

**Laisenia Qarase and Others v Josaia Voreqe Bainimarama and Others**

**Fiji High Court, Suva  
11<sup>th</sup>, 12<sup>th</sup> September 2007**

**Civil Actions  
HBC60.07S  
HBC398.07S**

**Gates, Acting CJ, Byrne J**

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**RULING NO. 3**

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Mr Tevita Fa for the Plaintiffs  
Mr Gerard McCoy QC, with Mr J. Sherry and  
Mr Gene Bai for the Defendants  
Dr Shaista Shameem with Ms B. Devi and  
Ms S. Colavanua for the Proceedings Commissioner

[1] Today was the day fixed for pre-trial conference with overseas counsel. Senior Counsel for the plaintiffs was not present. However considerable progress has been made sufficient to allow the court to dispense with the need to fix another day for pre-trial conference.

[2] There were six interlocutory motions or summons to be heard. The first was the plaintiffs' notice of motion of 7<sup>th</sup> September 2007 for variation of orders relating to the timetable.

[3] The plaintiffs had been given extended time to 11<sup>th</sup> September 2007 for the filing of their affidavits in reply. This had been necessitated by an earlier indulgence granted by the court to the defendants to allow them to file and serve their voluminous affidavit material [11 x lever arch folders] within enlarged time. Mr Fa sought till the 14<sup>th</sup> September 2007. Mr McCoy for the defendants generously and properly conceded they could be allowed as much as a further 14 days.

[4] In the circumstances, the court extends time till 24<sup>th</sup> September 2007 for the plaintiffs to file and serve their affidavits in reply.

[5] The plaintiffs sought to put off the pre-trial conference till 28<sup>th</sup> September 2007. As today's proceedings developed that proved unnecessary. The request is therefore declined. The date was set well in advance for Senior Counsel to be present. There will be adequate time for Senior Counsel on both sides to narrow down the contentious issues, from now until the trial which commences on 2<sup>nd</sup> October 2007. Counsel are urged to be in communication for that purpose. In a case of this dimension, it is essential that counsel seek to present to the court for determination only those matters which are the true core of their respective cases.

[6] The plaintiffs also sought to postpone the trial commencement date from 2<sup>nd</sup> October 2007 to 23<sup>rd</sup> October 2007. No reason was given in the supporting affidavit.

[7] There was no good reason here for putting off the start of the trial. It was anticipated the evidence might take 3 weeks, with argument adding a further week. With extra time granted for preparation of affidavits in reply, and to consider which witnesses were to be requested for cross-examination, there has been sufficient time allowed for preparation of the cases and argument. Whilst allowing a proper opportunity to all of the litigants to present their cases to the court, it was hoped a decision, at least at the High Court level, could be handed down before the first year's anniversary of the intervention out of which the issues for determination arise. Accordingly the request for postponement of trial is declined. There will be no order as to costs.

[8] We should add two further orders.

- (i) The evidence of all of the deponents contained in their filed affidavits shall constitute their examination-in-chief in the trial.
- (ii) By 24<sup>th</sup> September 2007 the plaintiffs are to notify the defendants' counsel and the court of which deponents they require to be available at court for cross-examination. Similarly the defendants are to notify the plaintiffs' counsel and the court of which witnesses they require for cross-examination within 2 days of the service of the plaintiffs' affidavits in reply.

[9] The Attorney-General had filed an originating summons Action No. HBC398.07S which could be referred to shortly as *Republic of Fiji and A-G v Qarase and Vosanibola*. This summons sought 13 declarations and costs. Ten of these declarations claimed Mr Qarase as Prime Minister had failed to inform His Excellency the President, in breach of his duty under section 104 of the Constitution, to keep the President generally informed about issues relating to the governance of Fiji. The failures of information involved the requests made for foreign military intervention, the presence of an Australian military taskforce of 3 warships within Fiji waters, a meeting of the Forum Foreign Ministers and the invoking of the Biketawa Declaration for intervention into the affairs of Fiji, discussions with Mr Kofi Annan about the events leading up to 5<sup>th</sup> December 2006 affecting Fiji's peacekeeping duties, the exclusion of the military from participation in the National Security Council, the arrival of Australian Special Air Services personnel without clearance of customs and immigration, the visit of Ambassadors to the Queen Elizabeth Barracks and their attempt to seek Captain Teleni's withdrawal of support for the Commander, the details of the meeting in Wellington with the New Zealand Foreign Minister and Prime Minister, the request for the International Police Agency to arrest the Commander in New Zealand, and certain matters in relation to a failure to have Code of Conduct legislation drafted in neglect of section 156 of the Constitution.

[10] The Attorney as plaintiff in this the second originating summons, sought by interlocutory summons of 30<sup>th</sup> August 2007 to have the later proceedings consolidated with Mr Fa's originating summons as amended [No. HBC60.07S]. Mr Fa objected to the consolidation saying this might delay the hearing and prolong the result of his client's action.

[11] There is some risk of that. However with the exception of the s.156 Code of Conduct matter, the remaining declarations are clearly inter-related with the main issues in the original proceedings. We are anxious the parties bring forward to the court the contentious and central issues of the 5<sup>th</sup> December intervention so that the court can deal with them at one time. It is possible these issues could be narrowed down even further following discussions amongst counsel, and in the way the cases are finally presented and argued at trial. That is a matter for the parties and for their counsel.

[12] We will permit the application for consolidation of the two proceedings, Actions Nos. HBC60.07S with HBC398.07S under the provisions of the High Court Rules [Order 4 Rule 2].

### **Intervention of Proceedings Commissioner**

[13] On 16<sup>th</sup> August 2007 the Proceedings Commissioner of the Fiji Human Rights Commission [the FHRC] filed a Notice of Motion to intervene in the proceedings. The motion seeks leave to intervene pursuant to section 37(2) of the Human Rights Commission Act [No. 10 of 1999] “on the ground that the Commission has investigated human rights allegations in the removal of the Prime Minister, Mr Qarase on behalf of the United Nations High Commissioner and had produced a report.”

[14] s.37 provides:

“37.—(1) The Proceedings Commissioner may appear and be heard in the High Court, the Court of Appeal or the Supreme Court in relation to any proceedings under section 36, whether or not the Proceedings Commissioner is or was a party to the proceedings.

(2) With leave of the court, tribunal or arbitrator, the Proceedings Commissioner may appear and be heard in relation to any proceedings before a court, tribunal or arbitrator in which human rights are in issue.

(3) If the proceedings Commissioner appears before any court, tribunal or arbitrator, he or she may, unless the rules of procedure of the court, tribunal or arbitrator otherwise provide—

- (a) appear in person or by a legal practitioner;
- (b) adduce evidence and cross-examine witnesses, unless the proceedings are by way of appeal.”

[15] The relevant subsection here is s.37(2). The court has a discretion as to whether it should permit the Proceedings Commissioner to intervene.

[16] At the outset of this case the FHRC was invited along with the Fiji Law Society to make submissions and to assist the court as *amicus curiae*. The court has not withdrawn that invitation. As *amicus*, the Proceedings Commissioner could make submissions to the court by way of assistance on the law and on the significance of the facts in relation to the law.

[17] Mr Fa objects to the intervention of the Proceedings Commissioner, though his objections were directed to the admissibility of certain evidence, certain reports, exhibited to the affidavits. That objection is premature and anyway might reflect on material adduced by witnesses from his own side. The court must first decide whether the discretion in section 37(2) of the HRC Act is to be exercised in favour of allowing the Proceedings Commissioner to appear with its accompanying rights provided by section 37(3) that is, to appear in person or by legal practitioner, and to adduce evidence and to cross-examine witnesses.

[18] Dr Shameem argued that there is no specific provision in the Act granting an *amicus* role for the FHRC. Mr McCoy said the role of *amicus* was a quite separate function from that provided for in the Act by s.37(2). The invitation to assist the court was a gift of the court, an exercise of inherent jurisdiction. It is clearly a practice of long standing borne of the mutual respect of Bar and Bench to achieve a decision that is as informed as each can distil together in the public interest. It is a non-partisan device. The right to appear under s.37(2) gives rise to much fuller rights largely indistinguishable from those of a party to the proceedings.

[19] Dr Shameem did not draw the nexus between the investigation of possible human rights abuses and the pleadings in this case, which concerns the two present parties. What was the human rights abuse that had bearing on the issues for determination? The reports would have reached certain conclusions. These as counsel said were however opinions. Nor was specific evidence referred to, to indicate its nexus with these two actions.

[20] This is not a case where an indigent and uninformed litigant seeks to have abuses of human rights addressed. Both sides here are persons of stature with access to expertise

and to senior counsel in order to present their claims competently and thoroughly. In the result we decline to permit the Proceedings Commission to become a full party or intervener under s.37(2) of the Act.

[21] However the court wishes to have available the assistance of the Proceedings Commissioner in the form already indicated, that of amicus. In a case of this complexity, the Commission's renowned scholarship in this field would be of particular benefit to this court.

### **The 3 summonses for strike out**

[22] Mr McCoy accepted that his summons seeking a striking out of two of his clients from the action, the Commander and the RFMF, was unrealistic in expecting the result he desired in an interlocutory application. Such weighty matters as the extent of residual Presidential powers could only be decided after the fullest evidence and argument in the main action. He withdrew his summons to strike out.

[23] Mr Fa followed the same course. Both counsel conceded their interlocutory claims merged in the two main actions. All 3 summons to strike out are withdrawn. There will be no orders for costs in any of the summons or motions heard or dealt with in this ruling.

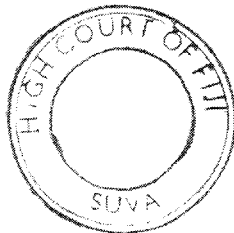
### **Summary of orders**

[24] We summarize the orders of the court:

- (i) The plaintiff is granted an enlargement of time within which to file and serve affidavits in reply, and that is till 24<sup>th</sup> September 2007.
- (ii) The application for postponement of the pre-trial conference is declined.
- (iii) The application for postponement of the commencement date of the trial is declined.

- (iv) The evidence of all of the deponents contained in their filed affidavits shall constitute their examination-in-chief in the trial.
- (v) By 24<sup>th</sup> September 2007 the plaintiffs are to notify the defendants' counsel and the court of which deponents they require to be available at court for cross-examination. Similarly the defendants are to notify the plaintiffs' counsel and the court of which witnesses they require for cross-examination within 2 days of the service of the plaintiffs' affidavits in reply.
- (vi) Action HBC60.07S and Action HBC398.07S are consolidated.
- (vii) The application of the Proceedings Commissioner of the Fiji Human Rights Commissioner to intervene pursuant to section 37(2) of the HRC Act is declined.
- (viii) All 3 interlocutory summonses to strike out are withdrawn.
- (ix) There will be no order as to costs.

[25] We wish to record our appreciation to all counsel for the speedy and efficacious way counsel have assisted the court in the disposal of these pre-trial matters.



*[Handwritten signature of A.H.C.T. Gates]*

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**A.H.C.T. GATES**  
**ACTING CHIEF JUSTICE**

*[Handwritten signature of J.E. Byrne]*  
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**J.E. BYRNE**  
**JUDGE**

Solicitors for the Plaintiffs : Messrs Tevita Fa & Associates, Suva  
 Solicitors for the Defendants : Office of the Attorney-General, Suva  
 Solicitors for the Proceedings Commissioner : Fiji Human Rights Commission, Suva