section 31 was included in the Decree. Therefore it is clear that Mr. Tuiteci's application has been caught by two ouster clauses. Section 31 (6) of the Act and section 173 (4) of the Constitution of the Republic of Fiji.

[26] One could argue that ouster clauses undermine the Rule of Law. An ouster clause would become an exception to the long standing principles of everyone is subject to the law and every person is entitle to have his or her rights decided by a Court of law.

[27] On the other hand there are grounds for justification of an ouster clause, such as section 31(6), as the process leading up to a parliamentary election should not be defeated by any delays caused by legal proceedings.

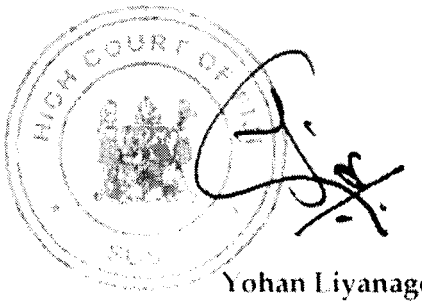
[28] Another aspect worth further consideration would be, applicability of section 173 (4) of the Constitution. Amended section 3 (i) and (j) of the **Interpretation Act 1967** states that any Decree or Promulgation which was in force on 31st July 2016, the words 'Decree' and 'Promulgation' are now replaced by the word 'Act'. Does that mean Section 173 (4) has served its purpose of a transitional provision as it was included in Part D of Chapter 12 of the Constitution to address transitional matters? Therefore it does not have any ongoing legal effect?

[29] I believe that is a matter for the Supreme Court to decide. Until such time this Court is bound by the full Court decision in ***One Hundred Sands***. The jurisdiction for judicial review of any decision made under section 31 (4) of the Electoral Act 2014 has been ousted by the operation of section 31 (6) of Electoral Act and section 173 (4) (d) of the Constitution.

[30] For the foregoing reasons I am of the view that Mr. Tuiteci has no reasonable cause of action. Thus Court makes following orders.

ORDERS

1. Application for leave to apply for judicial review hereby dismissed.
2. Parties to bear cost.



Yohan Liyanage

JUDGE

At Suva on 11th July 2023