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ATTORNEY-GENERAL v. SHIU PRASAD HALKA
SHIU PRASAD HALKA v. PUBLIC SERVICE COMMISSION

[COURT OF APPEAL, 1972 (Gould V.P., Marsack J.A., Spring J.A.),
 31st October, 1st, 3rd November]

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Civil Jurisdiction

Practice and procedure—application to strike out Statement of Claim—difficult and complicated question of law involved—procedure under 0.18 r.19 Rules of the Supreme Court 1968 inappropriate—Constitution of Fiji ss.104, 105, 105(10), 127, 136—Public Service Regulations 1968 reg. 4—Rules of the Supreme Court 1968 0.2 r.2, 0.12 r.8, 0:15 r.6, 0.18 r.19—Fiji Independence Order 1970.

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Practice and procedure—parties—striking out name of defendant—action against Public Service Commission—no power in commission to sue or be sued in own name—action for wrongful dismissal—Constitution of Fiji ss.104, 105, 105(10), 127, 136—Public Service Regulations 1968 0.2 r.2, 0.12 r.8, 0.15 r.6, 0.18 r.19—Fiji Independence Order 1970.

Public Service Commission—nature of—government agency—Constitution of Fiji ss.104, 105(10), 127, 136—Public Service Regulations 1968—Fiji Independence Order 1970.

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The plaintiff brought an action in the Supreme Court against the Public Service Commission and the Attorney-General (the latter representing the Crown) for declarations and damages arising out of his dismissal from government service by the Commission. On the application of the Commission its name was struck out of the proceedings on the ground that it was not a legal entity which could be sued as such; an application by the Attorney-General, treated as having been made under Order 18 rule 19 of the Rules of the Supreme Court, 1968, that the Writ and Statement of Claim be struck out as disclosing no reasonable cause of action, was dismissed. On appeal by the plaintiff against the first of such orders, and by the Attorney-General against the second:—

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Held: 1. The learned judge in the Supreme Court was correct in striking out the name of the Commission as a defendant as —

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(a) (*per Gould V.P. and Spring J.A.*) Though it might be made the subject of proceedings under section 136 of the Constitution it had no corporate entity and could not sue or be sued in its own name.

(b) (*per Marsack J.A.*) Without deciding whether or not the Commission was a legal entity the action was one for wrongful dismissal sustainable only against the employer, which was the Government of Fiji.

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2. The power to strike out a Statement of Claim given by Order 18 r.19 is one which is to be sparingly used and is not appropriate to cases involving difficult and complicated questions of law such as the right of the Crown to dismiss its servants at will. The appeal of the Attorney-General could not therefore succeed.

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Cases referred to :

Attorney-General v. London & North Western Railway Co. [1892] 3 Ch. 274: 77 L.T. 810.

- A** *Dyson v. Attorney-General* [1911] 1 K.B. 410; 105 LT. 753.
Law v. Dearnley [1950] 1 All E.R. 124.
Wenlock v. Maloney [1965] 2 All E.R. 871; [1965] 1 W.L.R. 1238.
Blackburn v. Attorney-General [1971] 2 All E.R. 1380; [1971] 1 W.L.R. 1037.
- B** *Hanratty v. Lord Butler* [1971] Sol. Jo. 386.
Inland Revenue Commissioners v. Bew Estates Ltd. [1956] 1 Ch. 407; [1956] 2 All E.R. 210.
Knight and Searle v. Dove [1964] 2 Q.B. 631; [1964] 2 All E.R. 307.
- C** Appeal from orders of a judge in Chambers (a) striking out the name of a defendant and (b) refusing to strike out the Writ and Statement of Claim.
S. M. Koya for the plaintiff.
A. R. Leys for the Public Service Commission.
- D** *A. D. Leys and R. Nair* for the Attorney-General.
The facts sufficiently appear from the judgments.

3rd November 1972

The following judgments were delivered:

E GOULD V.P. :

Two appeals from orders of a Judge in Chambers have been brought to this Court. The action is one in which the plaintiff has issued a writ against the Public Service Commission and the Attorney-General of Fiji (representing the Crown) as defendants. The Statement of Claim, in brief, alleged that the plaintiff was a public officer in the employ of the Government of Fiji holding the post of accountant; that he had been convicted of the offence of carrying on business as a money-lender without a licence and fined; that he was dismissed from Government service by the Public Service Commission. He alleged that the Commission's decision was in violation of the rules of natural justice and in particular :

- G** Rules of the Supreme Court 0.18 r.19: (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —
- (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;
- H** and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
- (2) No evidence shall be admissible on an application under paragraph (a).
 - (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.

- (a) It did not give an opportunity to the Plaintiff to show cause why he should not be dismissed from the service for the alleged offence. It did not notify the Plaintiff that it was contemplating to make a decision to dismiss the Plaintiff from the said service. **A**
- (b) that the First Defendant's decision to dismiss the Plaintiff from the said service was made in breach of General Orders governing the conditions of services and disciplinary matters affecting all Public officers in the employ of the Government of Fiji; **B**
- (c) the First Defendant's decision to dismiss the Plaintiff is illegal in that he has been already punished for the alleged offence by a Court of competent jurisdiction;
- (d) that the First Defendant's decision to dismiss the Plaintiff is harsh, unjust and unreasonable having regard all the circumstances of the case in particular that the Plaintiff had always bore an excellent character and the alleged offence was unconnected with his duties as a Public Officer. **C**

The prayer was as follows :—

"15. THAT by reason of the matters heretofore mentioned the Plaintiff has suffered damages. **D**

WHEREFORE the Plaintiff claims:—

- (a) for a Declaration that the First Defendant's decision to dismiss the Plaintiff from the said service was made in breach of rules of natural justice and therefore the same is null and void at Law; **E**
- (b) for a Declaration that the First Defendant's decision to dismiss the Plaintiff from the said service was made in breach of the General Orders hereinbefore mentioned;
- (c) for a Declaration that the First Defendant's decision to dismiss the Plaintiff from the said service is illegal at Law inasmuch as the Plaintiff has been punished by a Court of competent jurisdictions arising out of the charge lodged by the First Defendant and/or the Government of Fiji for the alleged offence; **F**
- (d) for a Declaration that having regard to all the circumstances of this case and like cases the First Defendant's decision to dismiss the Plaintiff from the said service is harsh, unjust and unreasonable; **G**
- (e) Damages;
- (f) Further or other Relief as to this Honourable Court seems just;
- (g) Costs." **H**

The Attorney-General issued a summons in the Supreme Court for an order that the Writ of Summons and Statement of Claim be struck out on the following grounds:—

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1. The Court has no jurisdiction to investigate the dismissal of the Plaintiff in the circumstances of this action.
 2. The Plaintiff has no reasonable cause of action herein.
 3. It is an abuse of the process of the Court.

The application was not stated to be made under any particular procedural rule. Shortly thereafter the Commission also took out a summons for the following relief and on the following grounds :—

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1. For an order under Order 2 rule 2 and Order 12 rule 8 of the Rules of the Supreme Court that the Writ of Summons beginning this Action and all subsequent proceedings herein be set aside on the ground that by the Writ and the Statement of Claim endorsed on it the Plaintiff seeks declaration and makes other claims in respect of his dismissal from his employment as a public officer and that it is not within the jurisdiction of this Court to grant any of the said declarations or to entertain any of the Plaintiff's said other claims because the tenure of office by a public officer is a matter lying in the absolute discretion of the Crown.
- C
2. For an order under Order 15 rule 6 of the Rules of the Supreme Court that the Writ of Summons and Statement of Claim in this Action be amended by striking out the name of The Public Service Commission as a Defendant upon the ground that the said Commission is an instrument of the Crown and is not a legal entity which can be sued or made a party as a Defendant under the Writ of Summons herein.
- D
3. For an order under Order 18 rule 19 of the Rules of the Supreme Court that the Statement of Claim endorsed on the Writ of Summons herein be struck out and that this Action be dismissed upon the ground that the Statement of Claim discloses no reasonable cause of action or is otherwise an abuse of the process of the Court in that the dismissal of the Plaintiff from his employment as a public officer alleged as the cause of action in the Statement of Claim is a matter lying in the absolute discretion of the Crown and that it is not within the jurisdiction of this Court in respect of such a matter to grant a declaration or to entertain any other of the Plaintiff's claims under the Statement of Claim.
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The arguments were heard together and the ruling of the learned Judge in the Supreme Court may be summarised as follows :—

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1. The Commission was not a legal entity which could be sued. Therefore the Writ and Statement of Claim would be amended by striking out the name of the Commission, which was entitled to its costs.
 2. Then as to the Attorney-General's application the case raised a question of general importance and serious questions of law. The application fell to be dealt with under Order 18 Rule 19 of the Rules of the Supreme Court which was not intended to apply to a case of that type; therefore the application was dismissed, with costs in the cause. As appears from the Statement of Claim and other papers the serious question was whether the Crown's prerogative right to dismiss its servants at will remained in full force and effect in Fiji at the relevant time.
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The Attorney-General has now appealed against the latter part of the ruling and the plaintiff against the order striking out the Commission as a defendant. A

I will deal first with the Attorney-General's appeal. In his ruling the learned Judge quoted extensively from a number of authorities in which the procedure under Order 18 rule 19 has been considered. They are *Attorney-General v. London and North Western Railway Co.* [1892] 3 Ch. 274; *Dyson v. Attorney-General* [1911] 1 K.B. 410; *Law v. Dearnley* [1950] 1 All E.R. 124 and *Wenlock v. Maloney* [1965] 2 All E.R. 871. Mr. Leys, for the Attorney-General sought to distinguish some of these cases, but his main complaint was that the learned Judge had not referred to two other cases which had been quoted in argument. The first is *Blackburn v. Attorney-General* [1971] 2 All E.R. 1380. This was an appeal from a Judge who had struck out the statement of claim in two actions which sought declarations that by signing the Treaty of Rome the government would surrender in part the sovereignty of the Crown in Parliament. The appeal was dismissed. No doubt the case involved an important question of law but their Lordships in the Court of Appeal did not appear to find it complicated or difficult. They did not discuss the procedural law applicable. B C

The second case was *Hanratty v. Lord Butler* [1971] Sol. Jo. 386. The action was for damages for negligence by the Home Secretary for failing to consider certain statements from witnesses before not advising Her Majesty to reprieve a convicted man. The Statement of Claim was struck out in the courts below and the Court of Appeal had no difficulty in holding that it was a question of the prerogative and the courts would not inquire into the manner in which the prerogative was exercised. D E

Though these cases indicate that in a proper case a Statement of Claim will be struck out notwithstanding that it raises a constitutional question, they do not detract, in my view, from the rule that the summary procedure under Order 18 rule 19 is to be sparingly used and is not appropriate to cases involving difficult and complicated questions of law. The authorities on the question of the prerogative as touching the right of dismissal at will of a Crown servant are numerous and raise fine points of distinction. The question is now raised because of the introduction of a written constitution in Fiji, the effect of which has not hitherto been considered in the Fiji Courts. In my opinion the learned Judge acted on no wrong principle and was justified in refusing the order. F G

Mr. Leys asked this Court to decide the question on law in any event, as argument upon it had been presented. The Court has power to do so, but, on consideration I am of opinion that it should not. For one thing, it does not appear certain that the constitutional question will necessarily be decided in the action. In argument Mr. Leys referred to the various regulations which govern disciplinary procedure and indicated the possibility that even on the facts disclosed by the Statement of Claim there might have been no departure from the prescribed procedure. It is not for the Court to decide an important constitutional question which may never arise in the action, and to do so *in vacuo*, without the benefit of a decision of the Supreme Court. H

A I would dismiss this appeal therefore with costs. It appears that the Statement of Claim requires amendment and I would therefore allow twenty-eight days from the date of the amendment for the filing of a Statement of Defence.

B I turn now to Mr. Koya's appeal against the striking out of the name of the Commission as a defendant. The learned Judge in the Supreme Court held that the Commission was not a legal entity and could not be sued in its own name. With this I would respectfully agree, though it could well be that the provisions of section 136 of the Constitution of Fiji would enable it to be made the subject of certiorari or other prerogative proceedings. This, however, is an ordinary writ claiming declarations and damages. The Commission is not given any corporate entity by the Constitution; there is no provision that it may sue or be sued in its own name. It is not in my opinion a quasi-corporation, as the War
C Damage Commission was held to be in *Inland Revenue Commissioners v. Bew Estates Ltd.* [1956] 1 Ch. 407. In *Knight and Searle v. Dove* [1964] 2 Q.B. 631 a trustee savings bank was held liable to be sued in its own name as it was an institution operating pursuant to statute, owning considerable property, employing a large staff, possessing a protected name and carrying on activities that might involve a natural person in actions for tort. These considerations do not apply to the Commission, which is,
D in my opinion, a Government agency.

The original regulation 19 (now re-numbered 4) of the Public Service Regulations, 1968 is still in force as part of "the existing laws" preserved by the Fiji Independence Order 1970. It reads:—

E "4. Every member of the Commission shall have such and the like protection and privileges in case of any action or suit brought against him for any act done or omitted to be done in the bona fide execution of his duties as is by law given in respect of acts done or words spoken by a Judge of the Supreme Court in the exercise of his judicial office."

F This regulation would appear to protect the individual member of the Commission from a suit such as the present, and ought not to be capable of evasion by bringing the action against the Commission in its official name. This, I consider, is an additional reason why the learned Judge's order should be upheld.

I would dismiss this appeal also with costs.

As all members of the Court are of the same opinion both appeals are dismissed with costs.

G MARSACK J.A. :

I have had the advantage of reading the carefully reasoned judgment of the learned Vice President and fully agree with both his reasoning and his conclusions. There are however some brief observations that I would wish to add.

H Following the decisions cited in the judgments of the Vice President and of the Judge of the Court below I think it is definitely established that the jurisdiction to strike out proceedings under Order 18 Rule 19 should be very sparingly exercised, and only in exceptional cases. It should not be so exercised where legal questions of importance and difficulty are raised.

That is definitely the position here. The hearing before this Court took a full day and a half and very many authorities were cited by both parties. It is impossible in my view to say that on the face of it no reasonable cause of action is disclosed. The extent and the complexity of the legal arguments submitted to us indicated beyond doubt that the question of the plaintiff's right of action was one involving deep research, the interpretation of certain provisions of the Constitution, and consideration of many authoritative decisions of the superior Courts. A

In these circumstances I am firmly of opinion that the learned Judge in the Court below was right in refusing to strike out the Statement of Claim under Order 18 Rule 19. I fully appreciate the diligence and the industry shown by Counsel in presenting the profound and well reasoned arguments submitted to this Court but the fact that such arguments were necessary supports, in my view, the opinion which I have expressed, that important and difficult questions of law are involved in this action. Consequently it is not a case in which the Court's discretion should be exercised in the direction of striking out under the rule quoted. B
C

On the second point whether the learned Judge was right in dismissing the Public Service Commission from the suit on the ground that it was not a legal entity which could be sued, Mr. Koya submitted to this Court a well presented argument in support of his contention that the Public Service Commission is a legal entity and that the Judge erred in ruling to the contrary. For the purposes of the present action I do not find it necessary to determine whether or not the Commission can be held to be a legal entity. D

The Public Service Commission is a body constituted under Section 104 of the Constitution; and under section 105 the power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding such offices shall vest in the Public Service Commission. Under Section 105 (10) Parliament may provide for appeals to lie from decisions of the Commission to such person or authority as Parliament may prescribe; but no such person or authority has yet been prescribed by Parliament. Accordingly no appeal from the decisions of the Commission would appear to lie except under the provisions of Section 136 of the Constitution, which gives a Court of law jurisdiction in relation to any question whether the Commission has performed its functions in accordance with the Constitution. E
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But the nature of the plaintiff's claim must not be overlooked. It is a claim, in substance, for damages in respect of what he alleges was his wrongful dismissal. Such a claim, as I see it, is sustainable only against his employer. In clause 1 of his Statement of Claim plaintiff states : G

"At all material times he was a public officer in the employ of the Government of Fiji."

It is clear from Section 127 of the Constitution that a public officer means a person holding any "public office", and public office means an office of emolument in the public service. The definition of "public service" is given in the same section: H

"the public service means the service of the Crown, whether in a civil or military capacity, in respect of the Government of Fiji."

- A** The fact that the Government of Fiji has provided that the Public Service Commission may appoint to and dismiss from the public service does not in my view constitute the Public Service Commission in any sense the employer of the plaintiff. It is common ground that if the Court awarded damages these would have to be paid by the Government and not by the Public Service Commission. Although the action of the Public Service Commission might well be the basis of a claim against the Government of Fiji, that would be only on the ground that the Government was liable for any wrong committed by its agent within the scope of the authority given to that agent. *Qui facit per alium facit per se*. The mere fact that the acts of the Public Service Commission had formed the basis of the plaintiff's claim, is in itself no reason, in my opinion, for having the Commission cited as a party to the proceedings.
- B**
- C** In the result, though for somewhat different reasons, I would hold that the learned Judge in the Court below was right when he dismissed the Public Service Commission from the action.

Accordingly I agree with the judgment proposed by the learned Vice President.

D SPRING J.A. :

I have read the carefully reasoned judgment of the learned Vice-President and agree with his reasoning and conclusions. I have nothing to add.

Both appeals dismissed with costs.