VILIAME BOUWALU v JONE SAULEIROGO SATALA (ABU0052 of 2005)

COURT OF APPEAL — CIVIL JURISDICTION

EICHELBAUM, PENLINGTON and SCOTT JJA

7, 10 November 2006

Administrative law — administrative decisions — three claimants disputed headship of Yavusa Vidilo — whether 1991 ruling remained intact and unimpeachable — Constitution of the Republic of Fiji 1990 s 100(4) — High Court Rules O 53 r 4(2) — Native Lands Act (Cap 133) ss 7(5), 17(1), 17(3).

The Appellant, his cousin Ratu Nacanieli Nava (cousin) and their uncle Ratu Malelili Naulivou (uncle) disputed the headship of a native land headed by the Yavusa Vidilo (Yavusa). The cousins were the grandchildren of Ratu Viliame Nava (Viliame), a former holder of the title, while the uncle was the son of a younger brother of Viliame. The Respondent was the son of the uncle. The Native Lands and Fisheries Commission (commission) held an inquiry into the disputed headship and the commission delivered a report (1991 inquiry) that the cousins' claims were stronger since they were from the eldest male family, as compared to the uncle who came from the younger male family. At the time of the inquiry, the cousins were aged 39 and 49 respectively, and the uncle was aged 68. The commission decided that the uncle was ineligible for the headship since he came from the younger male family and that the cousins were relatively inexperienced and had limited support. It ruled that the uncle would hold the headship in an acting capacity or status only in his lifetime, but upon his retirement or death, would pass to whichever of the cousins had the greater support. The commission further ruled that either the Appellant or his cousin would assume the uncle's position when he resigns or dies. The uncle accepted the decision of the commission while the cousins contested the result. The cousins' application for judicial review in the High Court and the appeal in the Court of Appeal were dismissed. The Court of Appeal ruled that the High Court had no jurisdiction to review a decision of the commission and that no appeal should be allowed. Section 100(4) of the 1990 Constitution was repealed in July 1998. In September 1998, s 7(5) of the Native Lands Act (the Act) was inserted. The uncle died followed by the death of the cousin. The Appellant, the sole surviving cousin, claimed and awarded the headship. The Respondent's application for leave to move for judicial review of the commission's failure to convene an inquiry under s 17 of the Act was granted. The Appellant appealed the High Court's decision and the sole issue was whether the 1991 ruling remained intact and unimpeachable.

Held — The 1991 ruling remained intact and unimpeachable so that judicial review should not have been granted. The High Court and the Court of Appeal (twice) reached the conclusion that the findings of the inquiry were unimpeachable. The commission did not merely decide between competing claimants but went further and laid down the line of succession to the title Taukei Vidilo. It specifically excluded the uncle's children from the succession and the Respondent was one of them. The commission decided that the succession to the title following the uncle's departure came from one of the two named cousins, provided he was able to demonstrate support within the i tokatoka.

Appeal allowed.

Cases referred to

Bulou Eta Kacalainin Vosailagi v Native Lands Commission (1989) 35 FLR 116; *Ratu Jeremaia Natauniyalo v Native Land Commission* [1998] FJCA 41, cited.

O'Reilly v Mackman [1983] 2 AC 238; *Ratu Nacanieli Nava v Native Lands Commission* (unreported, Civ App ABU0055 of 1993), considered.

K. Vuataki for the Appellant

I. Fa for the Respondent

Eichelbaum, Penlington and Scott JJA.

Introduction

[1] The subject matter of these proceedings is the disputed title "Taukei Vidilo". This title is held by the head of the native land owning unit which is known as the Yavusa Vidilo. The Appellant was installed as the holder of the title in September 2000 but the Respondent claims that the title should be his.

[2] Under the provisions of s 17(1) of the Native Lands Act (Cap 133 — as amended — the Act):

> In the event of any dispute arising between native Fijians as to the headship of any division or subdivision of the people having the customary right to occupy and use any native lands the [Native Lands and Fisheries] Commission may enquire into such dispute and, after hearing evidence and the claimants shall decide who is the proper head of such division or subdivision and such person shall be the proper head of such division or subdivision:
>
> Provided that if the claimants agree in writing in the presence of the Chairman of the Commission as to who is the proper head of such division or sub-division it shall not be necessary for the Commission to hear evidence or further evidence as the case may be.

[3] Section 17(3) provides that:

> A person aggrieved by a decision of the Commission under this section may appeal to the Appeals Tribunal constituted under Section 7.

[4] Section 7(5) Act provides that:

> Decisions of the Appeals Tribunal are to be final and conclusive and cannot be challenged in a court of law.

Background

[5] In August 1991 the commission (then named the Native Lands Commission) exercised the powers conferred upon it by s 17 of the Act and held an inquiry into the then disputed headship of the same Yavusa Vidilo. At that time there were three claimants to the title; the first two were cousins, Ratu Viliame Bouwalu (the present Appellant) and Ratu Nacanieli Nava. They were the grandchildren of a former holder of the title, Ratu Viliame Nava. The third claimant was their uncle, Ratu Malelili Naulivou who was the son of a younger brother of Ratu Viliame Nava. The present Respondent is the son of Ratu Malelili Naulivou. In an attempt to clarify the family tree, we exhibit an appendix to this judgment which was agreed by counsel to be correct at the hearing of the appeal.

[6] In September 1991 the commission delivered its report. On p 11 of the report it explained that:

> Evidence in this enquiry clearly shows that there is a well established customary rule or practice whereby headship was always given and taken by the members of the eldest male family and they only deviated from this practice during the time that Ratu Manoa Satala was allowed. The present position clearly indicates that amongst the three claimants the two cousin brothers Ratu Nava and Ratu Viliame have a much stronger claim to the position since they are from the eldest male family while Ratu Malelili Naulivou comes from the younger male family. With regard to the headship of such chiefly positions the younger male family can only by-pass and take over such chiefly

positions in the event that no one in the eldest male family is ready to take over the position and even then this can only be in an acting position.

[7] At the time of the inquiry the cousins were aged 39 and 49. Their uncle was aged 68. The commission decided that their uncle, Ratu Malelili Naulivou, was not eligible to take the title "absolutely because he comes from the younger male family in the chiefly unit". On the other hand, the cousins were relatively inexperienced and had limited support. The commission decided that the uncle would hold the title for his lifetime but that upon his retirement or death it would pass to whichever of the cousins had the greater support. The commission emphasised, on p 15 of its report that the uncle was to hold the title:

> in an acting capacity or status only and that the appointment will be confined to him alone and will not go to his children or his family.

One of Ratu Malelili's children was the present Respondent

[8] The commission concluded its report with the following words:

> When Ratu Malelili's leadership ends, either because he resigns or he wishes to pass on this chiefly position to someone else, then the position will be assumed by either Ratu Nacanieli Nava or Ratu Viliame Bouwalu depending on who satisfies this Commission as commanding the majority support from members of the tokatoka.

[9] While the commission's decision was accepted by Ratu Malelili Naulivou, the cousins were dissatisfied with the result. Ratu Nacanieli Nava commenced proceedings for judicial review of the decision in the High Court at Lautoka in May 1992. His cousin Ratu Viliame Bouwalu, the present Appellant, later joined the proceedings. In July 1992, after a full consideration of the decision, leave to move for judicial review was refused. The High Court held that the cousins had no arguable case.

[10] In November 1994 this court heard an appeal by Ratu Nacanieli Nava against the High Court's decision. The appeal (*Ratu Nacanieli Nava v Native Lands Commission* (unreported, Civ App ABU0055 of 1993) (*Ratu Nacaieli Nava*) was dismissed.

[11] In 1991 and 1994, the Constitution of Fiji was the 1990 Constitution. Section 100(4) of that Constitution provided that:

> for the purposes of this Constitution, the opinion or decision of the Native Lands Commission on:
>
> (b) disputes as to the headship of any division or subdivision of the Fijian people, having the customary right to occupy and use any native land, shall be final and conclusive and shall not be challenged in a court of law.

[12] As appears from the November 1994 judgment, the Court of Appeal took the view that s 100(4) was conclusive: the High Court had no jurisdiction to review a decision of the commission and accordingly there was no right of appeal from the High Court's refusal to grant judicial review. The court concluded its judgment with the following words:

> In relation to the continuing dispute relating to the Taukei Vidilo we can only urge the parties to resolve the issue by resorting to means and ways according to the customs, traditions and usages of the Fijian people. One thing is clear, the formal courts can play no part in the matter.

[13] In 1998 this court took a rather different approach to s 100(4) of the 1990 Constitution. In *Ratu Jeremaia Natauniyalo v Native Land Commission* [1998] FJCA 41 the court considered that s 100(4) would not operate to exclude

judicial review of a decision reached by the commission in breach of the rules of natural justice. At the same time however, it pointed out that in *Ratu Nacaieli Nava* there was no claim of undue process and that therefore in that case not surprisingly the court:

> held that Section 100(4) meant what it said in relation to a decision of the Commission which had been reached by valid process.

[14] The repeal in July 1998 of s 100(4) of the 1990 Constitution was followed in September 1998 by the insertion of s 7(5) into the Act.

[15] Following the November 1994 judgment it appears that the right of Ratu Malelili Naulivou to hold the title during his lifetime in an acting capacity was accepted. As we understand it, it was only following Ratu Malelili's death in 1999 that the dispute over the title, Taukei Vidilo, again flared up.

[16] By the time Ratu Malelili died, one particular event which had not been foreseen by the commission had occurred; Ratu Nacanieli Nava, one of the cousin claimants, had passed away. In these circumstances, the sole surviving cousin, the present Appellant, claimed and was eventually awarded, the title. Ratu Joni Sauleirogo Satala, the present Respondent, disagreed and claimed the title for himself.

Proceedings in the High Court

[17] According to an affidavit filed by the Respondent, members of the chiefly i tokatoka (sept) of the Yavusa Vidilo met following his father's death and decided that he should succeed to the title. On 5 November 1999, however, the commission wrote to the i tokatoka advising that it had decided to declare the Appellant to be the rightful successor.

[18] In its letter the commission gave the reasons for its decision: these were that in 1991 the commission had decided that the Respondent's father Ratu Malelili Naulivou would hold the title in an acting capacity but that the title would not devolve to any of his children (one of whom is the Respondent) but instead would revert to one of the two claimants from the elder male line. Since only one of those claimants, the Appellant, remained alive, it was he who was the rightful holder of the title.

[19] The Respondent rejected the commission's position and consulted his solicitors. On 29 November 1999 the solicitors wrote to the commission demanding that it hold a s 17 inquiry.

[20] During the early part of 2000 several attempts were made to resolve the dispute amicably. A number of informal meetings were held at which representatives of the commission and the parties attended. Unfortunately, the parties were unable to resolve their differences. Finally, on 20 February 2001, the Respondent's solicitors wrote to the commission advising it that if a s 17 inquiry was not convened, legal proceedings would be commenced.

[21] On 28 March 2002 the Respondent filed an application for leave to move for judicial review of the commission's failure to convene a s 17 inquiry. The Respondent sought mandamus to compel the commission to hold the inquiry and a declaration that the decision of the commission to recognise the Appellant as the legitimate holder of the title was null and void. The Respondent also sought an order restraining the Native Land Trust Board from dispensing the lease money which the holder of the title Taukei Vidilo was entitled to receive.

[22] In May 2002 the Appellant filed a notice of opposition. He also filed a summons to strike out the judicial review application on the grounds that it disclosed no reasonable cause of action, that it was scandalous, frivolous and vexatious and that it was an abuse of the process of the court. In his supporting affidavit the Appellant propounded the 1991 findings of the commission which he asserted had already decided the line of succession after Ratu Malelili's death. He pointed out that he had held the title since September 2000 and had been performing the duties, both official and unofficial which were required of the Taukei Vidilo since that time; any decision to refer his position to an inquiry would be detrimental to the good administration of the yavusa and its dealings with other interested bodies. Finally, he averred that as early as March 2000 a member of the commission had visited the village hall at Namoli and had heard representations from both sides. It was after entertaining these representations and hearing both the Appellant and the Respondent that the commission reaffirmed its 1991 ruling.

[23] The parties appeared before the High Court in October and November 2002. Unfortunately the judge (who has since left Fiji) did not deliver his decision on the application for leave until October 2004. He dismissed the application to strike out the judicial review and granted the Respondent leave to move. This is not an appeal from that decision and we are not concerned with its correctness. We are however disposed to observe that a delay of 2 years in dealing with an application for leave to move for judicial review is quite unacceptable. It is not only legal practitioners who should bear in mind the words of Lord Diplock who said in *O'Reilly v Mackman* [1983] 2 AC 237 at 280–1; [1982] 3 All ER 1124 at 1131:

> the public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of its decision making powers for any longer period than is absolutely necessary in fairness to the persons affected by the decision.

[24] The motion for judicial review was heard in May 2005. Judgment was delivered the following month. Although the court accepted that there had been "serious" and "substantial" delay the commission was ordered to convene a s 17 inquiry into the disputed title. The court declined to grant an order restraining disbursement of lease monies to the Appellant on the ground that such an order would be detrimental to good administration. The court summarily assessed costs at $5000 (without, we were told, hearing any submissions from counsel) and directed that, failing agreement, up to $1000 would be recoverable from the Appellant. The Appellant now appeals both against the order directing the commission to hold a s 17 inquiry and the order for costs against him. We do not know why the commission was not a party to this appeal.

Submissions of the Appellant and Respondent

[25] The Appellant advanced four principal grounds of appeal: First, it was again submitted that in view of the 6 years which had elapsed since the death of Ratu Malelili it was wrong in principle and detrimental to good administration to reopen the question of who was the rightful holder of the title. To this should be added the uncertain consequences of the order of mandamus. Although the High Court had declined to interfere with the disbursement of lease monies to the Appellant, the consequences of a s 17 inquiry resulting in a decision in favour of the Respondent had not been thought through.

[26] The Appellant next submitted that the commission's decision in 1999 to confirm the conclusions reached in the 1991 inquiry was not a decision of the commission within the meaning of s 17 of the Act. In the alternative, if the 1999 decision was to be regarded as a s 17 decision then the Respondent had failed to avail himself of the appeal procedure afforded by s 17(3) and was therefore, on established principles, precluded from moving for judicial review.

[27] The Appellant's final submissions was that the wording of s 17 being directory rather than mandatory, the commission was not bound to hold an inquiry into the Respondent's complaint. In support of this submission Mr Vuataki referred us to observations of Tuivaga CJ in *Bulou Eta Kacalaini Vosailagi v Native Lands Commission* (1989) 35 FLR 116 at 130–1.

[28] Mr Fa rejected the suggestion that there had been any untoward delay. He pointed out that certiorari had not been sought and therefore the 3-month period referred to in O 53 r 4(2) of the High Court Rules had no application. While conceding that it was generally desirable that judicial review should be applied for as soon as possible after the occurrence of the matters complained of, he advanced the upheavals resulting from the May 2000 events as at least partly explanatory of the delay which had occurred.

[29] Mr Fa next suggested that since there was undoubtedly a dispute between the parties as to who was the rightful holder of the title, the commission was required by s 17 to inquire into that dispute. Far from the Appellant having any grounds for complaining of detriment, it was the Respondent who had been disadvantaged by the commission's refusal to act according to law.

[30] Mr Fa dismissed the suggestion that the commission had any discretion at all on whether to proceed to convene a s 17 inquiry. The existence of such a discretion would, he suggested, be an open invitation to corruption and nepotism into the administration of native affairs. However frivolous or hopeless a complainant's case might seem, the commission had a duty to inquire into the complaint under s 17 provisions of the Act.

[31] So far as the commission's 1999 decision was concerned, Mr Fa accepted that it was not a s 17 decision which gave rise to a ground of appeal. That was why only judicial review was available to review a decision not to hold an inquiry. Mr Fa submitted that the 1999 decision was a nullity, first, because it reaffirmed the findings of the 1991 inquiry by which the Respondent could not be bound since he was not a party to that inquiry, and second, because it was reached without any sufficient relevant consultation.

The 1991 inquiry

[32] In our view the consideration of the several issues raised must begin with the 1991 inquiry.

[33] There are several features of the 1991 inquiry and the litigation which it engendered which we find to be especially significant. First, both the High Court and the Court of Appeal (twice) reached the conclusion that the findings of the inquiry were unimpeachable. Second, as is clear from its findings, the commission did not merely decide between competing claimants; it went further and laid down the line of succession to the title Taukei Vidilo. Third, it specifically excluded Ratu Malelili's children from the succession. Fourth, one of those excluded children is the Respondent. Finally, the commission decided that the succession to the title following Ratu Malelili's departure should come from one of the two named cousins providing he was able to demonstrate support within the i tokatoka.

[34] In our view the event which was not foreseen by the commission namely the death of Ratu Nacanieli Nava does not have the consequence that the findings of the 1991 inquiry are spent. Had both cousins predeceased Ratu Malelili then the situation might have been different, although Mr Vuataki informed us that there are in fact younger brothers of the cousins. As we have already noted, the evidence discloses that the Appellant had substantial, if not overwhelming support for his assumption of the title within the i tokatoka. His eligibility to assume the title upon the death of Ratu Malelili could not therefore be impugned on the ground of lack of support.

[35] Mr Fa's main objection to the findings of the 1991 inquiry was that the Respondent was not a party to the hearings which took place at that time. In these circumstances, Mr Fa suggested, the Respondent could not be bound by the findings. With respect, we are unable to accept the correctness of that submission. Courts and other tribunals frequently define rights and obligations which bind or affect persons who are not parties to the proceedings at which the definition took place. Among other examples which come to mind, are the exercise by the court of its powers in the probate jurisdiction. A determination by the court or other authorized tribunal that a particular title should pass down a particular line of succession does not seem to us to be open to challenge several years later by a descendant of the unsuccessful line. To take a well-known case by way of example, we find it inconceivable that a son or other descendant of Arthur Orton would have an arguable ground for challenging the 1872 findings of the Court of Common Pleas in the *Tichborne* case merely on the ground that he was not a party to those proceedings.

[36] As has been seen, s 17 of the Act provides that:

> In the event of any dispute *arising* between native Fijians …

In our view the word "arising" must be taken to refer to a fresh dispute. A dispute which is in reality no more than a reformulated version of a dispute which has already been disposed of is not, in our view, a dispute falling within the section. Neither the apparent non-attendance of the Respondent at the 1991 hearings nor the death of Ratu Nacanieli Nava are events which undermine the continuing validity and applicability of the findings reached. In our opinion the subject matter of the present dispute between the Appellant and the Respondent is entirely encompassed within the dispute which was dealt with by the commission in 1991.

[37] Having reached the conclusion that the 1991 ruling remains intact and unimpeachable it follows that judicial review should not have been granted. In these circumstances the other issues raised by the grounds of appeal do not require consideration.

Result

(1) Appeal allowed.
(2) Orders of the High Court dated 4 July 2005 are quashed.
(3) Appellant's costs assessed at $750 inclusive of disbursements.

Appeal allowed.