



IN THE SUPREME COURT OF NAURU
AT YAREN
CIVIL JURISDICTION

Judicial Review No. 1 of 2024

IN THE MATTER of an ex-parte application by **PETA GADABU** for leave to file an application for Judicial Review under Order 38 of the Civil Procedure Rules 1972

BETWEEN

PETA GADABU

APPLICANT

AND

SECRETARY FOR JUSTICE

RESPONDENT

BEFORE:

**R. N. Prakash,
Registrar**

DATE OF HEARING:

7 October 2024

DATE OF RULING:

21 February 2025

CITATION: **Peta Gadabu v Secretary for Justice**

KEYWORDS: Application for leave to file for judicial review; procedure; mandatory requirement

APPEARANCES: Ms. Peta Gadabu (In person)

RULING

1. On 3 June 2024, the Applicant filed an ex-parte application for leave pursuant to Order 38, Rule 3 of the *Civil Procedure Rules 1972* for Judicial Review. The Applicant filed an Ex-parte Originating Summons, Writ of Summons in Suit for an Order for Mandamus and an Affidavit sworn on 3 June 2024 in support of the application.

2. The Applicant as per the Ex-parte Originating Summons is seeking the following reliefs:

...that an order of mandamus be made directing that Cabinet take all necessary steps to duly constitute the Public Service Appeals Board and more particularly within 7 days of these orders:

- (1) in accordance with Article 70(1) of the Constitution to appoint a Chairman to the Public Service Appeals Board,*
- (2) in accordance with Section 105(b) of the Public Service Act 2016, appoint a member to the Board*
- (3) in accordance with Section 105(c) of the Public Service Act 2016 direct Chief Secretary to forthwith call for the election of a public officer member of the Board as provided under the said legislation*

3. The ground on which the orders are sought consist of:

The Plaintiff was at material times a public service officer

On 29 December 2023, the Plaintiff was terminated from employment without cause

On 9th January 2024, the Plaintiff lodged a Notice of Appeal with the Public Service Appeals Board (Case No. 1/24)

On 9th January 2024 the Notice of Appeal was served on the Chief Secretary

The 23rd January was the due date for the Chief Secretary to file a Response to the Notice but none was filed within time nor has one been filed since then to date

The 7th January 2024 was the due date for the matter to be listed with the Board but no date was listed, nor has been listed since then to date.

4. As per the affidavit filed by the applicant on 3 June 2024, the facts are that the applicant was merely employed as a public service officer prior to the termination without cause on 29 December 2023; and on 9 January 2024, a notice of appeal was filed with the Public Service Appeals Board with Case Number 1 of 2024. However, the applicant has neither provided any evidence to support her termination such as a copy of the termination notice nor a copy of the notice of appeal filed before the Public Service Appeals Board. The affidavit also does not disclose the nature of employment the applicant was engaged in while being a public service officer.
5. At the hearing on 7 October 2024, the applicant made brief oral submissions and relied on the affidavit sworn and filed on 3 June 2024.
6. Order 38, Rule 1 (1) (2) (3) and Rule 3 of the *Civil Procedure Rules 1974* provides:

1 No suit for order of mandamus, etc, without leave (O 38, r 1)

- (1) No suit for an order of mandamus, prohibition or certiorari shall be commenced unless leave therefore has been granted in accordance with this rule.***
- (2) An application for such leave shall be made by originating summons ex parte to the Registrar and shall be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits, to be filed before the application is made, verifying the facts relied on.***
- (3) In granting leave the Registrar shall direct upon whom the writ of summons is to be served.***

...

3 Mode of applying for an order of mandamus, etc (O 38, r 3)

- (1) Where leave has been granted to commence a suit for an order of mandamus, prohibition or certiorari, the suit for such order shall be commenced by a writ of summons in Form No. 37 of Appendix A which, or a notice thereof if service is made outside Nauru, shall be served on every person on whom the Registrar has directed that it is to be served together with a copy of the statement and affidavits referred to in paragraph (2) of Rule 1 which were presented in support of the application for leave to commence the suit.***

- (2) *A person on whom the writ is served shall, if he or she wishes to be heard in the suit, enter an appearance within 8 days of such service, or such further period as the Registrar may direct or the court allow.*
- (3) *There shall be no pleadings in a suit for an order of mandamus, prohibition or certiorari.*
- (4) *At any time after appearances have been entered by all the persons served or the period for entering appearance has elapsed, the applicant for the order shall cause a notice of motion for the grant of the order to be issued out of the registry of the court and served on all persons served in the writ who have entered an appearance and, where it relates to any proceedings in or before a court and the object is either to compel the court or an officer thereof to do any act in relation to the proceedings or to quash there or any order made therein, the notice or summons shall be served on the Deputy Registrar of that court. (Italic and bold added)*

7. Order 38, Rule 4 further provides that:

4 No grounds to be relied upon other than those in statement (O 38, r 4)

- (1) *Subject to the next following paragraph, no grounds shall be relied upon or any relief sought at the hearing of the motion or summons except the grounds and relief set out in the statement in support of the application for leave under Rule 1.*
- (2) *The court or judge may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of any affidavit of any other party to the application, and where the applicant intends to ask to be allowed to amend his or her statement or use further affidavits, he or she shall give notice of his or her intention and of any proposed amendment of his or her statement to every other person who has entered an appearance in the suit and, where applicable, to the Deputy Registrar of the District Court or the Family Court, and shall supply copies of such further affidavits.*
- (3) *Every party to the application shall supply to every other party copies of the affidavits he or she proposes to use at the hearing. (Italic and bold added)*

8. Before considering the test for an application for leave for judicial review and the merits of the application, it is necessary to determine whether the application filed is competent and in compliance with the *Civil Procedure Rules 1972*. The procedure for commencing leave application is clearly set out in Order 38, Rules 1 (1) (2) and (3) of the *Civil Procedure Rules 1972*.

9. An application for leave can only be considered unless the applicant conforms with the procedural requirements set out in Order 38, Rule 1 (1) and (2). According to the *Civil Procedure Rules 1972*, it is a mandatory requirement for the applicant to institute the application for leave for judicial review by following the correct procedure and by filing with the registry:
- a. Ex-parte Originating Summons to the Registrar;
 - b. Statement setting out the name and description of the application, the relief sought and the grounds on which it is sought; and
 - c. Affidavit in support verifying the facts relied on.
10. In the present application, the applicant filed a Writ of Summons in Form 37, Ex-parte Originating Summons and an Affidavit. As per Order 38 Rule 3 (1) of the *Civil Procedure Rules 1972*, after the leave has been granted by the Registrar to commence a suit for an order of Mandamus, then the suit for such order must be commenced by a Writ of Summons in Form 37. The Writ of Summons in Form 37 is premature at this stage before the leave application is considered.
11. Be that as it may, the applicant has not filed the Statement as required under Order 38, Rule 1 (2) of the *Civil Procedure Rules 1972*. The use of word '**shall**' in Order 38, Rule 4 makes it mandatory for the court to only consider the grounds and the reliefs which are set out in the Statement in support of the application. The applicant in this instant has not filed the Statement as required under Order 38, Rule 1.
12. Section 57 (2) of the *Interpretation Act 2011* stipulates the meaning of the word '**shall**' below:
- 57 Meaning of 'may' and 'shall'**
- (1) *In a written law, the word 'may', used in relation to a power or function, indicates that the power or function may be exercised or performed, or not exercised or performed, at discretion.*
 - (2) ***In a written law, the word 'shall', used in relation to a power or function, indicates that the power or function is required to be exercised or performed.*** (Italic and bold added)
13. Subsequently, the use of the word 'may' indicate discretionary function or power while 'shall' indicate that such function or power is mandatory, thus, cannot be waived. Similarly, the use of word 'shall' in Order 38, Rules 1 and 4 in the *Civil Procedure Rules 1972* make it mandatory for the applicant to file the Statement together with the application.

14. Since the Statement is not filed, the court is not required to consider the grounds and reliefs sought in the Writ of Summons in Form 37 and the Ex-parte Originating Summons. Non-compliance with the mandatory provisions and failure to file the Statement is fatal to the present application, hence, resulting in the application being incompetent.
15. It is the duty of applicant to be properly informed of the rules and procedures while making such applications to the court. When filing judicial review applications, the parties must exercise competence and due diligence especially when it involves filing of correct pleadings with the registry as this would avoid waste of courts time. In the Fiji High Court case of *Kaur v Prasad* [2016] FJHC 891, His Honour, Justice Tuilevuka at paragraph 36 stated that:

36 ...*One of the principal reasons why leave is required is “to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error” (see R v Inland Revenue Commissioners ex-parte National Federation of Self-Employed and Small Businesses Ltd [1981] 2 All ER page 105 as per Lord Diplock) and to “eliminate frivolous, vexatious or hopeless applications” and to ensure “that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further investigation at a full inter partes hearing” (see Supreme Court Practice 1995 (The White Book).*

16. Considering the application is incompetent, there is no basis for the court to consider the test for leave for judicial review and the merits of the application. Hence, the application is dismissed and struck out.

Dated this 21 February 2025.

Ronald Navin Prakash


Registrar

