IN THE HIGH COURT OF FIJI AT SUVA

IN THE MATTER of an application for constitutional redress pursuant to section 44(1)(a) of the *Constitution* 2013 and *High Court (Constitutional Redress) Rules* 2015.

[CIVIL JURISDICTION]

NIKOLAU NAWAIKULA

Applicant

CASE NO: HBM 148 of 2023

V

THE ATTORNEY GENERAL OF FIJI

1st Respondent

FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION

Interested Party

Counsel: Applicant In Person

Ms. O. Solimailagi and Mr. Y. Naidu for the 1st Respondent

Mr. J. Work for the Interested Party

Date of Striking out Hearing: 13th June 2024

Date of Striking out Ruling: 18th July 2024

RULING ON SUMMONS TO STRIKE OUT ORIGINATING MOTION FOR CONSTITUTIONAL REDRESS

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1. Nikolau Nawaikula, the Applicant, filed on 30 August 2023 a **notice of originating motion** with supporting affidavit for constitutional redress seeking a declaration that his right to fair trial guaranteed under section 15 of the Constitution of Fiji was contravened in FICAC v

Nikolau Nawaikula HACD 005 of 2022 (High Court) and FICAC v Nikolau Nawaikula MACD 30 of 2021 (Magistrate's Court).

2. On 6 March 2024 the Attorney General (1st Respondent) filed a **summons to strike out** the Applicant's originating motion supported by the affidavits of (i) Ashna Ben Harikishan for the 1st Respondent and (ii) Kuliniasi Saumi for the Interested Party on the following grounds:

   a) Pursuant to Order 18 Rules 18(1)(a), (b) & (d) of the High Court Rules 1988, the Applicant's application for constitutional redress, i) discloses no reasonable cause of action; ii) is scandalous, frivolous, or vexatious; and iii) an abuse of the process of the court; and

   b) According to section 44(4) of the Constitution 2013, the Applicant has an adequate alternative remedy available to seek the reliefs sought in his application for constitutional redress. Section 44(4) state *'[t]he 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'.*

3. Order 18 Rules 18(1)(a), (b) & (d) and (3) of the High Court Rules 1988 state:

> *18.-(1) The Court may at any stage of the proceedings order to struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –*
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> *(a) it discloses no reasonable cause of action or defence, as the case may be; or*
>
> *(b) it is scandalous, frivolous or vexatious; or*
>
> *(c) it may prejudice, embarrass or delay the fair trial of the action; or*
>
> *(d) it is otherwise an abuse of the process of the court;*
>
> *and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*
>
> *(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.*

4. Furthermore, the Attorney General (1st Respondent) also seek that the costs of the application to strike out be paid by the Applicant Nikolau Nawaikula.

5. Alleged contravention of a constitutional right and freedom does not render it obligatory that it be resolved via a constitutional redress action provided there is an adequate alternative remedy. This was upheld by the Fiji Court of Appeal in Singh v DPP [2004] FJCA 37; AAU0037.2003S (16 July 2004) citing Lord Diplock's dicta at page 64 who delivered the Privy Council's decision in Harrikissoon v Attorney General of Trinidad and Tobago [1979] 3 WLR 62:

> *In Harrikissoon v Attorney General of Trinidad and Tobago [1979] 3 WLR 62, the Appellant was transferred in his employment without the required 3 months notice. Instead of availing himself of the review procedure available in the Regulations, the Appellant applied to the High Court for constitutional redress. He sought a declaration that his rights had been violated. He was unsuccessful in the High Court, the Court of Appeal and the Privy Council. In delivering the opinion of their Lordships, Lord Diplock said at p.64:*
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> > *"The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."*

6. Furthermore, in Singh v DPP (supra) at page 15, the Fiji Court of Appeal held:

> *"We note that the Privy Council has consistently laid down that where an adequate alternative remedy is available then constitutional redress will be refused. It has regarded an application for constitutional relief in these circumstances as an abuse of process and as being subversive of the Rule of Law*

which the Constitution is designed to uphold and protect. These cases set out the relevant principles for the court to follow when considering and applying s.41(4) of the Constitution [1997]." (emphasis added)

7. In Radrodro v CR (1st Respondent) & AG (2nd Respondent) [2024] FJHC 229; HBM137.2023 (12 April 2024), the learned judge struck out the constitutional redress application pursuant to Order 18 rule 18 of the High Court Rules 1988 read in conjunction with section 44(4) of the Constitution 2013 on the basis that it was an abuse of process as it clearly interfered with the pending Applicant's appeal before the Court of Appeal. In arriving at his decision, the learned judge relied on *inter alia* decisions of the Privy Council and stated at paragraphs 24 - 29 of his judgment:

> *[24] It is clear that the orders sought in this CR clearly interferes with the pending appeal before Court of Appeal filed by Plaintiff. On that basis alone this application is an abuse of process and struck off in limine.*
>
> *[25] Even if I am wrong on the above Order 18 rule 18 of HCR is to be read along with Section 44(4) of the Constitution. It is an abuse of process to file parallel proceedings by way of CR, for denial of fair trial when the same issue is pending in Court of Appeal.*
> *[26] Section 44(4) of the Constitution states,*
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>> *"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."*
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> *[27] In Privy Council decision of Brandt v Commissioner of Police (Montserrat) [2021] 4 All ER 637 at 646-647 decided that boundaries of abuse of process of the court cannot be defined precisely. It was a case seeking constitutional declaration as to manner in obtaining electronic evidence from personal electronic device in a pending trial. It was held, (pp 646-647)*
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>> *The boundaries of what may constitute an abuse of the process of the court are not fixed. As Stuart-Smith LJ said in Ashmore v British Coal Corp [1990] 2 All ER 981 at 984, [1990] 2 QB 338 at 348, **the categories are not closed and considerations of public policy and the interests of justice may be very material**. Lord Diplock's speech in Hunter v Chief Constable of West Midlands [1981] 3 All ER 727 at 729, [1982] AC 529 at 536 underlines this point. He stated:*

> *"My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."*

Abuse of process must involve something which amounts to a misuse of the process of litigation. However, whilst the categories of abuse of the process of the court are not fixed there are clear examples which are relevant to this appeal.

[35] First, to seek constitutional relief where there is a parallel legal remedy will be an abuse of the court's process in the absence of some feature 'which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate'. The correct approach to determining whether a claim for constitutional relief is an abuse of process because the applicant has an alternative means of legal redress was explained by Lord Nicholls, delivering the judgment of the Board in <u>AG v Ramanoop</u> [2005] UKPC 15, (2005) 66 WIR 334, [2006] 1 AC 328 (at para [25]), as follows:

> *'... where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate.* ***<u>To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process.</u>*** *A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of State power.'*

There are examples of the application of that approach in cases such as <u>Harrikissoon v A-G of Trinidad and Tobago</u> (1979) 31 WIR 348 at 349, [1980] AC 265 at 268, <u>Thakur Persad Jaroo v A-G</u> [2002] UKPC 5, (2002) 59 WIR 519, [2002] 1 AC 871 (at para [39]) and most recently, in <u>Warren v State</u>

[2018] UKPC 20, [2019] 3 LRC 1 (at para [11]). This approach prevents unacceptable interruptions in the normal court process, avoids encouraging technical points which have the tendency to divert attention from the real or central issues, and prevents the waste and dissipation of public funds in the pursuit of issues which may well turn out to be of little or no practical relevance in a case when properly viewed at the end of the process. This approach also promotes the rule of law and the finality of litigation by preventing a claim for constitutional relief from being used to mount a collateral attack on, for example, a judge's exercise of discretion or a criminal conviction, in order to bypass restrictions in the appellate process (see eg Chokolingo v A-G of Trinidad and Tobago [1981] 1 All ER 244 at 248-249, [1981] 1 WLR 106 at 111-112. "(emphasis added)"

[28] From the above Privy Council (UK) decisions it can be deduced that for determination of abuse of process public policy and interest of justice are material. Section 44(2) of the Constitution must be read along with section 44(4) of the Constitution. Section 44(2) allows a party to seek CR 'without prejudice to any other action with respect to same matter …'. At the same time discretion is granted to the court to restrict CR in terms of section 44(4) when there is 'adequate alternate remedy is available'. There should be a balance between the said provisions but these provisions were not meant to allow parallel litigations to create confusion on settled law. Public policy and interest of justice guides the use of discretion of the court in the exercise of powers under section 44(4) of the Constitution.

[29] So Plaintiff must show that the alternate remedy by way of an appeal against the conviction is not adequate. This is an uphill task as the appeal process against conviction is comprehensive as to procedure and the law including and not limited to the allegation of denial of Fair Trial enshrined in section 15(1) of the Constitution.

Application of law on constitutional redress action

Chronology of Applicant's criminal case

8. The Applicant Nikolau Nawaikula initially appeared in the Magistrate's Court for the following charges in FICAC v Nikolau Nawaikula Criminal Case No. MACD 30 of 2021, which case was then transferred by the learned magistrate to the High Court:

FIRST COUNT

Statement of Offence (a)

FALSE INFORMATION TO A PUBLIC SERVANT: Contrary to section 201(a) of the Crimes Act No. 44 of 2009.

Particulars of Offence (b)

NIKOLAU NAWAIKULA on or about 10th April 2019 at Suva in the Central Division gave Viniana Namosimalua the Acting Secretary General to the Parliament of Fiji a person employed in the Civil Service false information that his permanent place of residence is in Buca Village, Buca Bay which he knows to be false knowing it to be likely that he will thereby cause Viniana Namosimalua to approve allowance claims submitted by him which Viniana Namosimalua ought not to do if the true state of facts with respect to the permanent place of residence of Nikolau Nawaikula were known to her.

SECOND COUNT

Statement of Offence (a)

OBTAINING FINANACIAL ADVANTAGE: Contrary to section 326(1) of the Crimes Act No. 44 of 2009.

Particulars of Offence (b)

NIKOLAU NAWAIKULA between 1st August 2019 and 30th April 2020 at Suva in the Central Division engaged in conduct namely submitted Allowance Claims to the office of the Acting Secretary General to the Parliament of Fiji and as a result of that conduct obtained a financial advantage amounting to $20,201.35 from the office of the Acting Secretary General to the Parliament of Fiji knowing or believing that he permanently resides at 15 kilometers Kings Road, Koronivia, Nausori which is a place less than 30 kilometers away from the place of Parliament or committee as per

the Parliamentary Remunerations Act 2014 and therefore was not eligible to receive the said financial advantage.

9. Being dissatisfied with the learned magistrate's order to transfer his case to the High Court, the Applicant and four others then filed an appeal in the High Court seeking that their cases be remitted to the Magistrate Court, which appeal was subsequently dismissed by the High Court primarily on the basis that the High Court lacked jurisdiction to hear the appeal. See Matanitobua & 4 others v FICAC [2022] FJHC 34; HACDA009.2021S (4 February 2022).

10. While his substantive criminal case [i.e. FICAC v Nawaikula HACD005.2022S] was proceeding in the High Court, the Applicant filed an appeal to the Court of Appeal [i.e. Matanitobua & 4 others v FICAC AAU008 of 2022] against the ruling of the High Court in Matanitobua & 4 others v FICAC [2022] FJHC 34; HACDA009.2021S (4 February 2022) dismissing their appeal noted in paragraph 9 herein.

11. Notwithstanding the Applicant's appeal to the Court of Appeal in Matanitobua & 4 others v FICAC AAU008 of 2022, the Applicant was then tried and convicted on 3 May 2022 of the aforesaid charges by the High Court in FICAC v Nawaikula [2022] FJHC 192; HACD005.2022S (3 May 2022).

12. On 20 May 2022, the Applicant was sentenced to 36 months imprisonment, which sentence was partially suspended by the learned judge to the effect that the Applicant serve 24 months with a non-parole period of 18 months, and the remaining 12 months suspended for five years. See sentence in FICAC v Nawaikula [2022] FJHC 236; HACD005.2022S (20 May 2022).

13. Being dissatisfied with his conviction and sentence, the Applicant then lodged his notice of appeal to the Court of Appeal on 2 June 2022. See Nikolau Nawaikula v FICAC AAU 035 of 2022. Appeal ground 10 in that notice of appeal state, *'[t]he Magistrate committed actual*

and presumed bias when he transferred the matter upon directive from the Chief Justice and aligning his decision to comply with that directive'.

14. On 30 April 2024, the Applicant's application for leave to appeal the 14 appeal grounds including ground 10 noted above was refused by Mataitoga, RJA presiding as single judge of the Court of Appeal in Nikolau Nawaikula v FICAC AAU 035 of 2022 (30 April 2024).

15. Notably, the Applicant Nikolau Nawaikula lodged his application for constitutional redress when his notice of appeal with 14 appeal grounds in Nikolau Nawaikula v FICAC AAU 035 of 2022 was pending in the Court of Appeal awaiting leave by a single judge of that court. On that note and based on section 44(4) of the Constitution 2013, Order 18 Rules 18(1)(a), (b) & (d) and (3) of the High Court Rules 1988 including the cited case authorities, the main issues for determination in this instant are:

    (i) Are the Applicant's appeals to the Court of Appeal in Nikolau Nawaikula v FICAC AAU 035 of 2022 & Matanitobua & 4 others v FICAC AAU008 of 2022 constitute adequate alternative remedies to his constitutional redress application in Nikolau Nawaikula v AG of Fiji HBM 148 of 2023, and is there any feature that renders the said appeal inadequate in light of Lord Nicholls dictum in *AG v Ramanoop [2005] UKPC 15, (2005) 66 WIR 334, [2006] 1 AC 328 (at para [25]).*

    (ii) Is the Applicant's constitutional redress application an abuse of the court's process?

Analysis of the arguments relative to law on constitutional redress

16. The Applicant argued that section 44(2) of the Constitution 2013 allows for the parallel action of constitutional redress to be instituted unimpeded by section 44(4), and section 44(4) can only be triggered provided there is an adequate alternative remedy.

    In Radrodro v CR (1st Respondent) & AG (2nd Respondent) (supra) at paragraphs 28 - 29, the learned judge held:

> *[28] From the above Privy Council (UK) decisions it can be deduced that for determination of abuse of process public policy and interest of justice are material. Section 44(2) of the Constitution must be read along with section 44(4) of the Constitution. Section 44(2) allows a party to seek CR 'without prejudice to any other action with respect to same matter …'. At the same time discretion is granted to the court to restrict CR in terms of section 44(4) when there is 'adequate alternate remedy is available'. There should be a balance between the said provisions but these provisions were not meant to allow parallel litigations to create confusion on settled law. Public policy and interest of justice guides the use of discretion of the court in the exercise of powers under section 44(4) of the Constitution.*
>
> *[29] So Plaintiff must show that the alternate remedy by way of an appeal against the conviction is not adequate. This is an uphill task as the appeal process against conviction is comprehensive as to procedure and the law including and not limited to the allegation of denial of Fair Trial enshrined in section 15(1) of the Constitution.*

Based on the learned judge's dicta noted above including Lord Diplock's dicta at p.64 in Harrikissoon v Attorney General of Trinidad and Tobago (supra) noted in paragraph 5 herein, I am of the opinion that section 44(2) of the Constitution 2013 must be read in conjunction with section 44(4) cautiously guided by public policy and interest of justice, to the effect that:

(a) section 44(2) cannot be read in isolation, thus it does not by itself provide an absolute or unimpeded right for one to institute a constitutional redress action in the High Court even if it is pursued as a matter of last resort bearing in mind the requirements of the High Court (Constitutional Redress) Rules 2015 and Order 18 Rules 18(1)(a), (b) & (d) and (3) of the High Court Rules 1988; and

(b) the High Court may allow a constitutional redress action provided there is any feature that renders the alternative remedy inadequate, based on Lord Nicholls dictum in *AG v Ramanoop [2005] UKPC 15, (2005) 66 WIR 334, [2006] 1 AC 328 (at para [25])* read together with section 44(4).

For these reasons, I therefore do not concur with the Applicant's argument on point.

17. The Applicant further argued that the phrase *'adequate alternative remedy'* in section 44(4) is not defined. Notwithstanding such phrase being undefined in the Constitution 2013, I am of the view that the cited case laws and judicial pronouncements have somewhat provided clarity and understanding of the practical implications of the said phrase as succinctly

emphasised by the Fiji Court of Appeal in Singh v DPP (supra) and highlighted in paragraph 6 herein:

> *"We note that the Privy Council has consistently laid down that where an adequate alternative remedy is available then constitutional redress will be refused. It has regarded an application for constitutional relief in these circumstances as an abuse of process and as being subversive of the Rule of Law which the Constitution is designed to uphold and protect. These cases set out the relevant principles for the court to follow when considering and applying s.41(4) of the Constitution [1997]." (emphasis added)*

On this particular point, the Applicant specifically argued that his appeals to the Court of Appeal have been rendered inadequate due to the fact that he has served his custodial sentence, and also refused leave to appeal by Mataitoga, RJA in Nikolau Nawaikula v FICAC AAU 035 of 2022. Despite the refusal of leave to appeal the 14 grounds of appeal, Mataitoga, RJA ordered that the Applicant's notice of motion to adduce fresh evidence be submitted with renewed application to the full bench of the Court of Appeal, and the Applicant's appeal against the refusal of the High Court to remit his case to the Magistrate Court in Matanitobua & 4 others v FICAC AAU008 of 2022 is still before the Court of Appeal.

On the other hand, the Attorney General (1st Respondent) and FICAC (Interested Party) contend that the Applicant had lodged his constitutional redress application when his appeals to the Court of Appeal in AAU 008 of 2022 and AAU 035 of 2022 were concurrently pending in the Court of Appeal at the leave stage, so given the context and chronology of the Applicant's criminal case and in light of relevant case authorities, the *'adequate alternative remedy'* at that juncture were the Applicant's actual appeals in the Court of Appeal.

I fully concur with this particular argument advanced by the 1st Respondent and FICAC.

18. In Radrodro v CR (1st Respondent) & AG (2nd Respondent) (supra) at paragraph 29 the learned judge held, *'[s]o Plaintiff must show that the alternate remedy by way of an appeal against the conviction is not adequate. This is an uphill task as the appeal process against*

conviction is comprehensive as to procedure and the law including and not limited to the allegation of denial of Fair Trial enshrined in section 15(1) of the Constitution'.

I am of the view that the Applicant has not shown that his appeals to the Court of Appeal in AAU 008 of 2022 and AAU 035 of 2022, being alternative remedies, are inadequate.

Conclusion

19. The main issues for determination in this instant raised in paragraph 15 herein are:

    (i) Are the Applicant's appeals to the Court of Appeal in Nikolau Nawaikula v FICAC AAU 035 of 2022 & Matanitobua & 4 others v FICAC AAU008 of 2022 constitute adequate alternative remedies to his constitutional redress application in Nikolau Nawaikula v AG of Fiji HBM 148 of 2023, and is there any feature that render the said appeals inadequate in light of Lord Nicholls dictum in *AG v Ramanoop [2005] UKPC 15, (2005) 66 WIR 334, [2006] 1 AC 328 (at para [25])*?

    (ii) Is the Applicant's constitutional redress application an abuse of the courts process?

20. Based on the reasons noted above, I find as follows pertaining to the aforesaid issues:

    (a) The Applicant's appeals to the Court of Appeal in AAU008 of 2022 and AAU 035 of 2022 constitute adequate alternative remedies to his constitutional redress action in HBM 148 of 2023.

    (b) The Applicant has not shown that his appeals to the Court of Appeal in AAU008 of 2022 and AAU 035 of 2022, being alternative remedies, are inadequate.

    (c) The Applicant's constitutional redress action in HBM 148 of 2023 is therefore an abuse of the courts process.

21. The application for constitutional redress in HBM 148 of 2023 is hereby struck out for abuse of the courts process given that there is an *adequate alternative remedy* pursuant to Order 18 Rule 18 of the High Court Rules 1988 read in conjunction with section 44(4) of the Constitution 2013.

22. The Cost of this application is summarily assessed at $2,000.00 to be paid by the Applicant Nikolau Nawaikula to the Attorney General (1st Respondent). No cost is awarded to FICAC (Interested Party) given the circumstances of the case.

Final Orders of the Court

1) Application for constitutional redress struck out.

2) Cost is summarily assessed at $2,000.00 to be paid by the Applicant Nikola Nawaikula to the Attorney General (1st Respondent).

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Hon. Mr. Justice Pita Bulamainaivalu
PUISNE JUDGE

At Suva

18th July, 2024

Solicitors
Applicant In Person.
Attorney-General's Chambers for the 1st Respondent
FICAC for the Interested Party