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

CIVIL APPEAL N0. ABU0085 OF 2004S
(High Court Civil Appeal N0. 34 of 2003L)

BETWEEN:

FIJI ISLAND REVENUE AND CUSTOMS AUTHORITY

APPELLANT

A N D:

NEW ZEALAND PACIFIC TRAINING CENTRE LIMITED

RESPONDENT

Coram:: Ward P
Henry JA
McPherson JA

Hearing: Monday 11 July, 2005

Counsel: B Solanki and J Mainavolau for the appellant
S Maharaj for the respondent

Date of Judgment: Friday 15 July 2005

JUDGMENT OF THE COURT

---

[1] The respondent, the New Zealand Pacific Training Centre (NZPTC), is an educational institution affiliated to the Box Hill Trade and Further Education College in Melbourne. It operates a number of training centres around Fiji offering certificate and diploma courses in computing and related fields of study.

[2] Ever since it was incorporated and registered, NZPTC has been registered to pay VAT and it did so as required under the VAT Decree 1991 until November 1999. In that year there was a change of Government in Fiji and the new Government stated that one of its policies was to remove VAT on education. There is no suggestion that this was any

more than a statement of intent but NZPTC relied on it and stopped charging its students VAT from December that year. It was thus able to reduce its fees by 10% and it did not charge VAT for the period December 1999 to the end of December 2002.

[3] However, in February 2001 the appellant, the Fiji Islands Revenue and Customs Authority (FIRCA) wrote, under section 33 of the VAT Decree, demanding returns for VAT from NZPTC for the period December 1999 to December 2000. This led to correspondence between the appellant and the respondent but the position remains that the appellant is demanding VAT for the full period.

[4] Later, FIRCA assessed the total VAT payable to the end of June 2002 as $346,610.82. The respondent disagreed with that assessment but, although there is a procedure under the Decree for lodging a notice of objection to the Commissioner, it appears no objection was lodged.

[5] No payments were made and, as a result, the Authority registered a garnishee notice on the respondent's Bank and followed it with a demand to NZPTC for an immediate payment of $116,734.01.

[6] Further negotiations took place and an arrangement was reached (forced upon it, according to the NZPTC) to pay $20,000 immediately followed by payments of $10,000 per month. Although NZPTC was making those payments and had paid a total of $70,000.00, FIRCA further demanded an immediate payment of $180,000 and threatened to reactivate the garnishee notice.

[7] As a result, on 24 January 2003, NZPTC filed a notice of motion in the High Court to have the garnishee notice and the monthly payments of $10,000 suspended and seeking injunctions restraining the appellants from demanding payment of $180,000 and from exercising any of the powers to recover the full amount. It was followed, on 27 January 2003, by an originating summons seeking a number of declarations and orders including those in the earlier notice of motion. On 10 February 2003, Byrne J suspended the garnishee notice and set a timetable for submissions.

[8] On 11 April 2003, FIRCA filed notice of motion seeking a declaration, inter alia, that the High Court had no jurisdiction in respect of the assessment and relief sought by the NZPTC and that those matters should be dealt with by the Value Added Tax Tribunal under the procedures established by the VAT Decree.

[9] It appears all submissions were filed by 18 April 2003 but nothing then happened for 18 months. The next step is described by Byrne J in his judgment:

> "17. When I read the papers in this case I was somewhat surprised that the plaintiff did not make any submissions on the validity of the VAT Decree and so I invited counsel to address me on this on the 13th of October 2004. I requested further submissions because it seemed to me that *prima facie* the VAT Decree of 1991 was unconstitutional."

[10] In view of the nature of the case, the sum involved and the already considerable lapse of time, we cannot avoid the comment that it was unfortunate the learned judge had not read the papers earlier. It is also relevant to point out that, until he raised the point, there had been no challenge to the validity of the Decree by either party.

[11] Happily, the earlier delay was not repeated and the learned judge gave a lengthy judgment on 21 October 2004. He found that the High Court had jurisdiction and concluded:

> "34. For the reasons I have given I hold that the VAT Decree of 1991 is unconstitutional. There will be judgment for the plaintiff and I make the following declarations and orders:
>
> (1) I declare that all assessments of Value Added Tax made by the defendant to the plaintiff are illegal.
> (2) I order that the sum of $70,000.00 already paid by the plaintiff to the defendant as Value Added Tax be refunded to the plaintiff.
> (3) I order that the defendant pay the plaintiff costs of $1,000.00."

[12] The appellant lodged notice of appeal on 25 October 2004 on four grounds:

1. That his Lordship erred at law in deciding that the VAT Decree 1991 is unconstitutional and invalid.
2. That his Lordship erred at law by holding that the High Court had jurisdiction in matters pertaining to VAT assessments and objections.
3. That his Lordship erred at law in declaring that the VAT assessments are illegal
4. That his Lordship erred at law at ordering the sum of $70,000 already paid by the plaintiff to the defendant as Value Added Tax to be refunded to the plaintiff.

The Validity of the VAT Decree 1991

[13] Following the abrogation in 1987 of the independence Constitution of 1970 and the declaration of a Republic, a new Constitution was promulgated by the interim military government in 1990. The first elections under that Constitution were held in 1992 and the country continued under that Constitution until the passing of the present Constitution by the Constitution Amendment Act 1997.

[14] The interpretation section of the present Constitution is section 194 and, in subsection (1), includes the following:

> "*Act* means an Act of the Parliament or a Decree;
>
> *Constitution of 1990* means the Constitution set out in the Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990;
>
> *Decree* means:
> (a) a Decree made by the President before the convening of the Parliament under the Constitution of 1990; or
> (b) a Decree made before 5 December 1987 by the Commander and Head of the Fiji Military Government
> *written law* means an Act or subordinate legislation"

[15] Section 195 (1) repeals a number of earlier Acts and Decrees and subsection (2), inter alia, provides:

> "(2) Despite the repeal of the Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990:
>
> ...
>
> (e) all written laws in force in the State (other than 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;"

[16] Despite a lengthy judgment and his concluding words that the decision is for the reasons he has given, it is not easy to ascertain the basis upon which the learned judge held that the Decree is unlawful.

[17] The judgment is largely devoted to an attack on legislation by decree. He cites his own earlier judgments and those of fellow High court judges to support it. We do not deal with that issue because, with respect to his obviously strongly held views, it was not the issue in this case.

[18] He was referred to the judgment of this Court in the case of *Attorney General of Fiji and the Minister for the Sugar Industry v Marika Silimaibau and the National Farmers Union* No ABU 50 of 2003 in which the Court considered the Sugar Industry (Amendment) Decree 1992 which had been declared invalid by the High Court.

[19] In that case, the Court of Appeal referred to the provisions of sections 194 (1) and 195 (2) and continued:

> "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 section 195(2). The conclusion is therefore inescapable that, on the authority of an express provision of the Constitution, the Decree continued in force as if enacted under the Constitution."

[20] Despite the clear terms of that decision, the learned judge simply ignored it, limiting his comment to a defence of his fellow judge in relation to a reference by the Court of Appeal to delay. He chose instead to refer to an earlier judgment of the same High Court judge in *Koroi v Commissioner of Inland Revenue*, no HBC179/2001L and to comment on the reasons given in the appeal from the same decision.

[21] His comments on the appeal judgment need not be set out in full but it is in some of them that the reasons for his decision in the present case may be found:

> "28. As to the claim by the Court that there are no statutory provisions requiring Parliament to adopt that course [the suggestion in the judgment of Gates J that Parliament should review all decrees] with respect I would have thought there was an obvious statutory provision, namely section 45. I cannot understand how, given the unqualified wording of section 45, any Decree could be considered to be a valid law and I am reinforced in that opinion by the definition of *subordinate legislation* in section 194(1). I also note the statement in the passage I have just quoted that, 'the Constitution is the ultimate legal authority in Fiji'.
>
> 29. It is true that the Court of Appeal rejected a submission from the respondents that subordinate legislation can only mean legislation made pursuant to powers contained in an Act but, as I have said, there is nothing in its judgment to show that any mention was made of section 45 during the hearing."

Earlier he had explained:

"18. Mr Maharaj for the plaintiff argued that the crux of this question hinges on what is held to be the law of Fiji.

19. Section 45 of the Constitution reads as follows: 'The power to make laws for the State vests in a Parliament consisting of the President, the House of Representatives and the Senate'.

20. I would have thought that nothing could be clearer. The section does not say that it is subject to any other sections of the Constitution but particularly sections 194 and 195 which bear on the present proceedings. ..."

[22] The judge then sets out the arguments of counsel in paragraphs 21, 22 and 25 :

"21. Counsel for the plaintiff argues that this case concerns a tax decree purporting to impose tax on citizens and others by a non-parliamentary process and purports to impose penalties for non-payment. Thus, says counsel, when Parliament passes a law it means an Act which has gone through the parliamentary process. He also submits that section 45 is not stated to be subject to sections 194 and 195 and that if it were the intention to make exceptions to section 45 that should have been clearly stated in the three sections mentioned. Furthermore counsel submits that the term "subordinate legislation" is defined in section 194 to mean "**any instrument of a legislative character made in exercise of a power to make the instrument conferred by <u>an Act</u>** (my emphasis). As only Parliament has the power to make Acts it follows that the VAT decree must be unconstitutional. I mention in passing that this Decree purported to come into force on the 1st of July 1992.

22. Counsel submits that the Decree which imposes such heavy consequences for offences must as a matter of fairness and democracy be passed by

Parliament as though it were a Bill. It cannot be authorised under the Doctrine of Necessity.

25. Miss Ali for the defendant made only brief submissions. She relied on section 195 of the Constitution which she said validated the VAT Decree and relied on the Court of Appeal judgment in *Silimaibau*. She also said that until the VAT Decree was ruled invalid, FIRCA was entitled to rely on it, which it did in this case. I accept that statement but cannot accept Miss Ali's submission that the validity of the VAT Decree as not an issue in this case for the simple reason that the assessments made against the plaintiff were made pursuant to the VAT Decree of 1991."

[23] As we have pointed out, the judge never addresses the findings in the *Silimaibau case* and simply disregards them. However, we are satisfied that decision was correct and that the same reasons can be applied to the present case.

[24] The chain of interpretation is clear. Under section 195(2)(e), all written laws other than those referred to in subsection (1) continue in force. A "written law" is defined as an Act or subordinate legislation. An "Act" is defined as an Act of the Parliament or a Decree. It is impossible to construe the word Act in the definition of written law as being different from the meaning given to it in the very same section. The VAT Decree is a Decree as defined.

[25] The definition of a Decree includes a Decree made by the President before the convening of the Parliament under the Constitution of 1990. This Decree was made by the President on 22 November 1991 and the first sitting of Parliament under the 1990 Constitution was on 29 June 1992. By section 194, it is therefore a Decree and, by the same section, comes within the definition of an Act. As such it is a proper instrument to authorise the raising of revenue under section 175.

[26] Section 45 does not assist the NZPTC. The Constitution came into effect on 27 July 1998 which is the date on which section 45 became operative. Accordingly, therefore, the power to make laws for the State vested in Parliament. Section 46 then provides for the way in which the legislative power is to be exercised. It can be noted that, under section 46(1), the defined process is expressed as being subject to the Constitution. Section 45 is not directed to laws in force prior to the Constitution coming into effect.. Transitional and repeal provisions are separately dealt with in section 195 and it must be under those provisions the validity of the 1991 Decree falls to be decided.

[27] Finally Mr Maharaj suggests that section 175 is a restriction that is also not subject to section 194 because, like section 45, it does not say so:

> "175. The raising by the Government of revenue or moneys, whether through the imposition of taxation or otherwise, must be authorised by or under an Act."

[28] His argument then continued that the section 194(1) definition of "Act" did not apply to section 175 because section 194 is preceded by the words "unless the contrary intention appears". It was then contended that, because section 175 is a revenue gathering provision which is traditionally recognised in most jurisdictions as requiring the Parliamentary process, that also represents the intention of section 175.

[29] Accepting the general premise relied upon, we do not agree section 175 can be construed in that restricted way. The words of section 194(1) must be given their proper meaning. The words "unless the contrary intention appears" can only be read as "unless the contrary intention appears in the Constitution". It is the Constitution itself which must evidence the contrary intention. Mr Maharaj did not point us to, nor are we able to discern, any provision in the Constitution from which could possibly be drawn an intention to depart from the section 194(1) definition in construing section 175.

[30] By section 1(2), the VAT Decree was to come into force on the first day of June 1992. The learned judge pointed that fact out in his judgment. He does not deal with the

point again but, if he stated it because he considered that was a relevant date for the purpose of this finding, he was wrong.

[31] The Decree is valid and the appeal on this ground is allowed.

Jurisdiction of the High Court in matters relating to VAT assessments and objections

[32] The originating summons included a request for declarations that the assessment of VAT by the Commissioner was "arbitrary unreliable and wrong and not recoverable and further should not be the basis for an issue of Recovery process by garnishee proceedings or otherwise howsoever" [paragraph (1)] and that "the defendant has acted unreasonably and is wrong to assess that VAT is payable in respect of the period December 1999 to end of December 2002" [paragraph (4)].

[33] The challenge to the High Court's jurisdiction arose from a notice of motion subsequently filed by FIRCA in March 2003 seeking, inter alia;

> "(1) A Declaration … that … the Court has no jurisdiction over the defendant in respect of the issues raised on assessments and the relief sought on the Garnishee …;
> (2) An Order that the relief sought by the plaintiff with regard to the assessment of the VAT returns and the garnishee be dealt with by the VAT Tribunal"

[34] The learned judge dealt it in the following passage:

> "15. … Regardless of the question of whether the VAT Decree is constitutional I am of the opinion that section 120 of the Constitution Amendment Act 1997 grants jurisdiction to this Court in this matter. Section 120(1) of the Constitution states that the High Court has unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other original jurisdiction as is conferred on it under this Constitution. In my view nothing could be wider so that for this reason alone I reject the submission by the defendant that the present proceedings should

be dealt with by a VAT Tribunal. I will say more about this tribunal when considering the constitutional questions which were argued before me on the 13th of October."

[35] Unfortunately, despite the last sentence, the learned judge does not return to the topic.

[36] Section 120 (1) to (3) of the Constitution provides:

> "120-(1) The High Court has unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other original jurisdiction as is conferred on it under this Constitution.
> (2) The High Court also has original jurisdiction in any matter arising under this Constitution or involving its interpretation.
> (3) The High Court has jurisdiction, subject to the conferral by Parliament of rights of appeal and to such requirements as the Parliament prescribes, to hear and determine appeals from all judgments of subordinate courts."

[37] The learned judge appears to take that as meaning that there is effectively no limit to the jurisdiction of the High Court over any matter filed before it. That is not correct for two reasons. The first is that the proceedings must relate to a justiciable matter and the second that its jurisdiction in some matters, especially appeals from bodies other than subordinate courts, is granted only by statute without which there is no jurisdiction. In the latter, the court's jurisdiction is limited by the terms of the statute granting it.

[38] As was emphasised by Mr Maharaj, section 175 requires that the raising of revenue may only be under the authority of an Act of Parliament. The VAT Decree, as we have found, is such an Act and it sets out the procedures for such revenue collection including objections and appeals.

[39] The assessment of VAT in the present case was made under section 44 by the Commissioner. The respondent had the right, under section 50, to lodge an objection

with the Commissioner within 28 days. Had it done so, the Commissioner would have been obliged to consider it.

[40] If the objection is not wholly allowed by the Commissioner, an objector then has two months from the notice of disallowance to require the objection to be heard by the VAT Tribunal.

[41] If the objector is dissatisfied with the decision of the Tribunal, he has twenty eight days to give written notice of his wish to appeal to the High Court. The Decree gives the High Court jurisdiction to hear such appeals but that is the only jurisdiction granted by the Decree and only arises when the other remedies have been pursued and completed

[42] The High Court has original jurisdiction to hear, by way of judicial review, any objection to the manner in which the various bodies under the VAT Decree perform their duties. Equally it is given original jurisdiction by section 120(2) to hear any matter arising under the Constitution or its interpretation.

[43] The appellants do not object to the judge's assumption of jurisdiction to determine the legality of the Decree as a matter of constitutional interpretation. However, the suggestion that the judge has jurisdiction to hear objections to, and to determine the correctness of, the assessment is clearly wrong. That is a matter for the Commissioner and the VAT Tribunal. The jurisdiction given to the High Court by the Decree is to hear appeals from the decisions of the Tribunal. It is a statutory power and not covered by the jurisdiction to hear appeals from subordinate courts under section 120(3) of the Constitution.

[44] As we have pointed out, the question of the constitutionality of the decree was not raised as an issue in the case by either party until the learned judge raised it in October 2004. Having done so, he had jurisdiction to determine that issue but it did not extend to a consideration of the assessments.

[45] In the event, the orders of the judge that the assessments were illegal and that the $70,000.00 paid by NZPTC be repaid were based solely on his finding that the decree was unconstitutional and, in view of our finding on that ground, we set them aside also.

[46] The appeal is allowed and we make the following orders:

1. The Order of the High Court that the VAT Decree 1991 was unconstitutional is set aside and we declare that it was and is valid.
2. The Order of the High Court that the assessments made by the appellant to the respondent are illegal is set aside
3. The Order by the High Court that the sum f $70,000.00 paid by the respondent to the appellant be refunded is set aside

[47] As we have stated, the Court was advised that NZPTC took no steps to use the procedures under the Decree to object to the assessments. The time limits under the Decree have now expired and it is clear that the originating summons was also filed well after they had expired.

[48] We note, however, that the first declaration sought by the respondent in the originating summons read:

> "(1) A Declaration that the defendant is bound by and estopped from acting contrary to the advice, assurance and representations made and given by the Fiji Labour Government in 1999 that no VAT is payable by educational institutions in Fiji."

[49] The issue of estoppel was not considered by the High Court and, if the respondents wish to pursue that cause of action, they shall make application to the High Court to have the matter listed before another judge.

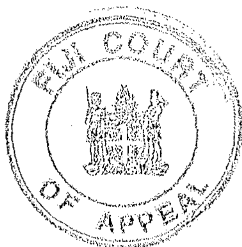
[50] Finally it follows that we must also set aside the Order by the learned judge made on 10 February 2003:

"That Bank of Baroda, Nadi Branch not to operate on the Garnishee given to it by the defendant in respect of account number 402339 and 402340 in the name of the plaintiff until further order of this Court"

[51] The order by Byrne J that FIRCA pay costs of $1,000.00 is set aside and we order instead that NZPTC shall pay the costs in the court below in the sum of $1,000.00 and in this Court in the sum of $500.00.

....

Ward P



....

Henry JA

....

McPherson JA

Solicitors:

Mr. B. Solanki and Mr. J. Mainavolau for the Appellant

Mr. S. Maharaj for the Respondent