

**MAHENDRA PAL CHAUDHRY v SPEAKER OF THE HOUSE OF REPRESENTATIVES and 2 Ors (HBM0130R of 2005)**

HIGH COURT — CIVIL JURISDICTION

5 COVENTRY J

17, 30 January 2006

10 **Courts and judicial system — jurisdiction — Petitioner both parliamentary leader of Fiji Labour Party and Parliament member commenced proceedings by petition on constitutional matters — whether petition proper and not originating summons — Constitution of the Republic of Fiji ss 41(10), 46, 71(1), 73, 73(1)(a), 73(1)(b), 73(5), 73(6), 120, 194(1) — Electoral Act 1998 Pt 7 s 160(2) — High Court (Constitutional Redress) Rules 1998 Ch 4 r 3 — High Court Rules O 2 r 1(3), O 5 rr 4(1), 5, O 8 r 15 1 — High (Supreme) Court Act ss 25, 25(2).**

The Petitioner was the parliamentary leader of the Fiji Labour Party and a member of the Parliament. The Petitioner commenced these proceedings by petition and argued that it was the correct originating process. He sought relief that the: (1) Chairpersons of the Rewa Provincial Council and Ra Provincial Council ... were public offices within the meaning of s 194(1) of the Constitution of the Republic of Fiji (Constitution); (2) Honourable (Hon) Parliament member Ro Teimumu Vuikaba Kepa, member for Rewa Fijian Provincial Communal Constituency, and Tomasi Vuetilovoni, member for Ra Fijian Provincial Communal Constituency, deemed to have vacated their respective places as members of the House of Representatives upon their elections as Chairpersons of Rewa and Ra Provincial Councils and as such they have contravened s 71(1) of the Constitution by becoming holders of a public office within the meaning of the Constitution; (3) Hon Ro Teimumu Vuikaba Kepa and Hon Tomasi Vuetilovoni vacated their respective places as members in the House of Representatives.

20 On the other hand, the Respondents argued that a petition was wrong and that originating summons was the correct application. The issue was whether the proceedings under s 73(1)(b) of the Constitution should be commenced by petition or by originating summons.

25 **Held** — The proceedings should have been commenced by originating summons and not by petition. The High Court exercised a jurisdiction which it would not otherwise have but for that provision when it heard an application under s 73(1)(b) of the Constitution. 30 The court was not sitting as the Court of Disputed Returns.

Neither the Constitution nor any enactments or rules made stipulated how a para (b) application was to be brought. By implication, a petition should not be used.

The High Court Rules applied to applications brought under para (b). The proceedings may only be begun by petition if the rules or by any Act the proceedings were required or authorised to be so begun. That was not the case in a para (b) application.

40 Application dismissed.

**Cases referred to**

45 *Devan Nair v Yong Kuan Teik* [1967] 2 AC 31; [1967] 2 All ER 34; *Theberge v Laundry* [1876] 2 AC 102; (1876) 2 App Cas 102, cited.

*Fijian Association v Adi Litia Samanunu Cakobau* [1995] FJHC 107; *Morarji v Singh* [1977] FJHC 147, considered.

A. *Singh* for the Petitioner

50 H. *Lateef* for the first Respondent

S. *Leweniqila* for the first/second Respondent

*S. Banuve* for the third Respondent

[1] **Coventry J.** Section 73(1) of the Constitution of Fiji states:

The High Court is the Court of Disputed Returns and has original jurisdiction to hear and determine:

- (a) ....;
- (b) an application for a declaration that the place of a member of the House of Representatives or the Senate has become vacant.

[2] The question to be addressed in this ruling is whether proceedings under subpara (b) should be commenced by petition or originating summons.

[3] These proceedings have been commenced by petition. The Petitioner argues that that is the correct originating process. The Respondents argue that that is wrong and the process should have been commenced by originating summons.

[4] In deciding this issue it is necessary to set out the entirety of s 73:

- (1) The High Court is the court of Disputed Returns and has original jurisdiction to hear and determine:
  - (a) a question whether a person has been validly elected as a member of the House of Representatives; and
  - (b) an application for a declaration that the place of a member of the House of Representative or the Senate has become vacant.
- (2) The validity of an election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise.
- (3) The petition:
  - (a) may only be brought by:
    - (i) A person who had a right to vote in the election concerned;
    - (ii) A person who was a candidate in that election; or
    - (iii) The Attorney General;
  - (b) except if corrupt practice is alleged, must be brought within six weeks of the declaration of the polls.
- (4) If the petitioner is not the Attorney-General, the Attorney-General may intervene in the proceedings.
- (5) Proceedings pursuant to paragraph (1)(b) may only be brought by:
  - (a) a member of the Parliament;
  - (b) a voter registered on any electoral roll; or
  - (c) the Attorney General.
- (6) If the proceedings are not brought by the Attorney-General, the Attorney-General may intervene in them.
- (7) A determination by the High Court in proceedings under paragraph (1)(a) is final.

[5] The Petitioner is Mahendra Pal Chaudhry of Ba and parliamentary leader of Fiji Labour Party and member of parliament. The relief or redress he seeks is as follows:

- (1) That on a constitutional interpretation ... the following officers, namely Chairperson of the Rewa Provincial Council and Chairperson of the Ra Provincial Council ... are public offices within the meaning and effect of section 194(1) of the Constitution of Fiji;
- (2) That the Honourable Member of Parliament namely Ro Teimumu Vuikaba Kepa Member for Rewa Fijian Provincial Communal Constituency and Tomasi Vuetilovoni member for Ra Fijian Provincial Communal Constituency, have or are deemed to have vacated their respective places as members of the House of Representatives upon their elections as Chairpersons of Rewa and Ra Provincial Councils in April 2005 and as such

they have contravened articles 71(1) of the Constitution of Fiji by becoming holders of a “public office” within the meaning of the Constitution of Fiji;

- (3) An order that the Hon Ro Teimumu Vuikaba Kepa and Hon Tomasi Vuetilovoni forthwith vacate their respective places as members in the House of Representatives;
- (4) Such other orders or ancillary orders or relief as to give effect to the aforesaid or declarations;
- (5) Costs of these proceedings.

[6] This action is clearly brought under s 73(1)(b) and has nothing to do with the question as to whether or not a person has been validly elected as a member of the House of Representatives.

This action does not concern a disputed return. On a plain reading therefore of s 73, subs 2, 3, 4 and 7 do not apply to this case. They clearly relate to disputed returns from election.

[7] By the same token, paras 5 and 6 do apply to this application. There is no suggestion that the Petitioner is not qualified under subpara 5 to bring this action.

[8] The first question that arises is whether or not the court is sitting as the Court of Disputed Returns or as the High Court. *Simpliciter*. I look at the opening words of subs 1. This states “the High Court is the Court of Disputed Returns and has original jurisdiction to hear and determine; (a) ... (b)...”.

In my judgment the only sensible way of interpreting these words is that the High Court is the Court of Disputed Returns and has original jurisdiction to hear and determine questions about the validity of election of members of the House of Representatives. When matters involved in subpara (b) are in question then the “High Court has original jurisdiction to hear and determine” them. In other words the whole of the opening sentence applies when matters in para (a) are being considered and the second half of the opening sentence applies when matters in para (b) are being considered.

[9] This therefore means that the High Court is sitting as the High Court *simpliciter* when hearing matters under subpara (b) and is granted thereby the original jurisdiction to hear and determine them. It is important to note by subs 7 that the determination of the High Court on a disputed return is final whereas there is no such limitation in an action under subpara (b).

[10] The question therefore necessarily arises as to what statutes or rules or regulations govern the procedures under subpara (b).

[11] I have considered the Electoral Act No 18 of 1998. That is clearly directed to elections and disputed returns. By s 160 the Chief Justice may make rules of the court for the purposes of Pt 7 “Court of Disputed Returns”. The High Court Rules apply unless and until such particular rules are made. They can only be made for operation within the ambit of the Act. The preamble to that Act states “an Act relating to elections for the House of Representatives”.

I am satisfied that the Electoral Act 1998 has no application to an action brought under s 73(1)(b) of the Constitution.

[12] No counsel has been able to put before me any specific Fiji authorities on this matter nor been able to point to any instruments or powers creating rules for the governing of actions under para (b).

[13] In determining what is the correct originating process for an application under para (b) I must necessarily look at the jurisdiction which is being exercised by the court.

[14] In the case of *Morarji v Singh* [1977] FJHC 147 a hearing at first instant Mr Byrne J considered the almost identical provisions contained in the Constitution of Fiji immediately preceding the 1997 Constitution. He stated:

5 It is well settled that in hearing election petitions, the High Court is not exercising its ordinary original civil jurisdiction. At common law, the jurisdiction to hear parliamentary petitions was originally vested in the legislature itself and it was only in the 19th Century that jurisdiction was transferred to the English Courts.

[15] These special circumstances have already been recognised in relation to Parliamentary Elections by the High Court of Fiji in the *Fijian Association v Adi Litia Samanunu Cakobau* [1995] FJHC 107 Fatiaki J at 7 stated:

15 This Constitutional tradition is succinctly explained by Lord Upjohn in the course of delivering the judgment of the Privy Council in *Devan Nair v Yong Kuan Teik* [1967] 2 AC 31; [1967] 2 All ER 34 when he said at AC 38; All ER 36—

20 Constitutionally decisions on questions of contested election are vested in the assembly for which the contested election has been held, but in the course of the 19th Century many countries, including this country and many of Her Majesty's possessions overseas adopted the view that, as a deliberations of the assembly itself were apt to be governed rather by political considerations than the justice of the case it was right and proper that such questions should be entrusted to the courts.

[16] Almost a century earlier in 1876 and in similar vein, Lord Cairns in delivering the judgment of the Privy Council in *Thebverge v Laundry* [1876] 2 AC 102; (1876) 2 App Cas 102 said of the two acts of the Quebec Parliament dealing with controverted elections at 106 “these two Acts of Parliament ... are Acts peculiar in their character. They are not Acts constituting or providing for the decision of mere ordinary civil rights. They are Acts creating an entirely new, and up to that time unknown, jurisdiction in a particular court of the colony, for the purpose of taking out, with its own concern, of the legislative assembly, and investing in that court, that very peculiar jurisdiction which, up to that time had existed in the legislative assembly of deciding election petitions, and determining the status of those who claim to be members of the legislative assembly. A jurisdiction of that kind is extremely special, and one of the obvious incident or consequences of such a jurisdiction must be that the jurisdiction, by whom so ever it is to be exercised, should be exercised in a way as soon as possible become conclusive and enable the Constitution or the legislative assembly to be distinctly and speedily known”.

40 [17] Byrne J continued “in the context of the present application and paraphrasing the above dicta there is not the slightest doubt in my mind that the ‘peculiar’ and previously ‘unknown jurisdiction’, of the High Court in election matters arises from and is to be found exclusively in section 46 of the Constitution and nowhere else”.

45 [18] All of those cases related to disputed returns. In my judgment exactly the same reasoning applies to the jurisdiction which is being exercised when an application under subpara (b) is made. Constitutionally questions as to whether the seat of a member of a House of Parliament, in this case the House of Representative, has become vacant is vested in the assembly concerned. In the absence of a provision such as that in subpara (b) then the court would not have jurisdiction. The drafters of the Constitution clearly had in mind these principles

when framing both subparas (a) and (b) of s 73(1). Accordingly the High Court is not exercising its general jurisdiction as conferred by s 120 of the Constitution but one specifically conferred by s 73.

5 [19] Section 73 itself does not prescribe the process to be used to commence an action under subpara (b). Subsection (2) states that “the validity of an election or return may be disputed by *petition* addressed to the Court of Disputed Returns and not otherwise”. It can thus be argued that as a petition is not a prescribed originating process for actions under para (b) that some other originating process must have been in contemplation. Further, it would only have required the  
10 addition of a few words to para 5 to prescribe the use of a petition for initiating applications under subpara (b).

[20] On the other hand it could be argued that by the very peculiar nature of the jurisdiction being exercised and the nature of the application itself that petition is the proper process for initiating the action.

15 [21] Section 160(2) of the Electoral Act specifically imports the rules of the High Court into disputed election return cases unless and until specific rules are made by the Chief Justice. The High Court Rules themselves are made under s 25 of the High Court Act.

20 [22] Does this mean that specific provision must be made before there are any rules of court pertaining to this peculiar jurisdiction or, in the absence of specifically made rules, can and will the ordinary High Court Rules apply?

[23] Section 25(2) of the High (Supreme) Court Act states:

25 It shall be lawful for the Chief Justice to make rules of court carrying this Act into effect and in particular for all or any of the following matters (that is to say):

- (a) for regulating sittings of the Supreme (High) Court for the dispatch of civil business proceedings therein and of a Judge sitting in Chambers;
- (b) for regulating the pleading, practice and procedure in the Supreme (High) Court in civil cases and matters which in Her Majesty’s High Court of Justice in England come within the jurisdiction of the Crown side the Queens Bench Division thereof;
- 30 (c) ...

[24] The action before me is clearly a civil as opposed to a criminal case. Special provision had to be made for the High Court when it was sitting as the  
35 Court of Disputed Returns. In the case of an action under para (b), in my judgment, no such special provision has to be made as the jurisdiction is given to the High Court itself as the High Court.

[25] Order 8 r 1 of the High Court Rules states “where, for the time being, by or under any law in force in Fiji, specific provision is made for regulating the practice and procedure, in or in relation to, any particular form of proceedings in the High Court, these rules shall not apply thereto except in so far as any such provision applies, incorporates, or imports the application of these rules, whether by express reference thereto or by reference to the rules of court of, or the practice or procedure in, the High Court”.

45 No rules can or have been made under para (b) and therefore the High Court Rules are not excluded.

[26] Order 5 r 4(1) states “except in the case of proceedings which by these rules or by or under any Act are required to be begun by Writ or Originating Summons or are required or authorised to be begun by Petition, proceedings may  
50 be begun either by Writ or by Originating Summons as the plaintiff considers appropriate”.

[27] Rule 5 states “proceedings may be begun by Originating Motion or Petition if, but only if, by these rules or by or under any Act the proceedings in question are required or authorised to be so begun”.

5 [28] There is nothing in the Rules or the Act specifically requiring or authorising para (b) proceedings to be begun by petition.

[29] Can it be said that by the very fact the proceedings emanate directly from the Constitution that they should be begun by petition. In many jurisdictions proceedings directly under constitutional provisions are commenced by petition. However, the High Court (Constitutional Redress) Rules 1998 are made “in  
10 in exercise of the powers conferred upon me (The Chief Justice) by section 41(10) of the Constitution and under section 25 of the High Court Act”.

Those rules concern applications for redress under the Constitution and referral of constitutional questions. Rule 3 states that an application to the High Court for redress under Ch 4 “Bill of Rights” may be made by motion supported  
15 by affidavit.

[30] Although this is a somewhat different kind of action the rules do stipulate that applications for redress under the Bill of Rights provisions in the Constitution should be commenced by motion supported by affidavit.

20 [31] There are no other provisions in the Constitution or rules made thereunder which specifically or impliedly require that actions must be brought by petition when constitutional matters are in question.

[32] Accordingly I summarise matters as follows:

25 (1) When the High Court hears an application under s 73(1)(b) of the Constitution it is exercising a jurisdiction which it would not otherwise have but for that provision. The court is not sitting as the Court of Disputed Returns.

(2) Neither the Constitution nor any enactments or rules made thereunder stipulate how a para (b) application is to be brought. It cannot be argued  
30 that by implication a petition should be used.

(3) The High Court Rules apply to applications brought under para (b). Those rules state that proceedings may only be begun by petition if  
35 those rules or by any Act the proceedings are required or authorised to be so begun. That is not the case in a para (b) application.

[33] Accordingly in my judgment therefore these proceedings should have been commenced by originating summons. The issue of a writ is clearly not appropriate.

40 [34] However, Order 2 r 1 (3) states “The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by originating process other than the one employed”.

[35] At the heart of this case are important substantive questions of law and fact which relate to two members of the House of Representatives. While an application under para (b) does not have the same urgency as one under para (a),  
45 nevertheless these are matters which must be dealt with expeditiously.

[36] Accordingly I order that:

(a) the “Petitioner” is given leave within these proceedings to issue an originating summons supported by affidavits. They must be served by  
50 3 pm on 6 February.

(b) I order that affidavits in response to those of the Plaintiff are to be filed and served by 3 pm on the 27 February.

- (c) Any affidavits in reply should be filed and served by 3 pm on 13 March.
- (d) There will be a further hearing of this matter on the 22 March at 9 am. The originating summons should be marked for return on that date at that time.

5 [37] I order that the “Petitioner” pay the costs of the Respondents for this application in a sum to be assessed in the presence of the parties.

*Application dismissed.*

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