

**COMMODORE JOSAI VOREQE BAINIMARAMA and
2 Ors v ANGENETTE MELANIA HEFFERNAN (ABU0034 of 2007)**

COURT OF APPEAL — APPELLATE JURISDICTION

5

BYRNE AJA

4 June 2007

10 **Practice and procedure — injunctions — application to grant stay of High Court's
order refusing stay pending appeal — whether ruling on interlocutory injunction has
effectively made certain findings that if matter in High Court proceeds as scheduled,
the appeal would be rendered nugatory — judge erred in making finding on
legitimacy of present interim administration — judge exceeded his jurisdiction —
15 Crown Proceedings Act s 15 — Emergency Powers Act 1998 s 2.**

The Respondent (Plaintiff) initiated proceedings against the Appellants (Defendants) by way of originating summons in the High Court. The summons sought declarations that the Appellants proclaimed the Interim Military Government Regulations 2006 and the State of Emergency Regulations 2006 in the absence of any power under Ch 14 of the
20 Constitution and did not comply with the provisions of s 2 of the Emergency Powers Act 1998. The Respondent also sought injunctions to restrain the Appellants from detaining or interfering with the freedom of movement and from entering any dwelling house or office occupied by her, her counsel, any of her legal advisers and witnesses pending the further order of the court. The Respondent then filed an interlocutory application seeking an injunction against the Appellants. The High Court granted the application. The Appellants
25 then filed an appeal in this court against the interlocutory ruling and filed an application in the High Court seeking a stay pending appeal. The High Court refused the Appellants' application. The Appellants filed an application to grant a stay of the High Court's order refusing a stay pending appeal.

Held — The learned judge exceeded his jurisdiction by granting an injunction to the
30 Respondent, which in effect held that the interim government headed by the first Appellant (A1) had usurped power from a legitimate government. The finding that the third Appellant (A3), the Attorney-General, had not been validly appointed was not open to him on an interlocutory matter. Also, by granting the injunction, the judge erred in making a finding on the legitimacy of the present interim administration.

35 Application granted.
No cases referred to.

A. K. Narayan and S. Sharma for the Appellants

No appearance for the Respondent

40 **Byrne JA.** On 31 January 2007, the Respondent initiated proceedings against the Appellants by way of originating summons in the High Court. That summons sought five declarations and three injunctions against the Appellants. I shall summarise the declarations here because they are relevant to what I have to say later. The first declaration was that the Interim Military Government Regulations
45 2006 proclaimed by the first Defendant (now Appellant) on 6 December 2006 and published in an extraordinary Government Gazette on 29 December 2006 were proclaimed in the absence of any power by the first Defendant (Appellant) under the Constitution.

50 The second declaration was that the State of Emergency Regulations 2006 proclaimed by the first Defendant (Appellant) on 6 December 2006 and published in an extraordinary government gazette on 29 December 2006 were

proclaimed in circumstances which did not comply with the provisions of s 2 of the Emergency Powers Act 1998 and were accordingly invalid.

The third declaration was that the State of Emergency Regulations was published in circumstances which did not comply with the provisions of Ch 14 of the Constitution and consequently were likewise invalid. Chapter 14 of the Constitution deals with emergency powers available to the state through the President.

The injunctions sought by the Respondent (Plaintiff) were first to restrain the Defendants (Appellants) from detaining or interfering with the freedom of movement of the Plaintiff (Respondent) and from entering any dwelling house or office occupied by her pending the further order of the court. Second an injunction restraining the Defendants (Appellants) from directly or indirectly detaining or interfering with the freedom of movement of the Plaintiff's counsel or any of her legal advisers from entering any dwelling house or office occupied by her counsel and her legal advisers pending the further order of the court. Third an injunction restraining the Appellants (Defendants) from directly or indirectly detaining or interfering with the freedom of movement of any witness in the present proceedings and from entering any dwelling house or office occupied by any such witness pending the further order of the court.

There followed six grounds purporting to support the declarations and injunctions sought. Summarised these grounds are:

- (1) That since 6 September (obviously I take it meant to be December) members of the second Appellant that is the Republic of Fiji Military Forces acting on the authority expressed or implied of the first Appellant (first Appellant) detained and assaulted and humiliated citizens who have questioned the authority of the Appellants allegedly because there was in existence a state of emergency which deprived citizens of their right under the Constitution.
- (2) That the third Appellant (Defendant) had until recently not questioned the lawfulness of such detentions and continues to support the first Appellant and second Appellant in their claim that the state of emergency exists.
- (3) That the actions of the first Appellant and second Appellant have received widespread media coverage which was intended by them to create a climate of fear and intimidation discouraging persons like the Plaintiff (Respondent) from exercising their rights to freedom of expression and association under the Constitution.
- (4) That the members of the second Appellant acting on the authority of the first Appellant have expressed a wish to speak to the Plaintiff (Respondent) who feared that she might be unlawfully detained by them.
- (5) That reports of the recent detention and mistreatment of a lawyer, Richard Naidu, by members of the second Appellant have caused the Plaintiff (Respondent) to fear that she too may be mistreated if detained.
- (6) That the Plaintiff (Respondent) fears that if not enjoined by the court, the first Appellant and second Appellant may detain and mistreat her legal representatives and any witness who supports her claim for relief from the court in order to discourage them from assisting the Respondent in her legal action against them.

On 13 February 2007 the Respondent filed an interlocutory application seeking injunction against the Appellants. On 20 April 2007 the High Court granted the Respondent an interlocutory injunction against the Appellants.

5 After sealing the order of the High Court the Appellants then filed an appeal in this Court against the interlocutory ruling of the High Court and on 27 April 2007 they filed an application in the High Court seeking a stay pending appeal from the High Court. On 24 May 2007, the High Court refused the Appellants' application for stay pending appeal.

10 Reasons for granting the interlocutory injunctions and the stay pending appeal were given by the High Court and are before me now.

Presently before me is an application by the Appellants to grant a stay of the High Court's order refusing stay pending appeal and this is listed for hearing in the High Court on Wednesday, 6 and Thursday, 7 June 2007. It is for this reason, the Appellants say, that they are making the present application to me as an
15 ex-officio judge of the Court of Appeal.

The burden of the Appellants' argument before me is that in his ruling on the interlocutory injunction the judge of the High Court has effectively made certain findings, such that if the matter in the High Court proceeds as scheduled, then the Appellants' appeal would be rendered nugatory. These findings include the
20 following:

- (a) By granting an injunction under s 15 of the Crown Proceedings Act, the High Court has effectively made a finding based on the submissions of the Respondent that the Interim Attorney-General has been appointed by the military regime as legal adviser to that regime and not a constitutionally recognised government. In short, a finding has been made that the Attorney-General is not a representative of the state and cannot rely on s 15 of the Crown Proceedings Act;
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- (b) The High Court has ruled that newspaper reports are admissible in the proceedings as relevant evidence, and has found that the Respondent's apprehensions are reasonable;
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- (c) The High Court has effectively proceeded on the premise that there had been a "removal of a democratically elected Government on 5 December 2006", which was a matter beyond the issues or evidence, and unless corrected on appeal will impact on the substantive hearing;
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- (d) On p 3 of its ruling, the High Court referred to the "might of the State whose lawfulness is in question in these proceedings" whereas the learned judge of the High Court at p 5 of his decision identified three serious issues in the proceedings, and which I note did not include lawfulness of the state.
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The serious issues mentioned by the judge were:

- (a) whether the State of Emergency Regulations are valid;
- (b) whether the Interim Government Regulations 2006 are validly enacted;
- (c) whether the Appellants have a legal right to arrest the Applicant or any
45 citizen.

The contention of the Appellants is therefore that substantive issues appear to have already been determined. It is submitted to me that there will be no prejudice to the Respondent if this court grants a stay of proceedings in the High Court. It is said that there is no risk of arrest of the Respondent and the
50 interlocutory injunction can remain in effect if the Respondent has any fears about this.

I pass now to the reasons of the High Court in granting the relief sought by the Respondent. At p 3 of the decision the learned judge says that, “This is a case where I have before me an ordinary citizen pitted against the might of the State (albeit whose lawfulness is in question in these proceedings)” and for that reason
5 in my judgment the learned judge erred. This was never, and could not be in the nature of the proceedings be an issue before the High Court in an interlocutory proceeding.

On p 6 of his decision the learned judge referred to s 15 of the Crown Proceedings Act and stated correctly that under that section injunctions can not
10 be granted against the state in civil proceedings against the state. He continued, “On the face of it, it appears that the Plaintiff is met with this legislative hurdle”. He then said that in response to that apparent obstacle, counsel for the Respondent stated that only a lawful state can “take shelter behind this provision, not a regime which has usurped power from a legitimate government”. He
15 continued, “There is much force in Doctor Cameron’s submission and is clearly an arguable matter”.

With respect to the learned judge, by his granting an injunction to the Respondent he has in effect held that the interim government headed by the first Appellant has usurped power from a legitimate government and in so doing, in
20 my judgment, has exceeded his jurisdiction. In an interlocutory matter such a finding was not open to him. Likewise in granting the injunction the learned judge, has in my view by clear implication found as a fact that the third Appellant, the Attorney-General, has not been validly appointed. Such a finding was also not open to him on an interlocutory matter.

I will mention only briefly the judge’s decision on stay of 24 May 2007. At p 2 of his decision he rejects a submission by the Appellants (Defendants) that the appeal will be rendered nugatory “as certain findings of his essentially determine the substantive issues in the originating summons”. The judge said he was at a
25 loss to understand this ground because he had expressly stated that he expressed no conclusive views on the serious issues. The judge obviously does not think his reference to a democratically elected government was expressing a conclusive view. As I understand the position in Fiji at present that question has yet to be decided by the courts. It also seems to me that by granting the injunction, the judge expressed not only a conclusive view but also made a finding on the
30 legitimacy of the present interim administration which in the circumstances he should not have.

For the reasons I have stated I am prepared to grant the stay sought by the Appellants in terms of paras 1 and 2 of the ex-parte notice of motion of 4 June 2007 I order that copies of this order and all relevant documents are to be served
40 on the Respondent or her solicitors no later than 8 June 2007 and that the matter be adjourned before me on Tuesday 12 June 2007 at 10 am.

Application granted.

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