THE STATE

A **v.**

PUBLIC SERVICE COMMISSION

ex parte
EPELI LAGILOA

B [HIGH COURT, 1994 (Pathik J), 10 November]

Revisional Jurisdiction

Judicial Review-whether interlocutory injunctive relief available against the State-whether a stay is available-State (Crown) Proceedings Act (Cap 24) Section 15(1), 15(2); High Court Rules 1988, Order 53 r 3 (8)(a)

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On application for interim injunctive relief against the Public Service Commission the Court HELD: the Court neither has jurisdiction to grant injunctions against the State nor stays having the same effect.

Cases cited:

D *Crystal Clear Video Limited v Commissioner of Police & Attorney-General* (Suva Civ. 331 of 88)
Factortame Ltd v Secretary of State for Transport [1989] 2 All ER 692
Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd [1991] 1 WLR 550
R v Licensing Authority ex p Smith Kline and French
E *Laboratories Ltd* (No. 2) [1989] 2 All ER 113
R v Secretary ex parte Blackett (15 November 1991) (unreported)
R v Secretary of State for Education and Science Ex parte Avon Country Council [1991] 1 All ER 282
R v Secretary of State for the Home Department, ex parte Muboyayi [1991] 3 WLR 442
F *The State v The Secretary, Public Service Commission ex parte Joeli Nabuka* (Judicial Review No. 8/94)

Interlocutory application in the High Court.

I. Fa for the Applicant
S. Rabuka for the Respondents

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Pathik J:

By ex parte Summons dated 22 July 1994 which was later heard inter partes the applicant sought an Order that the Respondents be restrained by injunction from effecting the applicant's termination as per their letter of advise to him dated 29 June 1994 to that effect. In support of the application he relied upon

the grounds contained in his Affidavit filed in support of his application for Judicial Review herein.

Judging from the way Mr. Fa argued, this application which is for an injunction, is in actual fact an application for a stay of the proceedings under Or.53 r.3 (8)(a) of the High Court Rules after leave to apply for Judicial Review had been granted.

The said rule 3 (8)(a) provides:

> "(8) Where leave to apply for judicial review is granted, then:
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> (a) if the relief sought is an order for prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;
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> (b) if any other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ."

The facts of the case briefly are as set out hereunder.

The applicant was dismissed from employment on 29 June 1994 for alleged misappropriation of the sum of $10000.00 in respect of which judgment in default of defence was entered against him on 29 November 1993. At the time of his dismissal he held the post of Acting Vice Principal in the Civil Service at Lautoka Teachers College. After the report was received regarding the alleged misappropriation the applicant was charged with disciplinary offences under the Public Service Commission (Constitution) Regulations 1990 for offences in breach of Regulation 36(t). The charge was to the effect that he betrayed the trust placed in him by the Dawasamu Old Scholars Association and converted to his personal use the Association's money the sum of $10,000 placed in his custody. In the Affidavit the applicant states, inter alia, that he was summarily dismissed without considering the truth or falsity of the allegations against him and without fully complying with Regulation 41 of the Public Service Commission (Constitution) Regulations 1990. The applicant says that he intends to apply to Court to have the said default judgment set aside and has annexed to his affidavit an affidavit sworn (without date) by certain representatives of the Dawasamu Old Scholars Association in relation to the alleged funds who in a nutshell state that they are not aware of the applicant owing the alleged debt of $10,000 and misappropriating the same for his own use.

In support of his argument for stay Mr. Fa relies heavily on R v Secretary of

State for Education and Science Ex parte Ayon County Council [1991] 1 All ER 282 and Scott J's judgment in The State v The Secretary, Public Service Commission and The Permanent Secretary for Education *ex parte* Joeli Nabuka (Judicial Review No. 8/94).

Mr. Rabuka, opposing the application, submits that there cannot be an injunction against the State because of the following provisions of section 15(1) & (2) of the Crown Proceedings Act (Cap.24).

> "15. - (1) In any civil proceedings by or against the Crown the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:
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> Provided that -
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> (a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and
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> (b) in any proceedings against the Crown for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Crown to the land or property or to the possession thereof.
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> (2) The Court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown."

On stay Mr. Rabuka argues that if a stay is granted it would amount to a mandatory injunction and will have the effect of "compelling the continuation of contractual relationship prior to termination". He says that there was an employer and employee relationship and a decision had been taken by the Respondents.

Now I would consider the issue before me in the light of the authorities as they stand at present.

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In this case the granting of leave simply meant that the Court gave the applicant its permission to bring proceedings and "implies no more approval and gives no more relief than that" (Applications for Judicial Review, Law & Practice of the Crown Office by Aldous & Alder). Moreover, here the applicant is seeking an interim relief by way of injunction. Subject to what I say hereafter, as provided under the said section 15 of the Crown Proceedings Act, injunction is not available in the case of the State. As stated earlier, the way the argument went, in actual fact the interim relief sought here is for a stay of the proceedings to which the application relates under Order 53 r. 3 (8)(a)

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It has been stated by text book writers that, on a Judicial Review:

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> the "question of interim relief against the Crown is an unfortunate muddle" (Aldous & Alder supra at p.147) and ".... the state of the law is confused because of a conflict between the English Court of Appeal and the Privy Council (an appeal from Jamaica). The cases are the R v Secretary of State for Education and Science, *ex parte* Avon County Council [1991] 1 Q.B. 558 C.A. (taking the wide view) and Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd (1991) 1 WLR 550 at p.556." (Judicial Review by Superstone & Goudie 1993 at p.363 - 364).

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In support of his argument Mr. Fa argued forcefully quoting extracts from the judgment in Avon (supra). To give a picture of the state of the law on this subject and commentary thereon involving the issue before me, I quote from the authors of Judicial Review (supra) at p.364:

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> "In Avon it was said, effectively, that the 'proceedings' referred to were not merely judicial or quasi-judicial proceedings but could be any proceedings which are subject to judicial review. In the Jamaican case, on the other hand, Lord Oliver said (in the context of a similarly worded provision) that the rule 'can have no possible application to an executive decision which has already been made'. Despite the weight normally to be attached to a Privy Council decision, it is submitted that Avon is to be preferred, the point not being fully argued in the Jamaican case, but see the contrary view expressed in Chapter 10, above. Neither case was cited in the other, judgment being given two days apart. Since the two decisions were made, the confusion has increased. In R v Secretary of State, ex p Blackett (15 November 1991, unreported) Popplewell J accepted the reasoning of the Privy Council. On the other

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> hand, in R v Secretary of State for the Home Department, ex p Muboyayi [1991] 3 WLR 442 CA Taylor LJ, at p.624G, expressed his continuing support for the reasoning of Glidewell LJ in Avon; and Donaldson MR indicated that the Avon decision was binding in English Courts short of the House of Lords (see p 452G)."

In The State v Secretary Public Service Commission *ex parte* Joeli Nabuka (supra) Scott J was faced with a similar situation as in the case before me and his Lordship acknowledged the divergence of views on the subject between the Court of Appeal in England and the Privy Council. There Scott J said "I will however assume that this court has power to order a stay of the implementation of an executive decision already taken" for the purposes of decision in the case before him.

Since the issue of stay and injunction vis a vis the State arises in this case I set out below a very important and interesting discussion on the difference between a stay and an injunction an contained in the judgment of Glidewell L.J. in Avon (supra) at p.285 to 286.

> In my view, this question comes back to the issue whether the phrase 'stay of the proceedings' is apt to include decisions made by the Secretary of State, and the process by which he reached such decisions. If I am correct in my view that the phrase is wide enough to embrace such decisions, it follows that what is sought is just as much a stay as it would be in relation to a decision or judgment of an interior court. It is not properly described as an injunction, which is an order directed at a party to litigation, not to the court or decision-making body. Of course, in some respects an application for judicial review appears to have similarities to civil proceedings between two opposing parties, in which an injunction may be ordered by the court at the suit of one party directed to the other. When correctly analyzed, however, the apparent similarity disappears. Proceedings for judicial review, in the field of public law, are not a dispute between two parties, each with an interest to protect, for which an injunction may be appropriate. Judicial review, by way of an application for certiorari, is a challenge to the way in which a decision has been arrived at. The decision-maker may take part in the proceedings to argue that his, or its decision was reached by an appropriate procedure. But the decision-maker is not in any true sense an opposing party, any more than an interior court whose decision is challenged is an opposing party. Thus the distinction between an injunction and a stay arises out of the difference between the positions of the persons or bodies

> concerned. An order that a decision of a person or body whose decisions are open to challenge by judicial review shall not take effect until the challenge has finally been determined is, in my view, correctly described as a stay. For these reasons I am of the opinion that a decision made by an officer or minister of the Crown can, in principle, be stayed by an order of the court.
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> If I am correct in my view that the essential question is whether the phrase 'a stay of proceedings' is apt to include decisions, and the process of arriving at such decisions, made by persons and bodies other than courts of law, and the answer is that it does not include such decisions and processes, it would follow that the courts have no jurisdiction, in judicial review proceedings to stay decisions of local authorities or other non-judicial decision making bodies. In other words, the court's jurisdiction or lack of it to order a stay is not dependent on whether the decision-maker is an officer or minister of the Crown. That the court should have the power to order a stay of a decision of a local authority pending the conclusion of a challenge to the decision-making process by way of judicial review I regard as apparent. I have sought to explain my reasons for concluding that the courts indeed have such a power".

In Avon (supra) the Court of Appeal held that although the courts had no jurisdiction to grant an injunction against officers of the Crown they did have jurisdiction when granting leave .... to grant a stay of the implementation of that decision. That case involved the approval of a school's decision to opt out of local authority control. However in Vehicle and Supplies Ltd (supra) the Privy Council took the view that a stay applied only to proceedings pending before a Court or tribunal and could have no application to an executive decision already reached; and according to this view, interim relief against a decision already reached must be by injunction. That case involved the reduction by a minister in Jamaica of the applicant's motor vehicle import allocation.

In Vehicle and Supplies Ltd (supra) at p.71 in delivering judgment of the Board Lord Oliver of Aylmerton said on the subject of stay that:

> "A stay of proceedings is an order which puts a stop to the further conduct of proceedings in Court or before a tribunal at the stage which they have reached, the object being to avoid the hearing or trial taking place.... It simply means that the relevant Court or tribunal cannot, whilst the stay endures, effectively entertain any further proceedings except for the purpose of lifting the stay ...."

He goes on to say, after referring to section 584 B(4) of the English Civil Procedure Code which is exactly the same as our Order 53 r. 3 (8)(a), that:

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> "This makes perfectly good sense in the context of proceedings before an inferior court or tribunal, but it can have no possible application to an executive decision which has already been made." (emphasis mine)

B In Avon it was stated that court had jurisdiction to grant a stay against a minister of the Crown and the possibility was also supported (obiter) by Woolf L.J. and Taylor L.J. in R v Licensing Authority, ex p. Smith Kline and French Laboratories Ltd (No. 2) (1989) 2 All ER 113. As stated earlier Glidewell L.J. in Avon distinguished between a stay and an injunction upon the basis that a certiorari application is not a dispute between parties as such but a challenge C to a decision whereas the purpose of an injunction is to protect specific interests of the parties. However, this view was rejected by the Privy Council in Vehicle and Supplies Ltd (supra) and Lord Oliver pointed out that in relation to an executive decision the effect of a stay and of an injunction are the same and refused to grant a stay against a minister. Nevertheless the Court of Appeal, although obiter, has affirmed the Avon decision (which was contemporaneous D with Vehicles and Supplies Ltd) in R v Secretary of State for The Home Department, ex p Muboyayi [1991] 4 All ER 72.

Avon has been subjected to a number of powerful criticisms as it was both obiter and wrong; obiter because no stay was in any event there granted on appeal; wrong because it cannot stand alongside even House of Lords case of E Factortame Ltd v Secretary of State for Transport (1989) 2 All ER 692 let alone Vehicles v Supplies Ltd (supra).

In the light of authorities referred to hereabove and applying the principles laid down in a case of this nature the application for injunction in this case can be quickly disposed.

F The courts do not have jurisdiction at common law to grant injunction against the State, nor against Officers of the State, acting in their official capacity. (Factortame Ltd v Secretary of State for Transport [1990] 2AC 85 supra).

In Factortame (supra) at 693 it was held:

> "(2) Moreover, the court had no power to grant an interim G injunction against the Crown in judicial review proceedings because injunctions had never been available at common law in proceedings on the Crown side and that position had been effectively preserved by ss 21(2)b and 23(2)(b)c of the Crown Proceedings Act 1947. Furthermore, S 31(2)d of the Supreme Court Act 1981 had not conferred a new jurisdiction on the

> court to grant interim injunctions against the Crown in judicial review proceedings and RSC Ord 53, r 1(2)e, which was in identical terms, could not extend the jurisdiction of the court in that respect."

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Lord Bridge in Factortame supra at p.708 said:

> "If the legislature intended to give the court jurisdiction to grant interim injunctions against the Crown, it is difficult to think of any reason why the jurisdiction should be available only in judicial review proceedings and not in civil proceedings as defined in the 1947 Act."

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It is pertinent to note that Factortame was considered in re M (as Appeal from M v Home Office [1994] 1 A.C. 377 but it did not in any way affect what I have stated hereabove in relation to that case. In re M (supra) the Court discussed at length the granting of injunctions against Ministers and other officers of the Crown and held, inter alia:

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> "that historically, orders of prohibition and mandamus had regularly been granted against the Crown or officers of the Crown acting in their official capacity and that section 31(2) of the Supreme Court Act 1981, on its natural interpretation, gave jurisdiction to the court on applications for judicial review to grant injunctions, including interim injunctions, against ministers and other officers of the Crown, although that jurisdiction should only be exercised in limited circumstances".

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I do not propose to say anymore on the subject there dealt with as it is not relevant for the purposes of the issue before me.

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There is "no effective way in which Courts can maintain the status quo pending the disposition of a judicial review application. No interim declarations can be granted. There is no way in which a Crown Officer such as a Minister can be positively ordered to take certain steps to preserve the status quo". (Judicial Remedies in Public Law supra).

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The legal position was preserved under the said section 15 of our said Crown Proceedings Act and particularly under section 15(2).

Hence injunction is not available against the State, and as submitted by Mr. Rabuka, and I agree, that to grant it would amount to a mandatory injunction against the State. He made reference to the case of Crystal Clear Video Limited v Commissioner of Police & Attorney-General (C.A. 331 of 88) where Fatiaki J held in an application of this nature that "this the Court cannot do for to do so would offend the provisions of Section 15 of the Crown Proceedings Act Cap. 24. On that ground alone the application must be refused ...."

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For the above reasons the application for injunction is refused.

A Although I have refused the application for injunction, in deference to Mr. Fa's submission on stay and his intention, as I understand him, to have the applicant reinstated until the determination of the judicial review, I shall now deal with this aspect of the matter.

So the question now is whether a stay as opposed to an injunction, can be granted against the Respondents.

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Order 53 r. 3 (8)(a) provides that the court may grant interim relief in the form of stay of proceedings. In Avon (supra) the Court of Appeal held that "proceedings" "are to be construed widely to include any procedure by which a public law decision is reached or implemented. Proceedings are not limited to judicial or quasi-judicial proceedings. Thus stay may be granted against C local authorities, non-judicial bodies and, most significantly, Ministers of the Crown". The Privy Council has, however, stated, obiter, that a stay of proceedings is "an order which puts a stop to the further proceedings in court or before a tribunal and cannot be used to prevent the implementation of a decision made by a Minister in the exercise of statutory discretionary powers" (Vehicles & Supplies Ltd (supra)) (Judicial Review in Public Law by Clive D Lewis).

But because the decision in Avon turned on the meaning of "proceedings" in Order 53 one view is that the reasoning cannot be supported (author of Judicial Review p.249 supra). But Woolf and Taylor LJJ held the same view obiter as Glidewell L.J. in Smith Kline (supra); they were also of the view that that E injunctions could be obtained against Officers of the Crown, Glidewell's L.J's reasoning was that a stay differed from an injunction because the latter "is an order directed at a party to litigation, not to the Court or decision-making body". But in this they were overruled by Factortame (supra) .... Lord Bridge at p.709 stated that the "views expressed ... by the majority of the Court of Appeal in the Kline case were erroneous and that, as a matter of English Law, F the absence of any jurisdiction to grant interim injunction against the Crown is an additional reason why the Order made by the Divisional Court cannot be supported."

It is said that when members of the Court in Avon agreed with Glidewell L.J. their reasoning ignored "entirely the fact that interim injunction can be granted on judicial review against respondents who are not Crown Officers: see Or 53/ G 3(10)(b)" (English) our Or.53 r. 3 (8)(b); "so the implicit proposition that injunctions are inappropriate in judicial review is incorrect" (Authors of Judicial Review supra p.250) (underlining mine).

It is clear from the authorities that any respondent to judicial proceedings, other than State Officers, is readily amenable to injunctive relief under our Or 53 r. 3 (8)(b).

To sum up, the present position regarding principles governing the grant of a stay according to a text book writer has been stated as follows:

> "The principles governing the discretion to grant a stay have yet to be worked out by the court. There is some guidance on the principles governing interim injunctions .... Similar principles are likely to be applied to stays, at least in relation to public bodies other than Ministers. The position on stays in as far as ministers are concerned is unclear". (Judicial Remedies in Public Law p.155).

Scott J in *ex parte* Joeli Nabuka (supra) assumed that this Court has power to order a stay and proceeded to apply the principles governing the granting of injunctions in considering whether to grant a stay or not. His Lordship was of the view that the status quo should be preserved and he did not think that the applicant should be reinstated to his former position pending the hearing of the action.

For my part with respect I feel persuaded to follow and adopt the decisions and obiter in the House of Lords case of Factortame and the Privy Council case of Vehicle and Supplies Ltd (supra) on the subject of injunctions, interim injunction and stay despite what has been said obiter in Avon (supra).

To conclude, since an injunction is not available against the State because of the statutory provision in the said section 15 of the Crown Proceedings Act then how can or why should an interim injunction or stay which has the same effect as an interim injunction according to Vehicles and Suplies Ltd, be granted against the State. In the context of this case on stay in relation to our Or 53 r. 8 Lord Oliver in Vehicles and Supplies Ltd said that "it can have no possible application to an executive decision which had already been made". In fact in Factortame the House of Lords have gone so far as to hold that "the court has no power to grant an interim injunction" against ministers in the judicial review proceedings "because injunctions had never been available at common law in proceedings on the Crown side" and that position had been effectively preserved by the said section 15 in our case.

For the aforesaid reasons, neither the application for injunction nor stay can be granted against the State.

The application is therefore refused with costs which is to be taxed unless agreed.

(Application dismissed.)