IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0050 OF 2003S
(High Court Civil Action No. HBC155 of 2001L)

BETWEEN:

ATTORNEY GENERAL OF FIJI
MINISTER FOR SUGAR INDUSTRY

Appellants

AND:

MARIKA VUKI SILIMAIBAU

First Respondent

NATIONAL FARMERS UNION

Second Respondent

Coram: Sheppard, JA
Tompkins, JA
Ellis, JA

Hearing: Wednesday, 17th March 2004, Suva

Counsel: Mr J. J. Udit and Mr K. Keteca for the Appellants
Mr G. P. Shankar with Mr. G. P. Lala for the Respondent

Date of Judgment: Friday, 19th March 2004

JUDGMENT OF THE COURT

Introduction

[1] In proceedings commenced by originating summons in the High Court at Suva the respondents (the plaintiffs in the High Court) challenged the nomination by the Minister of Sugar of eight persons to the Sugar Cane Growers Council ("the Council") made pursuant to the Sugar Industry (Amendment) Decree 1992 ("the Decree").

The hearing in the High Court

[2] The hearing was on 6, June and 19, July 2001. By a decision delivered two years later, on 17, July 2003, Gates J made the following declaratory orders:

> [a] The purported appointments of the Minister for Sugar and the acting Minister for Sugar are null and void and contrary to the provisions of the 1997 Constitution.
>
> [b] The Sugar Industry (Amendment) Decree 1992 is invalid and of no legal effect.
>
> [c] The exercise of powers by the purported Minister for Sugar in nominating eight members to the Sugar Cane Growers Council is null and void and of no legal effect.

[3] The appellants (the respondents in the High Court) have appealed against that decision. The hearing of the appeal came before this Court near the close of the current sitting. We considered whether, in view of the significant constitutional issues raised in the judgment and the submissions to us, the appeal should be adjourned to the July sittings to enable adequate time to be given to the hearing and to the preparation of the judgment.

[4] However, we were informed by counsel that the next election of the Council is due to take place in April 2004, that is next month. To enable those responsible for the election to know whether it is to take place under the Decree or under the law as it would be if the Decree were declared invalid, it was essential that the decision of this Court be available promptly. This is an unfortunate result of the Judge's delay in delivering his judgment. For that reason we have, in this judgment, determined only the particular issues necessary to decide the validity of the Decree. The other constitutional issues will need to wait for the day, if it ever arrives, when it is necessary for them to be determined.

The grounds of appeal

[5] In their notice of appeal the appellants challenged each of the three declarations made by the Judge in the High Court. However, at the hearing of the appeal, counsel abandoned the first and third ground. This was because, as the result of the passage of time and the imminence of the next election to the Council, it is no longer necessary to decide whether the Minister who made the initial appointments was himself invalidly appointed. If the Decree be

valid, the present Minister, the validity of whose appointment is not challenged, will be able validly to make the necessary appointments.

The Decree

[6] The Decree is dated 6, February 1992. It is stated to be made:

> "In exercise of the powers invested in me as President of the Sovereign Democratic Republic of Fiji and Commander in Chief of the Armed Forces, and acting in accordance with the advice of the Prime Minister and the Cabinet."

[7] It is signed by Peneaia Ganilau, followed by the description of his offices as set out above.

[8] Relevant to the present issue is clause 4 of the Decree. It amends s 32 of the Sugar Industry Act (Cap 206) by deleting subsection (1) and substituting:

> "(1) The council shall consists of -
>
> (a) One member to be elected from each of the 38 sectors;
>
> (b) One member to be nominated by the Minister from each of the eight districts"

[9] This amendment resulted in a significant change in the composition of the Council as provided in s 32 of the Act. Under that section the Council shall consist of three representatives from each sector elected by the growers in that sector and representatives of districts appointed to the Council under s 41. The result would be a Council of 93 members plus further members appointed by the Council under s 41. Thus the amendment resulted in a very substantial reduction in the size of the Council. But more significantly in the view of the respondents, the change for the first time provided for members appointed by the Minister. It was, as we understand it, that change and the manner in which it was exercised that prompted the respondents to challenge the validity of the Decree.

The judgment in the High Court

[10] In considering the validity of the Decree, the Judge referred to his decision in *Karoi v Commissioner of Inland Revenue* [2003] NZAR 18, and in particular to the following passage at 36 which he cited:

> "In the circumstances, it is essential that the incoming Parliament review all of the decrees made since 1987 and subject them to the normal processes of a Bill. Only then will Parliament be true to its constitutional pact with the people of Fiji. A reference tucked away that the end of the Constitution [s 195 (1)] to all written laws continuing in force, does not amount to a parliamentary process complying with such a pact. Parliament should seek to complete such a process within as short a time as possible, perhaps twelve months. Parliament, setting its own procedure, will no doubt extend that time as it thinks fit. But it is desirable to maintain constitutionality in Fiji's public life, and to restore its rolling stock to the tracks as soon as possible."

[11] We are unable to agree with this reasoning. We can state our reasons quite shortly. First, as we consider in more detail shortly, s 195 (1) (e) of the Constitution clearly validates the decree. That section is not to be written down simply by reference to where it appears in the Constitution. Secondly, there are no possible grounds for the Judge finding that all decrees have to be "reviewed" by Parliament (whatever that may mean). There are no statutory provisions requiring Parliament to adopt that course. It is not for the Court to legislate what Parliament is required to do. But, perhaps more significantly, the Constitution is the ultimate legal authority in Fiji. If, as we find to be the case, the Constitution validates the decree, there is not only no obligation on Parliament to "review" the decree, if it attempted to do so other than by a properly enacted amendment or repeal, it would be acting contrary to the Constitution.

Clause 195 (2) (e) of the 1997 Constitution.

[12] This clause provides:

> "(2) Despite the repeal of the Constitution of the Soveriegn Democratic Republic of Fiji (Promulgation) Decree 1990:
>
> (e) all written laws in force in the State (other than the laws referred to in subsection (1)) continue in force as if enacted or made under or pursuant to this Constitution and all other law in the State continues in operation;"

[13] The Decree is not one of the laws referred to in subs (1)

[14] The appellant submitted that, when regard is had to the relevant definitions in s 194, the decree continued in force by virtue of (e). The respondents submitted that it did not because in its submission it was not within the words "written laws" in (e)

[15] Section 194, the interpretation section, contains the following interpretations:

> *Written law* means an Act or subordinate legislation.
>
> *Act* means an Act of the Parliament or a Decree.

[16] Counsel for the respondents submitted that the Decree was neither an act nor subordinate legislation. He submitted that subordinate legislation can only mean legislation made pursuant to powers contained in an act, and the Decree was not made pursuant to such power.

[17] This submission overlooks the definition of Act as not only an act but also a decree. It follows that the Decree was, for the purposes of the provisions in the Constitution an act, as such it was within the words "written laws" as defined and therefore was within (e) of s 195 (2). The conclusion is therefore inescapable that, on the authority of an express provision in the Constitution, the Decree continued in force as if enacted under the Constitution.

[18] Counsel for the respondents further submitted that the Decree was not validly enacted, and therefore was not a decree for purposes of the definition in the 1997 Constitution. Counsel for the appellants submitted that the Decree was validly enacted pursuant to the 1990 Constitution which was itself established by decree. Clause 7 of that Constitution provides:

> "7. the provisions of Sections 5,6,7,8,9 10,11,12,13,14,15,16,17 and 18 of the Head of State and Executive Authority of Fiji Decree 1988 shall continue to be in force until Parliament is convened in accordance with the provisions of the Constitution;
>
> Provided that if any other provision of that Decree is inconsistent with the provisions of the Constitution, that provision shall to the extent of the inconsistency, be deemed repealed."

[19] The Decree was signed by the President on 6 February 1992 and published in the Gazette. Parliament was not convened in accordance with the provisions of the 1990 Constitution until after the general election in May 1992. It follows that when the Decree was made, the 1988 Decree was still in full force under the 1990 Constitution, with the result that

the Decree, having been made under the 1988 Decree, was validly made, and must therefore be regarded as a decree within the definitions of the 1997 Constitution.

[20] For these reasons the decree was validly made, and not having been repealed, remains in force.

Further comments

[21] In his judgment the Judge expressed certain conclusions relating to the dismissal and appointments of prime ministers, the dissolution of Parliament, the appointment of a caretaker prime minister, and the appointment of caretaker Ministers. We do not find it necessary to express views on these conclusions.

[22] Counsel for the appellant made detailed submissions with supporting authorities in support of the proposition that the 1987 revolution which began on 14, May 1987 was a successful revolution that abolished the old order, principally the 1970 Constitution, and replaced at with the new order and the 1990 Constitution. The doctrine of necessity, counsel submitted, has no application when a revolution is finally successful.

[23] Counsel submitted that once a revolution is successful, the legislative and administrative acts of the usurpers are legitimated *ab initio*. Thus the acts of the revolutionary regime became legitimate from 14, May 1987. On this argument there is no need for any subsequent validation of any legislative acts of the revolutionary regime by a Parliament which has created itself.

[24] If this analysis be correct, validation by the 1997 Constitution would not be required. Since we find that the decree continued in force by virtue of s 195 (2) (e) of the 1997 Constitution, it is not necessary for us to determined these alternatives submissions advanced on behalf of the appellants. Had more time been available for the hearing of the appeal and the preparation of the judgment, we may well have done so, since we appreciate that the issues raised in the submissions may have relevance in other circumstances.

The result

[25] The declaration made in the High Court that the decree is invalid and has no legal effect is set aside. In lieu thereof we make a declaration that the decree was validly made and remains in force.

[26] We express no opinion on the other two declarations made in the High Court,

[27] The appellants are entitled to costs on the appeal which we fix at $1500.

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Sheppard, JA

FIJI COURT OF APPEAL

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Tompkins, JA

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Ellis, JA

Solicitors:

Office of the Attorney-General, Suva for the Appellants

Messrs. G.P. Lala & Associates, Suva for the Respendents